# SENATE—*Friday, October 23, 1987*

*(Legislative day of Friday, October 16, 1987)*

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.*—I 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:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
*Washington, DC, October 23, 1987.*

*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.

JOHN C. STENNIS,
*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 reason together and, 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 therein 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 last night. 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

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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, a prime reason for our freedom is the absolute guarantee set forth and spelled out in the first amendment. Yesterday, I discussed with Chairman BIDEN and placed in the RECORD a long and detailed letter from Prof. Vincent Blasi of the Law School of Columbia University. That letter documented very thoroughly the contention that led to Professor Blasi's conclusion that:

* * * the confirmation of Robert Bork would pose a threat of uncertain proportions to * * * one of our grandest constitutional commitments, the shared understanding of the freedom of speech articulated in the opinions of Justices Oliver Wendell Holmes, Louis Brandeis, Charles Evans Hughes, John Marshall Harlan, and Lewis Powell, to name only a few of the many justices who have helped build the first amendment tradition that serves us today.

In the third place, as Chairman BIDEN spelled out masterfully in a colloquy between us on the floor of the Senate Thursday, Judge Bork would bring to the Supreme Court a view of antitrust law that would sanction price fixing by this country's massive manufacturing corporations right down to the consumer level. It would permit horizontal conglomerate mergers that would allow as few as three national competitors to control an entire market as long as none controlled more than 40 percent. In the words of Dean Pitofsky of Georgetown Law School, if Robert Bork's view should prevail,

This would be a very different country. Large firms could behave far more aggressively against rivals without fear of monopolization charges, each industry could become concentrated by merger to the point where only two or three firms remained, and wholesalers and retailers would be under the thumb of the suppliers as to where and at what price they can sell and what brands they can carry.

Now, let's be realistic. Robert Bork would serve on a collegial body of nine members. With this antitrust expertise he could easily become the dominant court figure on antitrust. His accession to the court could have a profound effect on the competitive American economy that has served this country so well for so long.

Finally, Mr. President, this Senator is impressed that after extraordinarily thorough and meticulous examination of the Bork record by the American Bar Association, 4 of their 15 members voted that Robert Bork is not qualified. To put that vote in perspective, the Senate has never confirmed a Supreme Court nominee that has had even as much as one vote of "nonqualified" registered against him by the American Bar Association. Even more impressively, an astounding 1,925 professors at accredited law schools have signed communications to the Judiciary Committee attesting to their opposition to this nomination. That, Mr. President, represents an astonishing 40 percent of all the law professors at accredited law schools in this country. It compares with less than 100 who have told the Judiciary Committee that they favor the Bork confirmation. That 20 to 1 vote against Robert Bork by the Nation's law professors deeply impresses this Senator.

This Senator hesitated until this moment to declare his opposition to Judge Bork. I did so because I have great respect for his remarkable intellect, for his long and rich experience as a law professor, as a lawyer, as a judge, and as an enforcement official in the executive branch. There has not been a single word challenging Robert Bork's integrity. He appears to be a man of excellent personal qualities. But I oppose his confirmation because of his record on civil rights, his record on the first amendment freedoms, and his record on antitrust. In this Senator's long career in this body, I cannot recall another time when I have voted against a person whose intellect, experience, and character so clearly qualified him. Unfortunately his record overcomes all of that.

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

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

## SENATOR JOHN STENNIS ANNOUNCES HIS RETIREMENT

Mr. BYRD. Mr. President, 5 years ago, September 28, 1982, a reporter for the Washington Post wrote: "It's hard to imagine the Senate without JOHN C. STENNIS or JOHN C. STENNIS without the Senate." Now, the United States Senate and the the senior Senator from Mississippi face that reality. Just a few days ago, our distinguished colleague announced that he will not seek another term in the Senate.

His leaving marks the end of an era in this Chamber. He was first elected to the Senate in 1947 and brought to this Chamber the skills and temperament—temperament—acquired during a decade on the judicial bench, 1937-47. He put this experience to effective use in this Chamber as he earned a justly deserved reputation for decency—decency—and fairness.

Having observed and admired Senator STENNIS since I was elected to the Senate in November 1958, I can say emphatically that Senator STENNIS has faithfully and successfully served the people of Mississippi and the people of the United States. During his four decades in the Senate, he has been a dominating figure in this Chamber, an advisor to Presidents, and a man of enormous power, influence, and sterling, hard-as-a-rock integrity.

In 1965, in recognition of his high ethical standards, Senator STENNIS was selected as the first chairman of the Senate Committee on Standards and Conduct. In this position, he was instrumental in developing the Senate code of ethics.

From 1969 to 1981, Senator STENNIS was one of the most effective chairmen of the Armed Services Committee in the history of the Senate.

On November 15, 1985, Senator STENNIS became the second longest-serving Senator in the history of the United States. He is currently chairman of the Appropriations Committee and President pro tempore of the Senate.

However, all those accomplishments and experiences are dwarfed by the courage and strength that Senator STENNIS has continuously demonstrated during his long tenure in the Senate. In January 1973, he was shot twice during a robbery in front of his house in northwest Washington. In 1984, he lost one of his limbs to cancer.

Yet he never allowed the pain and agony of these tragic events to limit his effective work as a United States Senator. Consequently, his has been a lengthy and illustrious career and he occupies an important place in the history of the United States Senate and the history of the United States.

As we now face the reality that the United States Senate, after 1 more year, will be without JOHN C. STENNIS, we already know that we will miss his wisdom, his decency, his dignity—his quiet, unassuming dignity—and the experience accumulated during more than four decades of service in this Chamber. But I am equally sure that I personally, and the Senate as a whole,

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 proponents 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 résumé 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 Post spoke of the "intellectual vulgarization and personal savagery" of the attacks on Judge Bork, "profoundly 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 predestination 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. It is 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 4 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, insisted on admitting to the Supreme Court that he had discovered that a key Government witness had lied in order to convict a black man on drug and tax charges.

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 report 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 us 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 every single time.

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 journalists have from libel suits. He struck down attempts to censor political statements. He extended the first amendment protections to commercial and scientific speech, as well as cable television programming.

Some have argued that Judge Bork's notion of justice has been eccentric. Does any of that sound eccentric to you?

Judge Bork joined in a decision to protect sacred and historic Navajo sites in New Mexico. He voted to protect the rights of a prisoner beaten by a prison guard. He supported relief for a group of public housing tenants when the Federal Government failed to protect them against lead-paint hazards.

Where do these views stray from the mainstream of American legal thinking?

With such a résumé, 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 presidents of the American Bar Association came foward 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 other 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, something those who wrote the Constitution rejected specifically. The anti-Bork leaders converted the nomination into a political referendum: My polling data versus your polling data.

My good friend from South Carolina, Mr. HOLLINGS, reminded us recently of Winston Churchill's observation: "Nothing is more dangerous than to live in the temperamental atmosphere of a Gallup poll, always feeling one's pulse," the great British statesman said. "There is only one duty, one safe course, and that is to try to do right."

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 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 pull down 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 boogey-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 anything 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 defeat 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-

jority staff that his record would be dragged through the mud if he testified. He didn't.

Should we prostrate ourselves before these campaigns of excess?

The campaign portrayed Judge Bork as antiwoman, antiblack, antieverything. 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 must be the most unreal 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, progress that has allowed Hispanics, 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; 9 times they were on the same side.

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 discretion 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 construct broadly 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 "privacy" 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 issue 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. The public knows that.

But in the eyes of the Supreme Court, the word "privacy" has a different texture, one that never 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 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 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 second-guess 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 injustice.

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

Mexico for his outstanding presentation on behalf of Judge Bork.

The Senator from New Mexico is an able lawyer, and he knows a good lawyer when he sees one. He has searched the record of Judge Bork, he has found it satisfactory, he has found it outstanding, and he stands here today and told the Senate that Judge Bork ought to be confirmed. I commend him. I think he has made a very helpful tribute to Judge Bork.

Mr. DOMENICI. Mr. President, will the Senator yield?

Mr. THURMOND. I yield.

Mr. DOMENICI. Mr. President, I thank the distinguished former chairman of the Judiciary Committee for his words.

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, will agree with the judge, as he sat in my office and said, "The thing that saddens me most is the distortion of my civil rights record."

I believe that is true. That is what lost him this nomination. 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, before I yield time 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.

All the evidence anyone has ever introduced is that, from all sources, all advertising, all beyond the control of any Member of this body, added up to less than $1 million. So distortions are flying rampantly here.

Mr. President, Senator ARMSTRONG's remarks about the apparent relationships between Senators in opposition to the nomination and outside groups—relationships that he surmised from reports' comments—was, at first, disturbing to me. It seemed to suggest that the events cited in reporters' stories actually established a closer relationship than I had felt existed.

But it was even more disturbing to me when I had the opportunity to read through Senator ARMSTRONG's statement yesterday in the CONGRESSIONAL RECORD. Remarks that I had taken as direct quotes from reporters were in fact characterizations of events made entirely by the speaker. And when I distilled those actual events from the characterizations, the events themselves showed far less than they had seemed—indeed, they showed nothing at all.

Let me start with the characterizations the Senator used. Plans were "actively orchestrated" among groups and Senators; there were "extensive communications"; committee aides were "most active in orchestrating and influencing"; there was "a skillful, highly organized, orchestrated nationwide campaign" against the nomination, boosted by "close interaction and support activities." Sounds convincing, doesn't it? It does until you consider that none of these characterizations came from news stories, or "outside observers" as the Senator from Colorado calls them. They came from the Senator from Colorado.

Of course, I have no doubt that he could dig up some from the other sources he did quote directly. But it is hardly a surprise, and hardly objective evidence, to find editorial statements sympathetic to the position of the Senator from Colorado in such newspapers as the Chicago Sun-Times, the New York Post, or the Wall Street Journal. Again, however, none of the characterizations I have cited—and there are more—were made by reporters or even editorialists from any newspaper.

When you look at the facts the Senator cited, they hardly justify the sweeping characterizations he made. "A Senator holds a meeting" was one. That's news. A Senator made telephone calls "to round up outside opposition." Seeking witnesses to testify on an important issue is not exactly uncommon or inappropriate in the Senate, as every Senator knows. And worst of all, we "frequently sought information" from outside groups. Is that something that Senators from the other side of the aisle never do? These actual events cited by the Senator from Colorado are entirely ordinary facets of Senate life, as he is assuredly well aware. They in no way add up to the sweeping characterizations he attaches to them.

Then finally, after having drawn the attention of the Senators in opposition to the nomination with these dramatic characterizations—this home-built evidence of a nationwide plot, this conspiracy—he draws back. "Is there something morally reprehensible or even unusual about Senators working with outside interest groups? The answer is, of course not. It is proper. then why, one might ask, are Senators so eager to disavow such an effort?"

The question I would address to the Senator from Colorado is, which effort is he speaking about? The Senators "working with outside interest groups," or the Senators "orchestrating * * * a skillful, highly organized, orchestrated nationwide campaign"? The latter description is clearly meant to concern us—although these rather sinister terms are all his own—even though it is based on the barest, most innocuous facts: "held a meeting," "round up opposition," "sought information."

But when we are asked why Senators do not claim responsibility for everything these outside groups do, suddenly this sinister, orchestrated campaign disappears. Suddenly, we're only "working with outside groups." The Senator from Colorado can't have it both ways. We can't be extensively involved in a highly organized, orchestrated nationwide campaign when our actions are being described, but only "working with" groups when we're asked why we object to being called the "orchestrators" of the supposed campaign.

Well, as the Senator from Colorado well knows, there was no "highly orchestrated campaign" among groups and Senators on this side of the aisle any more than there was on the other side. I have already detailed the extent of the massive political campaign run by right-wing groups in support of this nomination in material submitted for the RECORD on October 21, and I would simply refer interested Senators to that material, beginning on page S14723. I don't ascribe those groups' actions to a plot with Senators or the administration to support this nomination, and I have no doubt that any Senator who examines the record fairly and objectively will reach the same conclusion about Senators who oppose this nomination.

I would just close by repeating what I have said before. The Senate's decision on this nomination came from basic differences in principle between what most Senators and most Americans believe and what Judge Bork and many of his supporters believe. It was decided primarily by the testimony of Judge Bork before the Judiciary Committee, and secondarily by the testimony of other witnesses and by Judge Bork's extensive record of writings, opinions, speeches, and interviews. It was not decided by advertising, fair or unfair, pro or con. All the money spent by all the interest groups on both sides could not have paid for 1 day of the television coverage Judge Bork received in the hearings. Notwithstanding all of the charges thrown about Senators' motives in this matter, the verdict of history will be made on the same basis as the verdict in the Senate: On the merits.

Mr. President, I yield 15 minutes to the distinguished Senator from Nebraska.

Mr. EXON. I thank my colleague.

Mr. President, we continue debate today on a tragic and implausible chapter in the history of the U.S. Senate, continued confrontation for the sake of confrontation. No other purpose can be served.

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. This all defies reason and logic.

What legitimate national interest is to be served? The continued 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. Baring the at-times questionable legal linen of Bork's past pronouncements supposedly will cleanse him in the Senate 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, "the courts should not make the laws." His purported arbortion 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 convinces me they were overdone and not fair. Nevertheless, supporting or oppoing 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 declared on October 7—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 on 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 indispensable one or else the President would have nominated him ahead of previous nominees Justice O'Connor and Justice Scalia for the Court. I supported both of these nominees.

There has been an effort by some to convince the public that since the Senate previously approved Judge Bork for a lower court, there should be no discussion or indepth consideration now. Nothing is further from reality. In 1982 the Senate did approve Judge Bork to the Federal circuit court of appeals by a voice vote without discussion or debate on the Senate floor; but that does not mean we should rubberstamp him in this instance. Other than Justices to the Highest Court, there is seldom any controversy or deep penetrating examination. The point is, there is no appeal from the decision of the Supreme Court.

A recent article indicated that Judge Bork has long savored an opportunity to serve on the Supreme Court with his "friends" Justice Scalia and Justice Rehnquist. If this be true, it is reason enough to pause for contemplation. Three "friends" on the Court of nine individuals smacks of a one-third trio that might all but dictate the Court's direction and decisions. If we need independence and separation of thought anywhere, it is on the Supreme Court.

The good result of this confirmation proceeding has been that it has caused all of us to relearn some history in this 200th year of the celebration of the Constitution. Those of us who feel the Constitution is more than a historical document should read, study, and learn as we assess what is right and what is wrong, if anything, with our procedures on court confirmations. We should understand why the Founding Fathers designated the Senate to "advise and consent" as opposed to serving as a "rubberstamp" in the process of confirmation, especially with regard to judges.

They were leery of the concentration of powers in the President, particularly when the courts were involved. Why? Because they distrusted and were thus determined to limit the power of the President, not make him king, and in conjunction therewith they were very dedicated to the separation of powers between the President and the courts. In England the early immigrants to this country experienced tyranny, not only from the King, but also from the courts who were perceived as the implementors of the King's dictates.

Indeed, this cause and concern resulted in an effort in the constitutional proceedings 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 nominate, but that the Senate should approve or decide 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, is to reject the nomination. 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 U.S. 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 intimated that, because of these efforts, Members have been pressured and persuaded to vote 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 testify. I 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 constituents 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 4½ 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 life-time position of the Supreme Court is too important to risk to a person who has exhibited—and may still possess—a proclivity for extremism in spite of confirmation protestations.

Many who support Judge Bork do so because they believe that he will put an end to judicial activism and further intrusion by the Federal courts into their individual lives. I basically agree with this philosophy, but I do not want this philosophy to cause a diminution of fundamental rights of all Americans.

Judge Bork has criticized many cases that have expanded the rights of individuals in our society. He says he cannot find these rights in the Constitution. I can. The word "liberty" is subject to broad interpretation, as well as other constitutional words and terms. I believe the ninth amendment was placed in the Constitution for a purpose. I believe the Constitution is a living document that can meet the needs of a changing society. I believe in "originalism" but not in a narrow minded way.

During the hearings, I was particularly interested in Judge Bork's views of stare decisis; in other words how Judge Bork would approach past cases—even those with which he disagrees.

In his opening statement to the Judiciary Committee, Judge Bork said:

[T]he judge must speak with the authority of the past and yet accommodate that past to the present.

The past, however, includes not only the intentions of those who first made the law, it also includes those past judges who interpreted it and applied it in prior cases. That is why a judge must give great respect to 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 for a judge to ignore or overturn a prior decision. That requires much careful thought.

* * * [O]verruling should be done sparingly and cautiously. Respect for precedent is part of the great tradition of our law, just as is fidelity to the intent of these who ratified the Constitution and enacted our statutes.

This should be the position of a Justice of the Supreme Court. Yet, earlier, but still recent statements made by Judge Bork in his writings and speeches left me with a different impression.

In a 1985 speech at Canisius College, Judge Bork made the statement:

I don't think that in the field of constitutional law precedent is all that important. I say that for two reasons. One is historical and traditional. The court has never thought constitutional precedent was all that important. The reason being that if you construe a statute incorrectly, the Congress can pass a law and correct it. If you construe the Constitution incorrectly Congress is helpless. Everybody is helpless. *If you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it.* Moreover, you will from time to time get willful courts who take an area of law and create precedents that have nothing to do with the name of the Constitution. And if a new court comes in and says "Well, I respect precedent," what you have is a ratchet effect, with original meaning, because some judges feel free to make up new constitutional law and other judges in the name of 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 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 whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the Framers intended.

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 conservative thought, but 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 15-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 predetermined goals. If 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 that appear on the walls of the Jefferson Memorial clearly and succinctly express my thoughts:

> I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to still wear the coat which fitted him when a boy * * *

If Judge Bork is faithful to the judicial philosophy that he espouses, then 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 tempers cool and reason prevails, 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 person. I hope the next nominee will be a conservative, but not one who raises doubts about extremism and activism to the right or to the left.

Thank you, Mr. President.

The PRESIDING OFFICER. Who yields time?

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

Mr. RUDMAN. I wonder if the distinguished ranking member of the committee might allow 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. I thank 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 dicussion of Judge Bork's record as a judge and his background, but it seems 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, that in the case of both the proponents 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 pleased 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 civil. 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 courts simply follow the rule of 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 could 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 out 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 allegation whose truth we may assume.

He then went on to say that the Gertz case means that—

* * * a statement characterized as an opinion cannot be actionable even if made with actual malice and even if it severely damages the person discussed. In such circumstances, society must depend upon the competition of ideas to correct pernicious opinions rather than on "the conscience of judges and juries."

It does not sound like a man who wants to inhibit the first amendment as I read the law.

He then went on in that case and said:

(i)n the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose self-censorship on the press which can as effectively inhibit debate and criticism as would overt government regulation that the first amendment most certainly would not permit.

The words of an extremist? Or the words of a man who does not believe in the constitutional guarantees of free expression? I think not.

Finally, he said in that area:

Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessment.

"Necessary to the preservation of that freedom," the first amendment he was speaking of "of course, is the willingness of those who would speak to be spoken to and as in this case, to be spoken about. This is not always a pleasant or painless experience, but it cannot be avoided if the political arena is to remain as vigorous and robust as the first amendment and the nature of our polity require."

You know, as I have stood on this floor and listened to the attacks on Judge Bork, that he is against free expression, the first amendment, this is not stare decisis. This is not a computer spitting out U.S. Supreme Court decisions. This is a circuit court judge writing on the Constitution.

In the case of McBride versus Merrill Dowd, Judge Bork said:

Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and the high costs of litigation may lead to undesirable forms of self-censorship. We do not mean to suggest by any means that writers and publications should be free to defame at will, but rather that suits—particularly those bordering on the frivolous—be controlled so as to minimize their adverse impact upon press freedom.

Then, of course, there 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 concerning, I think, 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.

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 shock of his very conservative supporters, 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 majority leader, or if the Congress does 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 interests 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 beaten 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 essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negate the actions of the other branches.

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 exempted from constitutional 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 impound them in camps, solely on the grounds of race, and the courts will not interfere, no matter what facts are shown. 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 associated actions 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 dissapoint-

ed had Robert Bork gotten to the U.S. Supreme Court.

This has been a public relations compaign. It has had nothing to do with reality. This is the statement of a man who is sensitive to the rights of minorities. This is his word in a dissenting view. An extremist? Hardly.

As a matter of fact, I think of all the charges made against Robert Bork, the one that in my mind is the most reprehensible is that Robert Bork is a racist or insensitive to the rights of minorities. That just does not wash and people who made the charge frankly have no basis for it.

Finally, the other charge—Judge Bork would not respect precedent if he were on the Supreme Court.

What he said before the committee was:

> Overruling should be done sparingly and cautiously. Respect for precedent is a part of the great tradition of our law just as is fidelity to the intent of those who ratified the Constitution and enacted our statutes.

He went on to say:

> There is a need for stability and continuity in the law. There is a need for predictability in legal doctrine. And it is important that the law not be considered as shifting every time the personnel of the Supreme Court changes.

He did say that if he believed that the Constitution truly had been misinterpreted that it ought to be changed and the case ought to be changed. Thank goodness for that, or we would still be living under Plessey versus Ferguson, which was the law of this land for many years.

I daresay that any legal writer between Plessey versus Ferguson and Brown versus the School Board writing the extraordinary view that Brown later expressed, probably would be labeled an extremist by somebody on the floor of the Senate.

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 gone, in my view, beyond what the Supreme Court has said in protecting the rights of minorities, the first amendment, and discrimination of all sorts.

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 SPECTER, is not here to hear it—is a discussion of Judge Bork's views on the Brandenburg versus Ohio case.

For those who are listening and may not be lawyers, Brandenburg versus Ohio is the case that says you cannot restrain free speech unless there is a clear and present danger that can be shown, that is, that in the event, this free speech takes place, in fact there will be a threat of imminent lawlessness created.

I listened to that case being discussed in the Judiciary Committee by Judge Bork and various Members of the Senate. I have heard it discussed on the floor in a wonderfully cool atmosphere, almost discussed like a laboratory experiment.

Well, I lived with Brandenburg versus Ohio in a situation in which my actions were controlled by it and I want to put it on the RECORD so that my friends in this body can understand why Judge Bork holds the view he holds, with which I agree, and I am not for prior restraint.

I will go back to May 4, 1970, the day that the students were killed at Kent State. There is not anyone in this country or in this Chamber who does not remember that.

Four days prior to that a U.S. district court in New Hampshire, in response to a request from the trustees of the University of New Hampshire, allowed the "Chicago Three" to speak on the campus of the university. They were scheduled to speak on May 5.

On May 4, the killings took place. I was then attorney general of New Hampshire and charged with the public safety of the State including the lives of the students at the University of New Hampshire. A crowd of 7,000 people was expected. The Veterans of Foreign Wars, the American Legion intended to have a counterdemonstration in Durham. The news was full of reports of violence across the country relating to the Vietnam war. Brandenburg versus Ohio placed the burden on the State to show that imminent danger would result from that speech.

The judge followed the court and as attorney general, of course, I followed the court. The speech had to be allowed. I received literally hundreds of calls from parents of university students in fear of the lives of their children. That night at the university 7,000 students and associated folks gathered and because of the extraordinary precautions that were taken, no violence did result but, quite frankly, it was as much luck as planning.

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

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 campuses and 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 have 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 Judge Bork talked about. He has been severely criticized for his views on that. His views are not only reasonable but many in the law enforcement community and the legal community agree that the test is so severe it can never be proven by a law enforcement official.

Mr. President, 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.

I say to my friend from Delaware 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. GRAHAM). 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 pragmatism required 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 about this country we call a democracy. The Constitution is broad enough, flexible enough, artfully enough drafted, to guarantee for all Americans those basic freedoms and protections which are so essential to a free society. In fact, it is that very flexibility that has allowed us to flourish as a society for over 200 years, making it possible for us to celebrate the bicentennial anniversary of the Constitution.

Judge Bork does not seem to share that very basic understanding of the Constitution. In fact, when it is a question of protecting individual rights, Judge Bork sees the Constitution as a zero-sum game.

In 1985, Judge Bork said that "when a court adds to one person's constitutional rights, it subtracts from the rights of others." When asked last month by Senator SIMON if he believed that is always true, Judge Bork said, "yes. I think it's a matter of plain arithmetic," he said. "Plain arithmetic," the judge said. What does that mean? It means that in granting me rights under the Constitution, Mr. President, your basic rights must be lessened. What I gain, according to Judge Bork, you lose. What you gain, Mr. President, I lose. When slaves were granted liberty, he said, the slaveowners lost their liberty to own slaves.

Just what does that kind of constitutional math mean in the real world? It means, for instance, that if a woman is found by the Supreme Court to have the right under the Constitution to equal pay for equal work, the granting of that right denies someone else their right. But their right to what—to discriminate in the payment of wages based on sex? Is that a right under the Constitution? The Constitution may be silent, but that is different from granting a right to discriminate.

In 1963, Judge Bork's calculations led him to oppose the desegregation of lunch counters and other public accommodations. He was not concerned then about the rights of blacks who had been denied these basic rights for centuries, but about the supposed rights of proprietors to keep discriminating. He said then that denying the restaurant and hotel owners the right to discriminate was based on "a principle of unsurpassed ugliness." Denying a drugstore owner the right to discriminate as to whom he served a soda solely on the basis of race was to Judge Bork "a principle of unsurpassed ugliness?"

His logic was stated then with the same absolute certainty which marks more recent views. He said that "the most common popular justification of such a law is based on a crude notion of waivers: insistence that barbers, lunch counter operators, and similar businessmen serve all comers does not infringe their freedom because they 'hold themselves out to serve the public.' The statement is so obviously a fiction that it scarcely survives articulation."

He has since changed his view of public accommodations laws, he has said. But he has also reiterated his arithmetical and zero-sum view of constitutional rights, which is at odds with what this country has been all about for over 200 years. Group after group has moved dramatically closer to full equality without any real loss of rights—in the normal sense of the word—for those already enjoying the law's protection.

Judge Bork's arithmetical view of 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 guaranteeing 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 "terrifying frivolity," and shaped a view of the first amendment which contains a "strange solicitude for subversive speech." "Terrifying frivolity." "Strange solicitude for subversive speech." Judge Bork uses these extreme descriptions and ominous hints relative to the views of one of the most 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 was "an article of faith with collectivist liberals." He condemned the Supreme Court decision banning literacy tests as "pernicious constitutional law." He said that nondiscriminatory access to public accommodations was based on a "principle of unsurpassed ugliness."

Some of Judge Bork's opinons 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 intellectually empty," "thoroughly perverse" and even "unconstitutional." 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 mind-set 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 because that precedent, by the very basis of his judicial philosophy, has no legitimacy." In those clear words, Judge Bork, the nonpareil originalist judge, because of his originalist ideology, "certainly"—his word—"at the least"—his words—would "have no problem whatever"—again his words—in overturning much prece-

dent which I believe 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, Justice Lewis Powell. Powell 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 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 consistently ideological. 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 whatever his dogma happens to be at any particular moment. He has searched for what he calls "bright lines" to guide him—but these "bright lines" have tended to blind him to 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 demeanor is a mind undominated by doctrine or ideology. I fear that Judge Bork would bring to the Supreme Court an excess of whatever ideology attracts him at the moment. Prior ideologies to which he says he had subscribed have just too often led him to ignore vital lessons of American history and experience. I do not know that his next ideology would do so, but I am not willing to chance it. We have come too far as a nation to consciously place on the Court members whose views are so contrary to the numerous and necessary social gains of recent years.

I am not saying we are a perfect nation; we are not. But we are better than we once were and we can thank the Supreme Court for many of these gains. That Court, during my lifetime, has extended rights and opportunities to Americans, to the benefit of our Nation.

Because Judge Bork's statements represent more than a legally trained mind—they reflect a mind-set quite apparently determined to clear away all those "unconstitutional" decisions he has attacked with such absolute certainty—I cannot support his nomination.

I cannot vote for the confirmation of a Supreme Court Justice whose views have so often been stated so extremely and who has consistently viewed the world around him through such a sharp ideological prism.

I thank the Chair.

The PRESIDING OFFICER. The Senator from Michigan yields the floor.

Who yields time?

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

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KERRY. I thank my colleague.

Mr. President, we are anxious to move on, I know Judge Bork himself is anxious to see this process come to a close.

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 were not so depressing and injurious to the process they seek to defend, one might even find amusement in the charges.

For years, the President has made much out of his promise to appoint judges who would carry out his political 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 Presidents speeches—"What we need are judges who will do this or do that * * *" Judges who will accomplish what Reagan has been unable to carry out through the legislative process itself.

It seems apparent, Mr. President, that a few years ago, the chairman, the former chairman of the Judiciary Committee, was even requested to withdraw a questionnaire that was circulated in order to try to eliminate people in advance on the basis of questions which sought their political positions on issues.

What is clear is that when the President sent the Attorney General and Howard Baker to the Hill to consult on potential nominees a bunch of names were put in front of the leadership of the U.S. Senate. And I believe that those who knew the record of Judge Bork at that time said that his nomination would have difficulty, but there were other names on the list that would pass easily. I believe the chairman of the Judiciary Committee said that Judge Bork might create a fire storm. In fact, Mr. President, despite those warnings, it was Judge Bork's name that was sent up here, and the path of confrontation was chosen. Judge Bork was selected precisely because of his ideology not his judicial record.

To whatever degree politics and ideology have therefore been thrust into this nomination. I think it was by calculation and by purpose, and it was chosen by those who dominated.

Mr. President, I believe that a dispassionate—nonpolitically motivated analysis of the record makes it clear that Senators did not decide this nomination on the basis of pressure groups and politics though there has been exaggeration and even distortion. In many cases, Senators have decided in ways that went against their interest, against the easy route to oppose this nomination.

I do not believe that the questions asked by or the doubts expressed by the Senator from Pennsylvania or the Senator from Alabama were or are political questions or interest group doubts. These colleagues and many others have studied the record, read recent articles and cases, reread the Constitution, weighed days of testimony, and made difficult decisions.

To suggest that so many Senators decided in a different fashion is to challenge, if not insult, the integrity of a majority of this institution in a personal as well as collective way. It is to demean, in a manner unbecoming of this body, a cherished right which falls to us and only to us as U.S. Senators—the right to confirm a nomination.

Perhaps, ironically and sadly, nothing confirms the inappropriateness of this nomination more than the furor it has caused. Nothing excites extremes more than the extreme, and certainly Judge Bork has galvanized opponents and proponents alike.

This is not a choice between liberal and conservative jurist. I have no objection to the appointment of a conservative to the Supreme Court, and have voted for many of them. Out of over 100 judicial nominations by President Reagan in his second term, I have voted against only four.

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 reformulations, 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. Moreover, the Supreme Court has on many occasions been exceedingly wrong if one agrees with Judge Bork, who has at various times called its constitutional rulings "unprincipled," "utterly specious," "improper and intellectually empty," and made according to rules of "unsurpassed ugliness"—hardly tempered observations or mainstream characterizations.

During the hearings, I was particularly struck by Judge Bork's exchanges with Senator SPECTER on the issue of "original intent" and 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 nuance, 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 hollowness 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.

And as Senator HEFLIN put 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 posses—a proclivity for extremism in spite of confirmation protestations.

Even a cursory review of record yields numerous contradictions, and raises troubling questions.

Judge Bork has said that the Supreme Court has been wrong many times on Civil Rights. He has said the Supreme Court was wrong on ruling that the 14th amendment forbids State court enforcement of a private, racially restrictive covenant. He has said the Supreme Court was wrong to adopt the principle of one-person, one vote. He has said the Supreme Court 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 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, wrong when it found a congressional intent under the antitrust laws to protect small businesses, and that even the Congress is wrong on antitrust, accusing Congressmen of being "institutionally 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.

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 to the Supreme Court a man who has opposed so many of the Court's past 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 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 "value 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 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.

I wonder 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, only political speech was protected by the first amendment. 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 * * * to throw 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 body of law."

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 significant limitations on first amendment protection of speech. 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 model * * * [I]f 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 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 overthrown.

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 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 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 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 speech, privacy, and so many other areas, should be overturned. 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:

> There has arisen the myth of the spineless Senate, which says that Senates 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

battles. And for these reasons I oppose this nomination.

The PRESIDING OFFICER. Who yields time?

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

The PRESIDING OFFICER. The Senator from Idaho is recognized.

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

HOW THE PROGRAM OF DISINFORMATION CORRUPTED THE CONFIRMATION PROCESS

Mr. President, "there is still time for Senators to reconsider whether the brazen purveyors of disinformation deserve the reward of Judge Bork's scalp." Those are not my words. They are the concluding, hopeful words of Mr. Gordon Crovitz, who in a detailed, thoughtful article printed in the Wall Street Journal last Wednesday, October 14, 1987, exploded many of the pernicious myths about Judge Bork. He did it by examining the record, something that apparently is passe in the Senate. Nevertheless, I ask unanimous consent that it and other articles be printed in the RECORD at the conclusion of my remarks, just in case any of my colleagues are interested in reading some facts for a change.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. McCLURE. Mr. President, Mr. Crovitz is right, of course—there is still time. But is there courage? Is there integrity? Is there moral conviction? Is there statesmanship? These things would be necessary, too. And as Judge Bork himself has said, we harbor no illusions.

WHY THE FEAR OF DEBATE?

We are told that this debate is "unnecessary." Worse still, it is "political." "The will of the Senate is clear." "Don't bother me with the facts." "That nomination is history." "Let's move on." I wonder why it is that those who have declared their intention to vote against Judge Bork—and who rail against the charge they are a lynch 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 to elements 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 man's reputation could 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 real story of what has happened here, 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 few of us took the time to look at the record before leaping to opposition. If they only knew how some 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 excuses 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 is safety in numbers. Wolves know it, and interest groups know it, and Senators apparently know it. And so free and open, thoughtful and honest debate is not an aid but a threat. If a single Senator were moved by conscience and candor to acknowledge that the emperor has no clothes, why, other pretenders in the court might rush in to agree, lest they be classified as liars or fools. The whole scam might come unglued then, and that would be unthinkable.

I do not blame the distinguished majority leader, the distinguished Senator from Delaware—and most certainly I do not blame the Senator from Massachusetts—for wanting to put this episode quickly and quietly behind us. If I had been a party to this travesty—let alone a principal in it—I would be most anxious to "move on" without fanfare also.

But, I say to my colleagues, quite seriously, if the vote is as predicted it will make little difference from the vantage point of history whether Judge Bork's nomination goes quickly and quietly or whether the end is preceded by a loud hue and cry. What a majority of this body has already done to this confirmation process and through it, to this good and decent man, will live in infamy in the annals of the Senate.

We have a clever way in America of summing up a momentous experience or a horrendous episode in a single symbolic expression and then using that expression again and again to describe similar events. Thus, from one of the sorriest chapters in the Senate's history—one remarkably similar to this one—came the word "McCarthyism." This Senate will make its own unique contribution to the national vocabulary. When, in the future, one is victimized by demagogic attacks and men of goodwill shrink from his defense behind transparent rationalizations, we will say he "got Borked": "That's too bad old John Smith got Borked; he is a fine and decent fellow but, well, that's politics, you know."

You can just see the interest groups—liberal and conservative—plotting their opposition strategies for confirmation proceedings years hence: "Well, 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—none of their millions spent on blatantly false advertising, none of their 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'

mouths. Who do they think they are fooling?

THE DISINFORMATION CAMPAIGN IN THE SENATE AND ACROSS AMERICA

The defeat of Robert Bork, if it happens, will have been engineered—engineered—by a handful of ultraliberal Senators and their special-interest allies who developed a disinformation campaign strategy skillfully and executed it flawlessly. They used the most modern polling techniques, figured out which buttons to push in order to arouse and inflame the emotions of the American people, and then pushed them. It is that simple. And now, as even the most liberal editorial pages in the country are denouncing the scurrilous anti-Bork tactics, these same Senators stand before us and declare with all seriousness that none of that awful stuff had anything to do with the outcome of this process. I say to the gentlemen, no one is buying it. The disavowals ring more than a little hollow when one considers that hardly a week ago the committee chairman and other liberal Senators and their members were caucusing daily and plotting strategy with the very same interest groups that have so soiled the landscape with lies and distortions.

Mr. President, that is not a wild accusation, nor is it a figment of someone's imagination. Two major daily newspapers have published page 1 stories in the last 2 weeks chronicling in detail the campaign to defeat Judge Bork. They tell quite a story, and I urge every Senator to read them. I want to read the most fascinating portions into the RECORD, and I ask unanimous consent that the articles be printed in the RECORD in their entirety.

First, from the Los Angeles Times on October 8:

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 representatives of roughly 45 organizations that would play central roles in the debate to come.

* * * [T]he opposition quickly settled on an early strategy. It began calling reporters and Senate staff members with a single message: 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.

"We were very concerned 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 would just routinely express support for a presidential nominee" as many moderate and conservative Democrats had done a year before when William H. Rehnquist was nominated to be chief justice.

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 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 Democrat, Sen. Ernest F. Hollings of South Carolina, said that he would vote 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) met to discuss organizing their fellow Democrats and the Senate's moderate Republicans against Bork.

Inouye dropped out of a leadership role because he was chairing the Senate's Iran-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 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 conventional wisdom in Washington that a 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 late July, Gerald McEntee, president of the American Federation of State, County and Municipal Employees, one of the nation's largest unions and the one most active in the anti-Bork 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 question.

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 campaign and pointed to two themes that Bork's opponents would exploit. * * *

To defeat Bork, they said, opponents should make the public skeptical 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 at several points in his career to civil rights legislation, the campaign would play on the concern held by both southern blacks and whites about "reopening old wounds" and old battles—concern the South's conservative Democratic senators could not afford to ignore.

Separately, the opposition coalition hit upon what became its "Yuppie 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 furiously 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 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 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, coalition leaders 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, Marttila & Kiley, Donilon's memo, entitled, "The Bork Nomination and the South," argued that the presumption 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 teeters on the brink of extinction largely because the potential opposition Donilon 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," Donilon wrote. "Bork flouts the southern tradition of populism. And (perhaps most surprising to some) Bork poses a challenge to a very strong pro-privacy sentiment among southern 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 interest groups in this 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 the groups tear me apart, that's the medicine I'll have to take. I'm not TEDDY KENNEDY." My colleague's 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 reported that the distinguished Senator met with "a group of civil rights leaders and other liberal activists" and came out "pledg[ing] to lead the fight against the nomination." Presumably, they gave the Senator the same completely objective description of the Bork record that they have shared with the American people in those television ads.

If others insist on denying it, at least the interest groups know what their role has been in all this. They understand how this process really works, and they well understand why Judge Bork's nomination appears headed for defeat. Their self-congratulation over the accomplishment has been almost deafening. A smiling Mr. Neas of the Leadership Conference on Civil Rights has 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 and to 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 press 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 his 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. I saw much of it, and I commend him. But that unfortunately is beside the point. The fairness of procedures has nothing to do with the content of the statements made to the committee—which frequently were grossly misleading—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 agrument for emotion appeal, as leaders of the opposition repeatedly did—when a brilliant record is dissected disingenuously and even the most well-intentioned observers lose all sense 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 senator's voting "no" on a Supreme Court nomination because of a principled disagreement over constitutional interpretation. But there's a great deal wrong when organized pressure groups mount a public campaign of lies and slander, spreading deliberate disinformation and stirring hysteria, in order to bring political pressure on members of the Senate to vote down a 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 terms) in the Senate Office Building itself, helpfully provided for the purpose by Democratic members of the Judiciary Committee, and carefully coordinated with the conduct of the committee's own hearings.

When one of the reputation and stature of former Chief Justice Warren Burger, a man not given to exaggerated rhetoric or political hyperbole, is moved to tell the committee that he has never seen a hearing "with more hype and more disinformation" (his words), you begin to get some sense of how it really was.

In addition to being told the hearings were "fair," we are told that Judge Bork failed to make his own case effectively. Well, let's not add that insult to the other injuries inflicted on Judge Bork. It is as bogus as the claim of "fairness." Judge Bork conducted himself as a judge while his opponents behaved like politicians. He gave accurate, reasoned, scholarly and lawyerly responses in the face of blatant, demagogic appeals to emotion. He wasn't successful, if success is measured by standing in the polls. (I should add parenthetically, however, that I suspect the polls are more a reflection of the low viewership of the Cable News Network which covered the hearings and of the far greater impact of the multimillion-dollar, multimedia disinformation campaign than they are a reflection on what Judge Bork had to say.) But even if that is not the case, I ask my colleagues what do we want for our judiciary—learned judges faithfully applying the law, or telegenic jurists pandering to the public and rewriting the law in order to reach the politically popular result? Do we want Oliver Wendell Holmes or Oliver Norths on the bench? I think the former.

So let us not be misled. The claim that Judge Bork was given a fair hearing and failed to make his case is just one more element in the effort to

cover up what has really happened here.

THE FLOOR SPEECHES TELL THE STORY

Mr. President, if there was any doubt about the pervasive influence 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 when Senators were stampeded to judgment on this nomination. Senator after Senator came to this Chamber and uttered 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 betrayed 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 refuted claims and empty slogans of the interest groups were parroted in this Chamber. I will not accept that my colleagues—or most of them—did that knowing Judge Bork's true record. There is no way, absolutely no way, that those Senators could have read this hearing record and studied this nominee. If they had, mere fear of embarrassment, if nothing else, would have prevented them from making many of the statements made in this Chamber during the last 2 weeks.

No, what has happened here is that many of us have been sold a bill of goods. After seeing the plans and specs written up right there in the Post on October 4 and the LA Times on October 8, we ought not have any doubt about it. The salesmen made a slick presentation, used some very sophisticated hard-sell tactics, and many of my colleagues made a hasty purchase. Now, I can understand how some might be tempted to look the other way and pretend they didn't get suckered. That's natural. But the fact of the matter is we are going to have to confront these peddlers of deceit some time, or we are going to have to pay the price. We either reject this defective merchandise now or we're going to see it again and again. The only question is, How many more good, decent and capable men and women like Robert Bork will be victimized before we finally bring quality back to our product line?

I would like to share with my colleagues some of what I have found in my review of the floor statements announcing opposition to Judge Bork. I will not name names, of course, as that would serve no productive purpose. But the quotes and the rationales given on this floor are quite illuminating.

"FEAR" AND "DIVISION"

For example, a favorite reason given for voting against Judge Bork is that his nomination is "diversive" and "polarizing". One of my colleagues on this side of the aisle said Judge Bork "stirs fear and apprehension" and causes people to "honestly fear for their rights." One on the other side of the aisle said Judge Bork's confirmation would risk "an era of internal strife and disaffection." Another declared that "the nomination of Robert Bork has divided the country as no other * * *. It has divided communities and yes, it has divided families." Still another, his voice filled with profound regret, observed, "This nomination has polarized America * * * divided groups and races, * * * triggered passion and emotion * * *. [W]e do not need someone to divide us. We need someone to bring us together."

Mr. President, with all due respect, if that is the basis on which we approach this awesome responsibility of advice and consent, we don't need someone to bring us together. We need someone to bring us to our senses. For Members of this Senate, knowing of the concerted, sophisticated campaign that has been waged to create a false fear of this nominee throughout the land, to stand here on this floor and rest their solemn judgment on the existence of fear and division and passion and emotion, is a travesty. They might as well come here and blame victims for the high crime rate.

I ask my colleagues to pause and reflect for a moment on the meaning of this, because it is profound. We claim to be the world's greatest deliberative body, and that is our legacy, but where is the deliberation? And where is the commitment to fairness and justice that have long been the Senate's hallmark?

Fear and division—of course, there is fear and division. Listen to these ads: "If your senators vote to confirm [Robert Bork], you'll need more than a prescription to get birth control. It might take a constitutional amendment." "Robert Bork threatens almost every major gain women have made since we won the right to vote." "[He would] strip[ ] privacy protections; we couldn't even choose our own relationships or living arrangements without fear of government intrusion." "The nomination of Robert Bork has * * * a lot of people worried. And with good reason * * *. Sterilizing workers. * * * Billing consumers for power they never got. * * * No privacy. * * * Turn the clock back on civil rights. * * * No day in court. * * *" "Judge Bork has consistently ruled against the interests of the people." And on and on like that.

In the face of that barrage, it is amazing all Americans aren't terror stricken. I would be terrified, too, if I thought any one of the six horribles the Senator from Massachusetts said about "Robert Bork's America" were anything more than a crude, cruel lie. Back alley abortions, midnight police raids, courthouse doors slamming shut. Of course, there's fear.

If we pause to think about it, no one could seriously suggest that the nomination of Robert Bork—a man most Americans had never heard of until July—somehow spontaneously spread fear and division throughout the land. The man believes in judicial restraint—he wants to leave decisions to the legislature where the Constitution does not command otherwise. That is hardly a frightening prospect, unless you think, like the ACLU, that the American people are terrible ogres who sanction the death penalty, want to practice religion, think pornography is a bad idea, do not like racial quotas, and have all sorts of other neanderthal ideas.

No, letting the people decide major policy questions is hardly judicial terrorism. Although, I must tell you, after watching the handling of this confirmation, I have more than a little fear myself of how this elected body does the people's business. But the philosophy of judicial restraint was not frightening when Justice O'Connor or Justice Scalia or Chief Justice Rehnquist advocated it, and it is not when Judge Bork advocates it. The only meaningful difference between those nominees and the one now before us is that Judge Bork has been the victim of a well-financed, inflammatory campaign of distortion that has had a wholly predictable effect on the body politic. To reward that cynical and vicious fear mongering by relying upon the fact of its success as a basis for a "no" vote is not only to accept, but to endorse, the wholesale corruption of this confirmation process.

TURN BACK THE CLOCK ON CIVIL RIGHTS

Running a close second to fear and division as excuses for negative votes have been the fruits of the disinformers' well-planned and well-executed Southern strategy: The ever popular "He would turn back the clock"; "he would reopen old wounds"; "he would reverse decades of progress"; "we would re-fight old battles"; "he would reverse hard-won gains." This, my friends, is waving the bloody shirt, 1980's style. By my count, nearly 2 dozen of my colleagues have invoked one or more of these well-worn cliches as reasons for opposing Judge Bork. Any good campaign manager will tell you, as did Senator BIDEN's, that it pays to do polling first. Judge Bork's opponents did, and they knew exactly what buttons to push in order to

arouse passions in the South, as the Post and LA Times reported.

But have my colleagues taken the time to look at the record?

Do you understand that when this man was Solicitor General and had the perfect opportunity to try to turn back the clock on civil rights—if that was his mission in life—he not only did not, but rather sided with the NAACP in 9 of 10 civil rights cases, supported the minority or the female plaintiff in 17 of 19 cases, without a single exception pushed civil rights protections as far or farther than the Supreme Court was willing to go, and was in agreement with Justice Brennan's position more often than with Justice Rehnquist's?

Have you considered his record as an appellate judge—voting with the minority or female plaintiff in 7 of 9 substantive civil rights case?

About those writings that have been so viciously misrepresented, have you taken into account that among the critics of each Supreme Court decision whose reasoning Judge Bork has criticized stand some of the most respected and revered Justices in this history of the Court?

Have you paused to reflect how vile the charge of racism and sexism is for a man who as a young lawyer dared to challenge the discriminatory practices of his law firm, and who, as Solicitor General, responded swiftly and decisively when informed that his deputy, a black female, had been excluded from critical meetings?

Have you weighed the judgment of a President who has worked with Robert Bork, of a Chief Justice before whom he argued for 4 years, of sitting justices who have spoken out, of his colleagues, of former Attorney Generals like Griffin Bell and civil rights advocates like Lloyd Cutler?

Did the Senator who told us Judge Bork had aligned himself against remedies for discrimination in voting and education consider the judge's expansive view of the Voting Rights Act in the Sumpter County case of his congressional testimony against court-stripping bills to halt forced busing? We have the unbelievable spectacle of members who themselves voted against busing and against the Voting Rights Act just a few years ago telling us they fear Judge Bork will turn back the clock on civil rights because of views he expressed two decades ago. Have they looked at his record?

Why haven't my colleagues judged this nominee on his merits?

Mr. President, the evidence of a fervent commitment to civil rights is there in the record if we will only consider it. I challenge my colleagues to cite one statement, one action, one shred of evidence to support the scurrilous charge, parroted again and again here on this floor, that Judge Bork would turn back or reverse any civil rights gain. It just is not there.

Many of my colleagues know that, I am afraid. And so they have come here to the floor and couched their criticism in terms of uncertainty or doubt about Judge Bork's intentions. For example, we have heard:

> 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 disinformation 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 right 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 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 speech right 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 the birth control clinic, Griswold involved a Connecticut statute which banned the use of contraceptives. And Justice Douglas entered that opinion with a rather eloquent statement of how awful it would be to have the police pounding into the marital bedroom. And it would be awful, and it would never happen because there is the fourth amendment.
>
> Nobody ever tried to enforce that statute, but the police simply could not get into the bedroom without a warrant, and what magistrate 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.

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, just as 6 years ago we confirmed 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 farfetched 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 sure do not know what the Senator is talking about. I do know that the ultraliberal groups that want to push these privacy rights to the limit and are so hysterical in their opposition to Judge Bork are not doing much to strengthen "family relationships and the rights of children and parents" when they claim that parental notification about teenage abortions violates the constitutional right to privacy, when they insist the first amendment protects pornography, or when they tell us the Constitution requires a school principal to allow a teenage boy to bring his male lover to the senior prom. I guess what is good for family relationships is in the eye of the beholder—which is why, like Judge Bork, I prefer to have elected legislators rather than unaccountable judges making these choices, especially since that's where the Constitution leaves that responsibility.

FOR 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 did a so-called 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 as one of the supposed business 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.

But that did not keep 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 sought * * * their day in court, Judge Bork voted against the individuals in 14 of 14 split cases." All contrived and demonstrably false. Drivel straight from Ralph Nader's mouth into a Senator's floor speech. As I reflect on the impact of this fight, I wonder how one explains to his Southern constituents his reliance upon Ralph Nader-sytle disinformation rather than the evidence in the record in reaching judgment on a matter of this importance to the American people.

EXTREME, RADICAL AND REACTIONARY

When you read through many of these floor speeches, you get the feeling all the speechwriters went out to lunch together or something. Maybe they even took the pollster and a representative of People for the American Way with them to make sure they didn't deviate from the central themes. There are some unusual similarities. Two floor speeches, for example, included the same colorful, but hopelessly oxymoronic phrase: Judge Bork is "extreme, radical, and reactionary." Great minds think alike—this is the world's greatest deliberative body, after all.

In one area, however, my anti-Bork colleagues are not singing from the same sheet of music. They never could make up their minds whether to brand Judge Bork a rigid, unthinking ideologue or a spineless, expedient chameleon. The possibility that he might be somewhere in between—a conscientious, thoughtful jurist, pehaps—has not weighed too heavily on anyone's mind on that side of the aisle. Thus, we have heard this: "[He] is on the extreme right." "He has reaffirmed most of his basic views." "He has displayed a feisty, iron-clad consistency * * *" "[He is] locked into an extreme and inflexible ideology." Other Senators, however, saw it a little differently: "My problem with Judge Bork is he doesn't stick with his views." "[He has an] erratic philosophical record." "[He] lacks predictability." "[He is] an unknown man with unknown beliefs." "[He] does not know himself." Can my colleagues be talking about the same man?

We have also seen the opponents of Judge Bork contend that he is an extremist who would tip the balance on the Court. Now, that's an interesting one. If he is so far out of the mainstream and so extreme, how is he going to be able to get four other votes to tip the balance of the Court?

What we have here—and my colleagues, it is 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 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 witnessed anything more unseemingly in my time here. Senators grasping at straws. Senators erecting straw men and then piously knocking them down. Senators trying to avoid the cleaning exercise of debate by deciding the issue on a quick straw vote. You think we're trying to make political hay out of this? We'll reap what you've sown!

THERE IS STILL TIME

My colleagues, if there ever was a possibility that the effort to roll this nominee would succeed without the American people understanding what went on here, that possibility no longer exists. Each of us will be held accountable.

The question now is, will those of us who have been misled and stampeded into joining this lynch mob pause, step back from the crowd, and reflect on the principles at stake here? Justice. 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 citizens 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 of otherwise good, decent, fair-minded senators has gathered around the willow tree, after Senator Biden's drumhead court, watching Senator Kennedy prepare the noose. As in a lynch mob, they do not yet 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 the support from 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 willow tree, twisting in the wind, and know that they did it to him. As with a lynch mob, a silence will follow, and these U.S. senators will have the rest of their lives to feel 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 several issues that could be exploited. The best prospects for stoking apprehensions 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 fears.

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, but he rejected this view years ago. He cited his record, "I have upheld laws that outlaw racial discrimination. I have consistently supported *Brown v. Board of Education.*" Indeed, 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. "Everybody conceded that the company could have said women 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 department at a lower paying job, or if you want to, surgical sterilization is available."

Judge Bork said, "I think that is not a pro-sterilization opinion." Instead, "it was a sad choice these women employees had to make. It was very distressing. The only

question was, should they be given a choice? And is giving them a choice a hazard? We did not think it was under the act." His ruling suggested the women instead sue for unfair labor practices or sex discrimination. The case was eventually settled on these grounds.

*Equal Protection.* Several senators grilled Judge Bork on the 14th Amendment, which prohibits states from denying "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 amendment "applies to all persons, 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.

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

Judge Bork said this reasonable-basis test would better protect women. He disparaged a 1948 opinion upholding a law denying bartender licenses to women unless they were wives or daughters of male bar owners. "Distinctions that we made 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." The only two Judge Bork could cite as reasonable were Congress's prohibition on women in combat and the practice of public restrooms marked Gentlemen and Ladies.

What about the sex-discrimination case? The National Women's Law Center said *Vinson v. Taylor* made Judge Bork a sexist. The group claimed that he wrote that sexual harassment couldn't have occurred if the woman subordinate consented. Actually, Judge Bork ruled only that as a procedural matter, the employer could introduce evidence of an office romance. "While hardly determinative," Judge Bork wrote that Title VII discrimination law required introduction of such evidence. The Supreme Court agreed.

*Privacy.* According to Sen. Alan Cranston (D., Calif.), "When he said before the committee that he found no right to privacy in the Constitution, that did him in." In fact, Judge Bork said privacy was a major preoccupation of the Constitution and a basic requirement for a government of limited powers. "No civilized person wants to live in a society without a lot of privacy in it," he said. He cited several privacy rights. The First Amendment protects exercise of religion and free speech; the Fourth Amendment protects homes and offices from unreasonable searches and seizures; and the Fifth Amendment protects against self-incrimination.

What about *Griswold v. Connecticut?* Justice William Douglas reasoned from "penumbras formed by emanations" of the Bill of Rights to invalidate a law against using contraceptives. This phrase represents an imaginative reach of the Warren Court, but one entirely unhinged from constitutional text or original intent.

Judge Bork said the 1879 law against using contraceptives was "utterly silly," but pointed out that the law had never been enforced. This was a frivolous case, not because it didn't raise a philosophical issue, 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 for a wide-ranging holding. Planned Parenthood's New Haven branch conspired with a politically friendly prosecutor to get a case brought against it for "aiding and abetting."

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 barge into bedrooms to check if a married couple was using contraceptives because no prosecutor would ever ask for, or a judge issue, 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 antique law that "is just so out of date that it has gone into limbo."

*First Amendment.* 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 "everybody, including the Supreme Court, 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," has less protection.

What about school prayer? The Senate opponents cited a Washington Post report about a speech he gave in 1985 at the Brookings Institution. Judge Bork denied ever endorsing school prayer and cited a letter to the editor from Rabbi Joshua Haberman. "Your reporter was not present at the meeting. I was," Rabbi Haberman wrote. "I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our constitutional guarantee of religious freedom and equality. I heard nothing of the sort."

*Pro-Business Bias.* Several interest groups, including Ralph Nader's Public Citizen, published studies purporting to show that Judge Bork favors business litigants. He called these studies "very strange," noting that in a case in which we upheld a labor union against the federal labor relations agency, "they said, well, a labor union is really a business." That case, *NTEU v. FLRA,* held that a union didn't have to provide lawyers to represent non-union members to the same extent it provided counsel to members. Judge Bork testified that "if you look at my decisions on race, on women, on labor unions, on individuals vs. the government, you will find no . . . political line along which these decisions line up. They line up only according to legal reasoning."

In retrospect, there was a twisted logic to the distortion campaign. Judge Bork was first called an extremist, a right-wing ideologue. Then the flaw was that he failed to meet the critics' portrayal of him. They said he changed his views too often (he was a Marxist in his youth!) and his opinions were unpredictable because they were based on legal, not political, principles. Perhaps it's the critics' inconsistency that causes senators now to say 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.

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THE JIM CROWING OF BORK

(By L. Gordon Crovitz)

Who is this man a multi-million dollar ad campaign and a senator from Massachusetts 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 the partners end their Jewish quota and hire Howard Krane. Mr. Krane is now a senior partner there, and told the Judiciary Committee that "Bob Bork is a person without prejudice against any group." U.S. Solicitor General Bork was quick to rescue Jewel Lafontant, the first black woman to be a deputy in that office, when she told him of her exclusion from meetings due to her sex. "The very next day was the beginning of my attending so many briefings," Ms. Lafontant told the senators. "I wondered to myself whether I had been wise in complaining."

The deeds of Robert Bork in his personal life are matched by the words of his professional duties as appeals court judge and solicitor general. The evidence is that the distortions of Mr. Bork's civil-rights record are nothing more—or less—than a grotesque lie.

*Record as Appeals Judge.* Bork opponents have tried to substitute result-oriented statistics for careful analysis of his legal reasoning to impugn Judge Bork as anti-women, pro-business, etc. Yet even on the basis of the opposition's anti-intellectual methods, Judge Bork's civil-rights record is clear. In his five years on the U.S. Court of Appeals for the District of Columbia, Judge Bork has heard eight cases involving the rights of minorities or women—and ruled in their favor in seven. In no case did he render an opinion less sympathetic to minority or women's rights than the Supreme Court. Perhaps even more telling, his opinions are among the circuit's most notable civil-rights rulings.

STEWARDESSES VS. MALE PURSERS

In this year's *Emory v. Secretary of the Navy,* Judge Bork ruled for a black Navy captain who wanted to sue the promotions board. The issue was whether the military branches are subject to judicial review where civil rights are at stake. Judge Bork held for the first time that federal courts can decide these cases. Also this year, in *Doe v. Weinberger,* Judge Bork held that a plaintiff fired from the National Security Agency due to his homosexuality was illegally denied a hearing.

Judge Bork has written or joined several opinions protecting women's rights, especially at work: *Laffey v. Northwest Airlines* (1984) demanded that stewardesses get paid as much as male pursers for comparable work; *Palmer v. Shultz* (1987) held for women foreign service officers alleging discrimination by the State Department in assignments and promotions; and *Ososky v. Wick* (1983) reversed the lower court to bring women in the Foreign Service under Equal Pay Act protections.

*Record as Solicitor General.* When the critics ask, where was Robert Bork during the great civil-rights victories? The best answer is that he was standing in front of

the Supreme Court making the winning arguments. Indeed, perhaps the best measure of Robert Bork's civil-rights record is his four years as the government's chief litigator. Solicitors general have great freedom to file briefs weighing the claims of private parties in cases where they are not required to act as the government's defense lawyer. Mr. Bork used his position to argue more pro-civil rights cases than any Supreme Court nominee since Thurgood Marshall. In 17 of the 19 cases, Solicitor General Bork argued for the civil rights plaintiff or minority interest: the NAACP Legal Defense Fund was on his side in nine of the 10 cases where both filed briefs.

Indeed, perhaps the most lasting accomplishment of his solicitor generalship in the mid-1970s was building on the civil rights gains of the 1960s. He was ahead of the times in 1976 in Runyon v. McCrary. The issue was whether private schools can deny admission to blacks. This controversial case raised the conflict between the freedom of private groups to set their own rules and the public goal of non-discrimination. The civil-rights law. Solicitor General Bork said, "reaches the actions of private individuals not in any way facilitated by state law." The Supreme Court agreed, with Lewis Powell dissenting.

In several cases, Solicitor General Bork took the controversial position that plaintiffs do not have to prove the defendant's discriminatory intent in order to win discrimination cases. Black workers brought the 1975 case of Albemarle Paper Co. v. Moody against their employer and their union. They argued that they had been locked into low-paying jobs by testing policies and union rules. Mr. Bork successfully argued that even if the employer didn't mean to discriminate against black workers, the mere existence of a discriminatory effect entitled the plaintiffs to back pay. Solicitor General Bork tried to take the law even further. In the 1977 case of Teamsters v. U.S., the Supreme Court refused to accept his argument that a wholly race-neutral seniority system is unlawful if it perpetuates discriminatory effects.

Despite Judge Bork's record of public service to civil rights, Sen. JOSEPH BIDEN claimed that "throughout his career, Judge Bork has opposed virtually every civil rights advance." How can this be? The critics cite Mr. Bork's speculative academic writings—yet distort even these:

Brown v. Board of Education. Whatever Sen. BIDEN was referring to, it couldn't have been the landmark Supreme Court case that desegregated the public schools and gave courage to a politically deadlocked Congress to act on civil rights, Judge Bork has said that by the 1954 Brown case, "it had become abundantly apparent through repeated litigation that separate was never equal." This isn't a recent conversion: In a 1968 Fortune article, he called the ruling "surely correct."

In his 1971 Indiana Law Review article, then-Yale Prof. Bork said that the 14th Amendment "was intended to enforce a core idea of black equality against governmental discrimination." At a Federalist Society meeting this past January, Judge Bork defended Brown's reasoning against critics who insisted that the 14th Amendment was not intended to prohibit segregated schools. He said. "To have chosen separation rather than equality would have been to read the equal protection clause out of the Constitution." Judge Bork calls Brown "perhaps the greatest moral achievement of our constitutional law."

*Public Accommodations.* Much has been made of Mr. Bork's three-page article in The New Republic in 1963 making the libertarian case against government-coerced desegregation of private establishments. Unlike the segregationists, he was not motivated by a desire for racial separation. Indeed, he stipulated that "of the ugliness of racial discrimination there need be no argument." Instead, his purpose was to warn against the dangers of government intervention into private relations even for a cause as noble as desegregation. "It is sad to have 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 these abstract libertarian principles." Does this sound like someone who would undo racial progress?

*Voting Rights.* Critics of Judge Bork make the startling claim that he favors poll taxes, the device once used to deny blacks their right to vote. Judge Bork told the Judiciary Committee that he has "no desire to bring poll taxes back into existence. I do not like them myself." 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 $1.50 poll 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 a better ground for invalidating a poll tax would be if it were so high an amount that it interfered with the constitutional provision guaranteeing a republican form of government.

BLACK OPPRESSION BY ACTIVIST JUDGES

Apart from Judge Bork's extraordinary civil-rights record, there is a strong argument that minorities above all others should demand judicial restraint and an honest reading of the Constitution and its civil rights amendments. If justices of the William Brennan variety can 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 history of activist judges until recently is a history of black oppression; justices in *Plessey v. Ferguson* (1896) ignored the text of the 14th Amendment to create separate but equal. Judges such as Robert Bork insist that the law adhere to the Constitution, preserving a text that protects minority rights that someday could again lose popular favor.

A reading of Judge Bork's voluminous civil rights record leaves the inescapable conclusion that the partisan campaign against him was one of intentional distortion. If only the special interests had shown a fraction of the compassion for the truth as Robert Bork has shown for minorities. As it is, senators who take the time to review his record will find no honest argument that minorities or women have anything to fear from a Justice Bork.

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[From The Washington Post]

THE BORK NOMINATION

The uncharacteristic silence in this space over the past couple of weeks on a hot, controversial topic has been the silence of second thoughts. When Judge Robert H. Bork was nominated to the Supreme Court, we hoped and expected to be able to support his confirmation—comfortably and unequivocally—even though his political inclinations are far from our own. Those many aspects of the campaign against him that did not resemble an argument so much as a lynching only reinforced our original instinct. But we find, at the end of a period of total immersion in the subject—the written record, the testimony for and against Judge Bork and, most tellingly, the testimony by him—that we cannot.

By now the question may of course be academic; the Bork nomination appears to be gone. The reason for this, we suspect, is not the one being offered by President Reagan's perennially disappointed conservative constituency—i.e., that the White House failed to campaign for Judge Bork as a Great Avenger of the Right, a law-and-order man who would roll back the detested tide of permissiveness. Rather it was that Judge Bork's natural and expectable support never materialized in the political middle. There was almost no real or serious resistance in this quarter to the assault from the left against him; there was instead *a lot* of uncharacteristic silence.

Why? The commonest explanations have been political—conservative southern Democrats afraid to offend the blacks who have, ironically, become the decisive constituency in the party in that region, moderate northern Republicans likewise fearful for their reelection. But behind these political weak spots has been an abscess of a different kind. On a careful reading of the evidence, a preponderance of powerful reasons to support Judge Bork was fatally undermined by a couple of even more powerful and critical reservations that finally, for us and, we suspect, for many others disposed to support him, could not be overcome.

We are not being playful when we say that much of the anti effort was almost enough to make you pro. It's not just that there has been an intellectual vulgarization and personal savagery to elements of the attack, profoundly distorting the record and the nature of the man. It is also, more important, that the dismal political and programmatic content of some of the argument against him, as heard day after day in the committee hearings, could only confirm a suspicion that the time is ripe for a rigorous challenge to the lazy and dangerous cliches that often pass for policy wisdom and juridical profundity among liberals these days. There was also something disquieting in the idea that intellectual audacity and a challenge to prevailing legal orthodoxy were automatically to be punished or at least put down.

A second factor in Judge Bork's favor was the conventional view to which we continue to subscribe and which has now fallen into such disrepute, namely that a president has a large claim to support in nominating a judge of proven competence and distinction to the court; we think there is something to currently expressed anxieties that the Bork

events pave the way to a demagogic, highly politicized future where confirmation proceedings are concerned.

And finally there is the intelligence and professional achievement 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 cruelly characterized by those fighting 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 most: Judge Bork has retained from his academic days an almost frightening detachment from, not to say indifference toward, the real-world consequences of his views; he plays with ideas, seeks tidiness, and in the process does not seem to care who is crushed.

What people like ourselves needed when confronted with this impression was modest, but critical. It was not evidence that Robert Bork is a political liberal or in fact a political anything, and it was not evidence that he would have approved of everything the Supreme Court has done on matters of race, and other forms of discrimination.

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[From the Los Angeles Times]

SUPPORTER OUT-MANEUVERED—A "PEP RALLY" FOR BORK SEEMS TO BE A CHARADE

(By David Lauter and Ronald J. Ostrow)

WASHINGTON.—Shortly after noon Wednesday, as Robert H. Bork entered an ornate office on the second floor of the Capitol with his wife at his side and his bearded chin jutting determination, 16 senators rose to their feet and began to cheer.

"Don't quit, don't quit," they shouted as they crowded around the stocky federal judge.

"A pep rally," one participant called it.

The senators—all Republican conservatives—kept on cheering as the meeting ended and they escorted the Borks out of the Capitol through the law library entrance. "I felt like an astronaut on 5th Avenue," said Tom C. Korologos, chief Republican lobbyist on the Bork nomination.

But the rally, if it buoyed Bork's spirits as its sponsors hoped, was an empty charade. Most of those who took part were convinced that the game already has been lost. Asked a few hours later if any chance remains, a rueful Korologos confessed: "Not any more. The thin thread is gone."

How did a Supreme Court nomination that seemed to promise everything American conservatives had dreamed about turn to ashes in just three months?

It is a story of pro-Bork strategists outthough, out-maneuvered and out-spent from the start by their liberal opponents. It is the story of a White House once again unable to resolve an internal schism that has dogged the Reagan Administration for seven years—the conflicting impulses of its ideological and pragmatic wings. And, at the end, it is the story of a weakened President hobbling headlong toward almost certain defeat.

"WRONG TIME, WRONG PLACE"

It is also a historic episode that seems likely to leave as its legacy an emboldened Democratic majority in Congress and renewed bitterness among Republican conservatives, many of whom think that the fruits of the "Reagan revolution" have been stolen from them not so much by their liberal foes as by their moderate comrades.

And beyond the bare-knuckles political struggle, the Bork nomination came to pose for many Americans—and thus for many undecided senators—some fundamental questions about the role of the Supreme Court in the life of the nation and what people might want from it in the years ahead.

The answer seemed to be that Bork—an experienced jurist of unquestioned integrity, a legal scholar of acknowleged brilliance and 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 Bork on the high court began months before Associate Justice Lewis F. Powell Jr. announced his retirement.

As long ago as last summer, when he nominated Judge Antonin Scalia to the court. President Reagan sent a personal promise to Bork that he would be next, Administration and Senate sources say. On 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 been expectng a Bork nomination with a mixture of dread and anticipation.

HOWARD BAKER CONSULTS

In the days after Powell's June 26 retirement, White House Chief of Staff Howard H. Baker Jr. conducted an elaborate consultation process, visiting his former Senate colleagues and presenting them with a list of names under consideration. Several senior senators, including Judiciary Committee Chairman Joseph R. Biden Jr. (D-Del.) and 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. Sen. Strom Thurmond (R-S.C.), the senior Republican on the Judiciary Committee, for example, pushed the name of his former aide William Wilkins, now a federal appellate judge on the 4th Ciricuit 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 heeding it. As Thurmond later was told, the President had made a promise to Bork.

Reagan redeemed that promise on July 1, a Wednesday. But the Administration was already one step-behind:

The opposition had started its campaign 24 hours earlier with a meeting on Tuesday morning, June 30, at the Washington office of the Leadership Conference on Civil Rights. It brought together representatives of roughly 45 organizations that would play central roles in the debate to come.

And, where the pro-Bork forces were divided between ideologues who wanted to make a crusade of it and moderates who wanted to pursue what they considered a more practical approach, the opposition quickly settled on an early strategy. It began calling reporters and Senate staff members with a single message: 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.

"We were very concerned 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 would just routinely express support for a presidential nominee" as many moderate and conservative Democrats had done a year before when William H. Rehnquist was nominated to be chief justice.

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 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 Democrat, Sen. Ernest F. Hollings of South Carolina, said that he would vote 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, and Alan Cranston (D-Calif.), Howard M. Metzenbaum (D-Ohio) and Daniel K. Inouye (D-Hawaii) met to discuss organizing their fellow Democrats and the Senate's moderate Republicans against Bork.

Inouye dropped out of a leadership role because he was chairing the Senate's Iran-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 each Thursday afternoon with coalition representatives to map strategy and share information.

To all this, the pro-Bork side responded with near-total silence.

Korologos, one of the savviest of the private Republican lobbyists, had been recruited early to help Bork, but Korologos' specialty is legislative maneuvering among Washington's political insiders. As he now concedes, no one in the White House anticipated the ferocity of the public campaign against Bork.

"I plead guilty" to underestimating the opposition, Korologos said Wednesday, adding bitterly: "I thought it was going to be a fair fight."

"THAT'S NOT GOOD ENOUGH"

On the day the nomination was announced, Korologos recalled that Chief of Staff Baker asked him: " 'Do you think he can get confirmed?' And I said: 'Probably.' 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 first White House meeting with Bork did not occur until July 13, nearly two weeks after the opposition's first session. Attending were Baker, White House counsel A.B. Culvahouse, former counsel Fred Fielding, congressional liaison William L. Ball III and A. Raymond Randolph, a Washington lawyer and friend of Bork.

When the President and his aides made public statements on Bork, it was to emphasize his belief in "judicial restraint."

Reagan said in his radio speech the Saturday after the nomination was announced that Bork "shares my belief that judges should interpret the laws, not make them." The theme reflected the belief—widely held within the Administration—that the public was fed up with activist courts, whether liberal or conservative.

Bork's opponents declined to fight the battle on those terms. "We felt it was absolutely crucial that the debate be framed on our issues," said one anti-Bork activist who asked not to be named.

DENIED USUAL STRATEGY

At the same time, the opposition was denied the usual strategy for attacking judicial 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 conventional wisdom in Washington that a campaign waged 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 late July, Gerald McEntee, president of the American Federation of State, County and Municipal Employees, one of the nation's largest unions and the one most active in the anti-Bork 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 question.

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 campaign and pointed to two themes that Bork's opponents would exploit. While about one-quarter of those polled believed that the high court had too much power, 55% said that the court's level of influence was about right and another 14% thought the court was not powerful enough.

A "campaign on the existence of a public mandate for change on the court" would not succeed, the firm reported. "When it comes to the Supreme Court, most Americans are inclined to support the status quo."

To defeat Bork, they said, opponents should make the public skeptical 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 at several points in his career to civil rights legislation, the campaign would play on the concern held by both southern blacks and whites about "reopening old wounds" and old battles—concern the South's conservative Democratic senators could not afford to ignore.

Separately, the opposition coalition hit upon what became its "Yuppie 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.

In the face of that strategy, Administration officials continued to emphasize Bork's academic and professional credentials—the fact, for example, that none of his opinions as an appeals court judge had been reversed.

Their campaign receive major boosts in August as Bork was endorsed by Supreme Court Justice John Paul Stevens and by Lloyd Cutler, White House counsel in the Jimmy Carter Administration. But conservatives, including many in the Justice Department, already had begun objecting that the White House was not doing enough to support the nomination.

Conservatives led by veteran Southern California Republican activist Bill Roberts announced in mid-August the formation of a pro-Bork lobbying group, We the People, pledging that it would raise $2.5 million for a national media campaign. By this week, a spokesman said, it had raised only about $250,000.

Rather than place advertising in states where key uncommitted senators lived, as groups opposed to Bork were doing, We the People devoted its initial effort to attacking Kennedy with advertisements in Massachusetts and anti-Bork Republican Bob Packwood in his home state of Oregon.

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

The most eagerly sought-after witness was William T. Coleman Jr., former transportation secretary for President Gerald R. Ford, the only black member of Ford's cabinet and now head of the Washington office of Los Angeles' O'Melveny & Meyers law firm.

Administration officials had approached Coleman about testifying in Bork's favor. Declining, he indicated that he preferred not to be drawn into the debate. Throughout the month, however, Coleman was besieged with calls by Biden and was urged to testify by lawyers from the NAACP Legal Defense Fund, which he chairs. Eventually, he agreed, citing a passage from the Bible about the man who declined to intervene to prevent evil and was informed by the handwriting on the wall that "you have been weighed in the balance and found wanting."

Besides Coleman, who became the most compelling of the anti-Bork witnesses, Biden and his staff lined up a series of academic experts and attorneys whose testimony was designed to build a substantive case against Bork.

The White House counted on Bork himself to answer all the substantive charges against him and concentrated on finding prominent persons, including Ford and former Chief Justice Warren E. Burger, to serve as character witnesses. When Bork proved unable to allay committee members' doubts, the pro-Bork side had few witnesses able to respond.

After the first day of testimony, 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 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 hearing, lawyers for the anti-Bork effort delivered analyses to reporters covering the hearings. By the end of Bork's testimony, coalition leaders now say, the campaign against the nomination was safely on the downhill slope.

(Times Staff Writers Henry Weinstein in Los Angeles and James Gerstenzang and Sara Fritz in Washington contributed to this story.)

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[From the Washington Post]

BORK'S FOES BUILT STRATEGY ON SOUTH

(By Edward Walsh)

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, Marttila & Kiley, Donilon's memo, entitled, "The Bork Nomination and the South," argued that the presumption 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 teeters on the brink of extinction largely because the potential opposition Donilon 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," Donilon wrote. "Bork flouts the southern tradition of populism. And (perhaps most surprising to some) Bork poses a challenge to a very strong pro-privacy sentiment among southern 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.

Last week President Reagan vowed to keep fighting for confirmation. And the majority of southern Democratic senators whose votes Bork desperately needs remained officially uncommitted. But the trend against Bork in the South is clear and many think irreversible. As the first of the southern Democrats, reflecting the deepening doubts about Bork among their constituents, announced that they would oppose confirmation, Reagan's hope of adding Bork's powerful, conservative voice to the nation's highest court began to fade.

The theme that some thought would be most effective against Bork—his generally pro-business views that run counter to southern populism—turned out to be the least important. But privacy became a central issue in the confirmation fight as Bork's opponents played down the explosive issue of abortion amid more general concerns about Bork's strict interpretation of the Constitution, an interpretation that his critics said provides scant protection for unstated but implicit individual rights.

"People actually believe they have rights that are not in the Constitution," a Judiciary Committee Democratic aide said. "The focus groups and polls were right, but even without that it was just common sense.

"Everybody thinks privacy is a code word for abortion," he added. "It isn't. This guy [Bork] doesn't believe in inalienable rights."

From the beginning, Bork's opponents said that his own views—set out in a 25-year career of prolific writing and speaking—would prove unacceptably narrow to a majority of Americans. Bork cooperated with this strategy. He retracted some of his positions and modified others, but he could not recant a lifetime of seeing the Constitution through the prism of the Framers' "original intent," which leaves little room for what was called during the hearings "the evolving concept of liberty."

"I still think I was right," Bork said of his criticism of the Supreme Court's landmark "one-man, one-vote" rulings that forced the reapportionment of state legislatures and, not incidentally, transformed the politics of the South.

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.

Following Bork's five days of testimony, the first witnesses to appear before the Judiciary Committee were meant to dramatize this message. They included Andrew Young, the black mayor of Atlanta: Barbara Jordan, the black former Democrat congresswoman from Houston who teaches at the Lyndon B. Johnson School of Public Affairs at the University of Texas, and William T. Coleman Jr., not a southerner but a highly respected black lawyer and a Republican who was transportation secretary in the Ford administration.

"Had Judge Bork's truncated view of the First Amendment prevailed, Dr. Martin Luther King Jr. would not be a venerated national hero—he would instead be serving a jail sentence in Alabama and the nonviolent method of social change might never have found foot on American soil," Young told the committee.

"Had Judge Bork's view on personal freedom prevailed, the Public Accommodations Act would have never opened the doors of the hotel and convention industry which is now Atlanta's lifeblood and the city's largest employer. . . . Had Judge Bork's view of the Constitution prevailed over the past 30 years, my city would not be a city 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 court," said Sen. Richard C. Shelby (D-Ala.), who has not yet announced his position. "In the South, we've made a lot of progress. We do not want to go back and revisit old issues that are settled."

Shelby said there is "surprising" opposition to Bork among conservative, white women in Alabama who invariably raised the privacy issue.

"I thought for a while abortion was primary, but now I think it's this privacy issue," said Sen. Howell Heflin (D-Ala.), who is also uncommitted.

"I am from a southern state that for 30 years has struggled to heal the ugly wounds of racial strife," Sen. David H. Pryor (D-Ark.) said in the first formal statement of opposition to Bork by a southern Democrat. "Can I vote to take a chance or a gamble with a man we do not know?"

Early Friday morning, Sen. Lloyd Bentsen (D-Tex.) a highly successful businessman before he entered politics, spoke on the Senate floor about Bork's criticism of the public accommodations section of the Civil Rights Act of 1964 at the time the bill was being debated in Congress. The year before enactment of the measure, Bentsen recalled, the first major hotel in Houston was integrated by hardheaded business leaders who recognized the inevitability of change.

"As the head of the company that owned that hotel, I find [Bork's] statement repugnant," Bentsen said.

There were other reasons for the southern Democratic tide that threatened to drown the Bork nomination. A native of Pittsburgh, he was nominated to succeed Lewis F. Powell Jr., who had been the court's lone southerner. Last year, Reagan campaigned across the South against Democratic Senate candidates, four of whom defeated their GOP rivals largely because of the overwhelming support of black voters. The Bork nomination was put in grave danger even then.

With blacks adamantly opposed to Bork and whites at best divided and moving strongly toward opposition, it was not surprising that most of the southern Democrats read the politics of the confirmation fight the same way.

"It's all bloody wrong," Tom C. Korologos, a lobbyist brought in by the administration to help win confirmation said in exasperation late last week. "He's got a good civil rights record, but we can't get that point across. They've painted him into a corner."

"Maybe this is unfair to Judge Bork," Sen. J. Bennett Johnston (D-La.) said after announcing he would vote against confirmation. "But we just cannot take a chance."

The Judiciary Committee is scheduled to vote on the nomination Tuesday. When the panel's eight Democrats and six Republicans gather, the air will be heavy with irony. Biden, the chairman, watched the collapse of his campaign for the 1988 Democratic presidential nomination during the hearings of reasons having nothing to do with Bork. Yet Biden, by most accounts, not only conducted the fair hearings he promised, he helped engineer and execute the strategy that has brought Bork so close to defeat.

Heflin, the committee's only former judge and its lone southern Democrat, was seen in the beginning as the key vote on which many of the other southerners might turn. But Heflin, typically, hesitated while others acted, reducing his visibility and his influence.

Through much of last summer, Senate Republicans complained bitterly that Biden and the Democrats were stalling by not starting hearings on the nomination until Sept. 15. But by late last week they seemed in no hurry. As the Judiciary Committee prepared to send Bork's name to the Senate floor with or without a recommendation, it was the Republicans and the Reagan administration who were playing for time.

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[From the Washington Post]

BABBITT, DUKAKIS JOIN BORK OPPONENTS

(By Gwen Ifill)

NEW YORK, July 7.—Democratic presidential candidates Bruce Babbitt and Michael S. Dukakis said today at the NAACP annual convention here that they oppose confirmation of conservative Appeals Court Judge Robert H. Bork to the Supreme Court.

Bork's confirmation has become a lightning rod for criticism at the 15,000-delegate convention and is increasingly being treated by civil-rights leaders as a political litmus test for presidential candidates and elected officials.

Chicago Mayor Harold Washington, speaking today, said that if Bork wins confirmation, "affirmative action is doomed."

"Have you heard a speech or two about Robert Bork so far?" former Arizona governor Babbitt asked. "Are you ready to hear another one? Because there can't be too many speeches about this nomination."

On Monday, Rep. Richard A. Gephardt (D-Mo.), another presidential candidate, denounced the Bork nomination as "a bad choice for America." Babbitt echoed that, saying Bork's constitutional philosophy is a threat to civil rights because he believes in the letter, not the spirit, of the law.

"We must have justices whose philosophies are consistent with that calling, and Robert Bork, won't pass that test, I believe," Babbitt said.

Massachusetts Gov. Dukakis spoke briefly to a gathering of youth delegates tonight. He told reporters afterward that if he were a senator, he would not vote to confirm Bork. "I don't think you pick people who come from a very narrow ideological perspective and appoint them for life," he said.

Democratic presidential candidate Jesse L. Jackson is expected to appear here Wednesday.

NAACP executive director Benjamin Hooks said he originally invited only Bab-

bitt and Jackson but has extended an invitation to other candidates to speak if they wish.

The first sign of the pressure the NAACP has vowed to exert on the Bork issue came today when NAACP board member and New York Democratic National Committeewoman Hazel N. Dukes introduced Sen. Daniel Patrick Moynihan (D-N.Y.) as a veteran NAACP supporter who would most certainly oppose Bork's confirmation.

Moynihan, however, said afterward that he would not say how he will vote on Bork.

"I have the votes in New York to defeat him." Dukes said when told of Moynihan's response. "When I get with his staff in New York, I'll get what I want. It's strictly politics."

New York Gov. Mario M. Cuomo, who was greeted warmly by the delegates, said, "Now today we're confronted with the possibility that the Supreme Court . . . may be about to turn back the clock."

The governor was not directly critical of Bork, but said after his speech, "It is wrong, in my opinion, for a judge to go on the Supreme court . . . bench with his mind made up on abortion or any issues. If it becomes clear that he has already made up his mind, then he should not be on the bench.

"Can you call a strike before the pitch is thrown? Cuomo asked. "How can you make a decision without reading the evidence?

Bork's record opposing high court decisions in areas from affirmative action to abortion to voting rights, and his literal interpretation of the Constitution, have stirred opposition of civil-rights and feminist groups.

These Bork opponents fear that his replacing Lewis F. Powell Jr., who was often a crucial swing vote, would ensure a conservative majority on the Supreme Court.

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[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 great deal wrong when organized pressure groups mount a public campaign of lies and slander, spreading deliberate disinformation and stirring hysteria, in order to bring political pressure on members of the Senate to vote down a 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 terms) in the Senate Office Building itself, helpfully provided for the purpose by Democratic members of the Judiciary Committee, and carefully coordinated with the conduct of the committee's own hearings.

But that's what happened to the nomination of Robert H. Bork. The organized left hijacked the confirmation process, turning it into an exercise in gutter politics 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' constituents whipped into hysteria by a calculated campaign of lies.

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

What's at stake is the integrity of the process by which we choose the nine justices of that court on which we depend for the maintenance of our liberties. In the final analysis, the moral authority of that court is the bulwark of the Constitution, just as the Constitution is the bulwark of our liberties.

The key to the court's moral authority is its insulation from the crasser forms of partisan or electoral politics. And that's why the massive multimedia campaign against Judge Bork has been such 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, Robert Bork has left a trail strewn with words on paper—articles, speeches, debates. It's the mark of his restless, inquiring mind that these are rife with contradictions; he freely discarded ideas when, having tried them, he found them wanting.

But what The New Republic has colorfully described as his "wild ideological fusillades 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 overstepping 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 rule of law.

In examining the record of Judge Bork's earlier years as intellectual provocateur, a senator might genuinely conclude that appointment to the court would entail too great a risk. This could be a principled reason, even if mistaken, to reject the nomination.

But this is not the way the game was played.

The left made it an exercise in organized pressure-group politics that tossed truth to the winds and had nothing to do with principle.

President Reagan was correct when he called the get-Bork forces a "lynch mob." This blatantly political lynching of a Supreme Court nominee, of whom no less an authority than retired Chief Justice Warren Burger said none in the past half century had finer qualifications, must not be allowed to stand unchallenged—or unavenged.

Not for the sake of retribution, but for the sake of principle and precedent.

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[From the Wall Street Journal]

THE BORK DISINFORMERS

As senators decide 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 "with more hype and more disinformation." Or what former University of Chicago Law Dean Gerhard Caspar meant by accusing the committee of "McCarthyite distortions." If Judge Bork loses, the lesson to us, and we're sure to important and well-informed parts of the public, will be that we have a political structure in which a group of intellectual charlatans can win by peddling mendacity and deceit on a massive scale.

Joe Biden, Teddy Kennedy and other moralizing senators relied on a tactic once called the big lie. They repeated their charges so often they sounded as if they must be true, when the truth is the precise opposite. In particular, they repeated to exhaustion that Judge Bork does not believe the 14th Amendment applies to women. What Judge Bork in fact said was that the due process and equal protection clauses apply to "all persons"—women, blacks, everyone. He said there should not be "strict scrutiny" of laws applied to blacks and a lower level of review for women, that the same test should apply to all.

The American Civil Liberties Union also used sleight of hand in a news release that "Judge Bork, in a 1985 speech, said it would be a good thing if religion were reintroduced into public schools." Judge Bork did give a speech observing that the "resurgence in the political assertiveness of religion-based movements" is a reaction to the court's "deliberate and thoroughgoing exclusion of religion." But nowhere did he endorse religion or school prayer. Asked to comment, an ACLU spokesman said its claim was "merely an extrapolation" from Judge Bork's speech.

Some of this "extrapolation" is by people who truly should know better. Over the past several days we've had several discussions with Harvard Law's Laurence Tribe over the letter that appears opposite. The Biden material on which he initially relied gave an incorrect reference saying Judge Bork dismissed the Ninth Amendment as a "waterblot." In the hearings, Judge Bork did use the phrase "inkblot," as follows: "I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an inkblot, and you cannot read the rest of it, and that is the only copy you have, I do not think the court can make up what might be under the inkblot."

What is at issue here is Mr. Tribe's pet project of using the Ninth Amendment as carte blanche for judges to create whatever new constitutional rights fit their fancy. Judge Bork does reject the notion "that under the Ninth Amendment the court was free to make up more Bills of Rights." But it is Mr. Tribe who is out of the mainstream; he surely knows the Supreme Court has never used the Ninth Amendment in the way he advocates.

Watching the anti-intellectualism of the assault on Judge Bork, we're reminded of the campus anti-intellectualism of the 1960s. In reaction to the universities' failure to defend reason or free speech, those who treasured these values founded the neoconservative movement in this country. Significantly, many of the people who reacted to those times by embracing conservative political ideas became the men and women who stocked the brain trust of the Reagan revolution.

Whether or not Judge Bork is confirmed, this shabby treatment of the nation's most distinguished legal scholar and jurist will not soon be forgotten. Both conservatives and liberals who hold dear the ideals of rational discourse and honest scholarship will be passionate in their outrage, and that passion is likely to have lasting intellectual and political effects.

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[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 withdrawing it even though it appears the Senate will vote against the nomination.

The climate surrounding the nomination is that of an intellectual lynch mob. Sen. Kennedy, the American Civil Liberties Union, the National Association for the Advancement of Colored People and other elements of the liberal 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 bestial in his disregard for basic liberties, his racism, his sexism, his determination to roll back the clock to Jim Crow laws and back-room, coat-hanger abortions.

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 of otherwise good, decent, fairminded senators has gathered around the willow tree, after Sen. Biden's drumhead court, watching Sen. Kennedy prepare the noose. As in a lynch mob, they do not yet 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 Sen. Kennedy to put the noose around Judge Bork's neck, and with a final shout kick the support from 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 willow tree, twisting in the wind, and know that they did it to him. As with a lynch mob, a silence will follow, and these U.S. senators will have the rest of their lives to feel the gnawing guilt of what they have done.

JUDE WANNISKI,
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The controversy surrounding Judge Bork's nomination is further proof of Newton's Law of Politics, which states: "For every action there is an equal but opposite criticism." Perhaps Judge Bork can take comfort knowing that the vehemence of his opposition is testimony to the power of his work.

WILLIAM L. BASSETT, Jr.

CLEARWATER, FL.

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Opponents of Judge Bork's nomination to the Surpreme Court say he is outside the mainstream of judicial thought, and will therefore wreak havoc and cause dangerous upheaval throughout the land by overturning the court's balance of philosophy.

Logically, of course, their argument means Sens. Biden and Kennedy and others believe at least four of the eight other justices will consistently vote with Judge Bork, if he is to have the impact they dread.

But how in the world can Judge Bork be outside the judicial mainstream if half the other justices share his philosophy?

By opposing his nomination on the grounds he will wield influence in the court, Sens. Biden and Kennedy and others are acknowledging that Judge Bork stands squarely within 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-to-8 vote into law.

DAVIS JACKSON.

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 preposterous. Let us talk just for the minute and a half that I have given myself about lynch mobs, public opinion polls. When the press started taking public opinion polls, Judge Bork was doing very, very well with the American public, until he testified. Then 409 million people watched him on television for 32 hours and when it was all over the press did more polls, not the Senators, and the majority of the American people in the North, the South, the East, and the West, said, "We do not like Judge Bork. He might be a fine man. We do not want him on the Court."

Senator BIDEN 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 people 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 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 on the Court, and vice versa.

That is my sworn responsibility.

But this notion I heard this morning, lynch mobs, and I heard from another Senator this morning, $15 million ad campaigns, where I come from 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.

I yield the floor. I yield to my friend from Michigan 5 minutes.

Mr. RIEGLE. 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 the other side 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 minority people, 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 strongly 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-established views expressed 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 active opposition to 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 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 studying 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 lynch 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 fill this vacancy. I am confident that, if a sensible nomination is made, it will be confirmed as we saw in the cases of O'Connor and Scalia. I am very hopeful we will see that done soon.

I thank the Chair and yield the floor.

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 sloganeering, 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 record, which includes 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 factors.

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—nor 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 Nazis have 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 ignored as legalistic or mechanistic reasoning 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 personally 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, policymaking 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 phony issues raised in television ads and other places. 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 also is 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 barred? Judge Bork believes this 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. It also deserves more than shortcut 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 whole record—Judge Bork's statements, his actions 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 we 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—broader and fuller, in fact, than 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, or the U.S. Navy.

Judge Bork's record on civil rights is complex and may be open to fair attack, but it deserves more than distorted descriptions of him as a defender 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 disproportionate 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 experience, 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 of the role of the courts and great respect for both. This record indicates that while Judge Bork is on the conservative side of the spectrum, he is clearly within the mainstream of current judicial thinking and should be confirmed by the Senate.

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 careful consideration of Mr. Bork's 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.

Surely, the importance of this nomination is apparent from the painstaking manner in which my esteemed colleague from Delaware, Senator BIDEN, conducted the Judiciary Committee

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 and commitment to 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 corresponded to my own.

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 insure 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 began with. For myself, and I believe for the majority of my colleagues, that issue always has been whether Mr. Bork, if confirmed to the Supreme Court, would preserve our basic constitutional rights, both those that are explicit and implicit in the Constitution.

Central to our system of government, and to the great compromises that gave birth to this system 200 years ago, was the principle that ours is a Government of limited power. Rights and freedoms reside in the individual, not in the Government. Mr. Bork would turn that principle on its head, and would turn back the clock on 200 years of progress on everything from civil rights to religious freedom, to worker protections.

As I indicated 3 weeks ago when I first announced my position on this nomination, my guidepost in this matter has been the Constitution. It is perhaps fitting that in this year, the 200th anniversary of that great document, we should be engaged in a great debate about what the Constitution means. This nomination has focused our attention on the core constitutional values and guarantees that define the very role of government in our society: Freedom of speech, freedom of religion, the right to privacy, and equal protection of the law.

Those same values translate the guarantees of equality and liberty on which this great Nation rests, into the rule of law by which we live.

As I see it, it is the paramount responsibility of the Supreme Court to protect and preserve the equality and liberty of which the Constitution speaks. It is the Supreme Court that breathes life into the promise of those words.

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 views equality—whether involving questions of race or gender or lineage—as an intellectual exercise rather than as a principle of profound importance.

It is for these reasons that I see no room on the Supreme Court for Robert Bork.

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 irretrievable.

I approached this appointment with an open mind about the nominee. I have become 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 such 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 "conservatives." 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 been overruled by the Supreme Court? No—not one opinion Judge Bork has been associated with on 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 positions, we started hearing 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 its conclusion—what counts above all 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 seen 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 change 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 1 hour 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 a great deal of anticipation, because I thought that we had a real treat 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, where does decisionmaking power 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 for 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 conventional fashion, the clash between democracy 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. 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 legislative branch of Government.

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 Hughes who once said that the Constitution is what the Supreme Court says it is. The Court can interpret the Constitution any way it wants. We cannot do anything about it. And so the issue is the degree to which a judge is willing to replace 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 extended to, as he put it, "objects not contemplated by the founders."

Oliver Wendell Holmes said:

I think that the proper course is to recognize that a State legislature can do whatever it sees fit to do unless it is restrained by some expressed prohibition of the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain.

Justice Felix Frankfurter wrote:

The Supreme Court for about a quarter of a century has distorted the power of judicial review into a revision of legislative policy, 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 either expressly or impliedly vests 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, unwise, arbitrary, capricious, or irrational. The adoption of such a loose, flexible, controlled standard for holding laws constitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country.

Mr. President, do not those various quotes from some of most distinguished people ever to sit on the Supreme Court of the United States sound very much like the basic writings of Robert Bork? That is what the debate should have been. What a debate it would have been.

Mr. President, I am absolutely convinced that had we focused our attention on the fundamental question of the power of the Court, Judge Bork would have won this nomination. He would have won the nomination because I am convinced that most Members of the U.S. Senate agree that an unfettered judiciary is a threat to democratic principles, and I believe that an overwhelming majority of our constituents share the same belief.

When just a matter of weeks ago, a U.S. district judge in Kansas City decided that he would impose taxes, both property and income taxes, on the people of the Kansas City school district to finance a desegregation plan, there was a widespread outcry—not against the idea of taxation, but against the idea of taxation without representation. Many, many people believe that the judge had extended himself beyond the proper role of the judiciary, and I believe that the basic premise of Judge Bork, the premise of judicial restraint, is one that would have resonated in this country if that debate had been allowed to go forward. But, of course, it was not. It was not allowed to go forward. It was transformed into something else, because those who wanted to defeat Judge Bork were willing to use standard political methods in order to attain his defeat.

At the beginning of this process, in fact even before Judge Bork was nominated, Kate Michelman of the National Abortion Rights Action League said, "We're going to wage an all-out frontal assault like you've never seen before on this nominee, assuming it's Bork." That is what it became. It became something other than an argument about judicial philosophy.

It became an all-out frontal assault on Judge Bork, including the ginning up of interest groups just the way we do it here in the Senate, just the way all Members of the Senate do it when, for example, we have a tax bill and you want to defeat an amendment, or you want people to support an amendment, and you try to gin up public support for your point of view. That is exactly what was done with the judicial nomination. I do not know that it has ever been done with a judicial nomination before. Maybe it has. It was done with this one—frontal attack, and a frontal attack waged 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

him. I think it was probably more subtle than that. But that was the innuendo.

That was the clear meaning of the message against Judge Bork. That was the clear meaning of the newspaper ads that were taken out by the various groups that opposed him. Judge Bork will "turn the clock back." Judge Bork will "open old wounds." Judge Bork is a "judicial extremist." As Senator KENNEDY himself said, "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizen's doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens;" usual possibly excessive statements by politicians. We all do this kind of thing all the time. But people believed 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 positions 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 racist, 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, this bright, liberal Democrat, 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." No resemblance to 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 Judge 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 Frankensteining 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. Jewell LaFontant did testify in the Senate Judiciary Committee, but she testified over the 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 those articles to critique opinions 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 was right again." 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. 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 against privacy. He criticized 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 Connectiut. Law review articles blossomed, criticizing the Griswold case. To criticize it, you did not have to be for beating down the doors of people's bedrooms. It had 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 would be students in a course called "Feminism in the Law," taught at Yale Law School. My daughter told me on the phone within the last week that even in that course, everybody dumps all over the reasoning of 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—overruled the Court, itself; 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 Frankfuter'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 Harper versus Virginia Board of Elections, 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, Stewart, 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 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."

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 in the law firm, went in to see the most senior partner and said that he would not tolerate this. And here is a man who, when Jewell LaFontant, 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, as the Wall Street Journal said, a Frankenstein, does not square with those who have worked with him over the years.

I telephoned, Mr. President, a week or so ago the dean of Yale Law School, Guido Calabresi, and I said to him, "What do you think of what has happened to Bob Bork?" And he indicated to me on the phone that he was sick about it. And I said, "Here is a man who is going to be defeated but at the very least I think that it is important for somebody who knows the man to tell the world what he thinks of him."

Within a day, within a day, express mail, came a statement signed by a couple dozen members of the faculty of Yale Law School; more names telephoned in later. I do not know how many are now on the list, maybe 30 or so. It took no time at all to get it. Here is what his colleagues at Yale Law School say, and I quote:

> As members of the Yale Law School Faculty who were once colleagues or students of Robert Bork, we take this opportunity to comment on an important matter that may be overlooked in the present confirmation controversy: the personal quality and character of the man. As a result of our own differing views on constitutional and public policy issues, some of us supported Judge Bork's confirmation; some of us opposed it; some of us did not take a position. But all of us wish to express, on the public record, our respect for Judge Bork's decency, humanity, courage and integrity. He is known to us as a kind and honorable human being, and we will continue to look upon him that way long after the present proceedings have been completed.

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," which is a forerunner as far as investment in South Africa, in a letter to me wrote:

> The charge that, on matters of racial justice, Robert Bork would seek to 'turn back the clock' or would 'reopen old wounds'—charges circulated widely in mass mail campaigns and even reiterated by some Senators—do Judge Bork a grave injustice.
>
> "The facts do not support—indeed, they contradict—this charge.

And then the 25 former colleagues in the Solicitor General's office wrote:

> * * * as Solicitor General, Judge Bork displayed an abiding commitment to the rule of law and to respect for individual liberties and civil rights.

And the description of Bob Bork, 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 am sure this has been pointed out on the floor many times.

Seventeen of the nineteen amicus briefs filed by him when he was Solicitor General on matters related to race and sex discrimination, including cases dealing with job discrimination and school desegregation, were on the side of the minority or the woman litigant.

You say, "Oh, boy, he was just acting as Solicitor General."

To my understanding, and I have had this confirmed by the Justice Department, the Solicitor General has very, very wide latitude in determining what amicus briefs are to be filed.

Seven out of eight cases that he has decided on the D.C. Court of Appeals relating to minority and female litigants have been decided for the minority or for the woman litigant.

Mr. President, I would like now to turn to the broader question of what is wrong with the process and what we have done wrong here. I think the question is not only the unfairness to Robert Bork as a person, and I think this has been unfair to him, but I believe that the thrust of this is that confirmations in the future will most likely go to either nonentities or to persons who have been nominated who have tremendous political moxie in dealing with the U.S. Senate.

If I were advising a person who has been nominated for the Supreme Court of the United States and I had no principles at all and just wanted to get the job done, I would say to this person, "Go around like a nominee for any other position, go to offices of the U.S. Senators and tell them what they want to hear."

What happened in this case was that Judge Bork has been asked not only in the committee but I believe by specific Senators and endless office interviews that he has had what his position is on particular cases, "What is your position, Judge Bork, on Roe versus Wade? Would you overrule the Supreme Court decision on Roe versus Wade? What is your position on the standing of Members of Congress to file suits? What is your opinion on the War Powers Act?" And on and on and on.

Senators 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 it is going to 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-sterilization.
>
> 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-

pendent judiciary and contrary to the principle of academic freedom.

I think that it is saying that we are going to judge you on the basis of characterizations of decisions, we are going to judge you on the basis of Law Review articles that you have written in your position as a professor. And if you take any position that can be characterized as against privacy or against one man, one vote or for poll taxes or for sterilization, that is going to be used against you.

It is very much like being a Member of the Senate, you know, when we come down in the well. There are countless times when Members of the Senate come down in the well to vote on an issue, and we say to ourselves: "How is this going to be characterized in a 30-second commercial in my next campaign?" How many times have we gone down to that well during a vote and asked ourselves when we were voting, not whether the amendment made sense or not, but, how is this going to turn up in the next political campaign?

And I think that the same situation, Mr. President, is going to or may exist in the future with respect to nominees or potential nominees for the U.S. Supreme Court.

One other thought. You know, we are politicians in the Senate. We are used to the battle, the combat of politics. We are used to getting into the fray. People say about politicians, "If you can't stand the heat, get out of the kitchen." Harry Truman used to say that. "If you can't stand the heat, get out of the kitchen." That is what a politician is: tough, combative.

I remember another professor of mine at law school and another former colleague of Judge Bork who once told me—I cannot even remember the context—but he said:

> You know, a lot of people who are law professors leave the practice of law and go into teaching. And they do so because they really are of a somewhat more delicate nature than the people who are practicing law. They do so because they really don't like all the tension. They don't like all the battle. They don't like the contests, the combativeness that is part of law, just as it is part of politics. They want to remove themselves from that. They want a more serene life, a more, if you please, academic or ivory-tower life than they had practicing law.

I suppose it can be said that they cannot stand the heat. But, Mr. President, are we saying, by what Judge Bork has gone through, that what we really want is people on the U.S. Supreme Court that can stand the heat; people who can take it? If you really want to destroy a person in academia, if you really want to assassinate his character, create the impression that he is an extremist. Create the impression that he is for sterilization. Create the impression that he is against minorities; that he is against women. 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?

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 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 house. Some of us helped generate the trashing. 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 trashing 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 wonderful tradition of standing for principle; it says on its masthead that it will never tolerate injustice—how can it write an editorial in this morning's paper that says of this phone call to Professor Baker that it was wrong but it did not matter. It matters.

Well, Mr. President, I close by saying I would love to win. I mean, I started out this speech saying everybody who stands up on the floor of the Senate hopes that he can change votes, that he could win the vote, win his case, make his points. I would love to win. And maybe lightning will strike. Who knows? Maybe Members of the Senate will have a second thought. But I do not think so. It is not impossible, but it is very hard.

But, Mr. President, win or lose, win or lose, I hope that we would resolve, not just in the Senate but in the country, I hope that we would resolve that we are never going to let this kind of thing happen again. I hope that we would resolve that we are never going to let this kind of thing happen again. We are never again going to take the position, particularly with a judicial nomination, that any means justifies the end of confirming or defeating a nominee for the U.S. Supreme Court.

I hope that we would never again take the position that nominees are to be pinned down in advance on their positions on matters that might come before their Court. And I hope that we could again resume the debate on the role and scope and the power of the Federal judiciary and of the U.S. Supreme Court without getting sidetracked into characterizations of the motives of very good and decent people.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, before I yield the Senator——

Mr. THURMOND. Mr. President, could I say just a word?

Mr. BIDEN. I yield the floor.

Mr. THURMOND. I want to commend the able Senator from Missouri who has made a magnificent presentation. I do not see how any open-minded person could hear that presentation and vote against Judge Bork.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, before I yield 20 minutes for the unanimous-consent agreement the Senator from Montana has, I am going to yield myself 1 minute just to make two very brief comments on the speech made by my friend from Missouri.

The PRESIDING OFFICER. The Senator is recognized.

Mr. BIDEN. First, a minor point but factually inaccurate, the Senator from Delaware was there when Miss LaFontant testified. I believe—I will check the record—that there were other Democrats there also.

Second, that although none of the people who testified against Judge Bork said he was a bad man or alleged he was, as characterized by the Senator from Missouri, I should point out that 1,925 of his colleagues who teach in law school took the time to write and say: "Although a fine man, a decent, honorable man, his views should not be represented on the Supreme Court."

I would point out that 10 of his colleagues at the Yale Law School wrote and/or testified saying he was a fine, honorable, decent man, but that his views should not be represented on the Supreme Court. And 32 of the most distinguished law deans in America—although I realize, as the Senator from Missouri believes, Yale is probably the most distinguished law school—the dean of the Harvard Law School, the dean of Georgetown Law School, all fine, honorable men and women—they wrote and said: Although Judge Bork is a fine and hon-

orable man, his views should not be represented on the Court.

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

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

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 basic 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 question of judicial activism or judicial restraint, that age-old conflict on which good 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 said, as a Frankenstein. They characterized him as a bad person.

I just came back from my State. You talk to blacks in my State, talk to women in my State, and they were scared. They were frightened of Judge Bork. They were frightened of a person, because of a portrayal of him that the people who knew him said bore no resemblance to the human being they knew and bore no resemblance to his record as Solicitor General; bore no resemblance to his record on the court of appeals; and bore no resemblance to the countless human kindnesses and sensitivities that he showed. No resemblance at all to the man.

He was characterized as a monster. He was characterized as a threat to decency. It was done over and over again and it was done in a public way. It was done in order to frighten the American people so that it became a political issue with Members of the Senate so that the public communicated. The public said, in effect, we are scared.

Mr. BIDEN. Would the Senator yield for a question? Does the Senator think that is the reason why 2,000 law teachers——

Mr. DANFORTH. Is this on the time of the Senator from Delaware?

Mr. BIDEN. Yes. On my time, assuming you will only use a minute or so to answer—or you answer on your time, if you would.

Does the Senator believe that is the reason why so many law professors, more than any time in the history of a Supreme Court nomination, why they took the view they took?

Mr. DANFORTH. No. I do not. But I think that the dynamics of what happened in the U.S. Senate have absolutely nothing to do with what hundreds or thousands of law professors said. I do not think that that is what weighed in with Members of the Senate. I think what weighed in with Members of the Senate is that there was an extraordinary amount of heat that was generated throughout the country and the heat that was generated was in the form of fear and the fear was of a Robert Bork who was characterized as being something that bears no resemblance to the real Robert Bork.

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

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. It seems to me, and the Senator from Missouri knows and we say—we use these florid terms all the time—about I have respect for our good friend from—he knows I do respect him. I think he is one of the most respectable Members that served in this body in the 15 years that I have been here. And I mean that seriously.

It seems what the Senator is indicting is less the process than the Senate. To suggest that the—I predict 57, possibly 58—of our colleagues here today who are going to vote against Judge Bork are doing so because they have succumbed to the raw pressure, from wherever it was generated, it seems to me that is one heck of an indictment of your colleagues. Because, if you insist that that is the reason they are voting the way they did, not because of the caliber of the testimony and the people who testified against him; not because of his record; then, it seems to me, that the indictment is not so much of the system but the indictment is of the lack of courage of individual Members of the Senate. And that, to me, is an awfully, awfully, awfully strong indictment.

Mr. DANFORTH. I would only say, Mr. President, in my judgment this process has been comparable to the repeal of withholding on interest and dividends in judicial form, really.

Did we at that time hear from our constituents? Yes. And did we decide the issue on the basis of what we heard from our constituents? Yes, we did. And does that apply now? Yes, it does. And are we politicians? Yes, we are. And is that an indictment of Members of the Senate? Maybe. Maybe. But I think it is an accurate description of what happened.

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

Mr. THURMOND. Mr. President, I have to object to any time being charged to our side. We are running very close. We have allocated it and we are going overtime now.

Mr. BIDEN. Mr. President, on my time I yield myself a minute.

The PRESIDING OFFICER (Mr. SHELBY). The Senator from Delaware.

Mr. THURMOND. You understand it is on your time and the response will be, too?

Mr. BIDEN. I will not ask a question. I will make a statement, Mr. President.

I would like the Senator from Missouri to be aware of what all my Republican and Democratic colleagues have pointed out to me and that is that their mail in their offices has run 10 to 1, to 20 to 1, for Bork. So, if the Senator is right, that we yield to what our constituents says, I would like to ask my staff—before the 2 o'clock vote, to roll over, literally, the boxes. We weighed them. We did not read them. We weighed them, the boxes of letters and postcards. I mean this sincerely, I instruct my staff now to go get them and I ask unanimous consent that I can pile them up here on the floor.

We are talking about who wrote to their Senators? Everyone here has said—I asked the Senator from Missouri, did he get more mail for or against Bork? Do not answer unless it is on your own time.

I ask the rhetorical question to the Senator from Mississippi: Did he get more mail for or against Bork? I ask all my colleagues here. I want them to come here and tell me, one of them, that they got more mail in their office against Judge Bork than for. And then I ask my friend the rhetorical question: How can his argument make any sense?

I yield the floor.

Mr. DANFORTH. Mr. President, in 15 seconds, the answer is that it was ginning 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 colleague 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 Mississippi. 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 make a decision, apparently 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 correct.

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 while this has been going on over the past 2½ months; and, 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 only taken that much time 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, 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 is a newspaper published there 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 15 organizations I have not heard of. Why? Because 6 of the organizations are homosexual organizations, 6 out of the 15 are homosexual organizations.

What does it 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 listed here. 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 this have to do with MELCHER?"

"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 amaze 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 say? I guess 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 the Senate, in the House, 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 similarity 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 the President sends up 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 of the inaction we have had in terms of 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 suicidal policy of combining huge record-breaking Federal deficits and Federal debt and trade deficits which, if not checked, will result in the Nation's worst depression with an economic collapse that will rock the world.

President Reagan on this nomination need not accuse me of politics or need not accuse me of politics in regard to his programs. For more than 6 years I have tried to cope with the weird political philosophy and economic 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 administration's legacy of economic suffering.

There is work to be done that could still alleviate the worst of it. I shall attempt in every way possible to help the administration to improve the trade deficit by exporting more U.S. agricultural commodities and cut back on the Federal deficit by strengthening agricultural prices, developing U.S. energy resources, cutting back on subsidized metal imports, and developing U.S. minerals. Although the time remaining for President Reagan and his Cabinet is only 15 months, the remaining time should be spent in a combined effort of Congress and the administration 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 recession.

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 puts a big responsibility on those 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 executive branch of our Government.

Mr. President, under ordinary circumstances, 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 ordinary 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 refrain from comment 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 Senator, in ordinary circumstances, both out of respect for the court and in recognition of the court's prerogative to decide the case without further comment from me, would cause me to refrain from commenting on the suit while it is still being considered. In particular, I would under ordinary circumstances 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 Senator and in my responsibility as a Senator to state my views on Judge Bork's nomination and on Judge Bork's views on a particular issue. It happens that he holds a strong opinion on that issue which is also a significant issue in my suit now being heard in the appellate court. That issue is the issue of standing to bring suit in the Federal court on a constitutional matter.

Judge Bork is on record as saying Members of Congress do not have the right to bring suit to challenge the constitutionality of a law. The basis of my suit is the constitutionality of an act passed in 1935 dealing with the appointment of five members to the Federal Reserve Open Market Committee of the Federal Reserve Board. I believe this portion of the act is unconstitutional and attempts have been made to challenge its constitutionality for more than 10 years in three separate suits brought before the Federal courts, all of which were rejected in court decisions stating that the plaintiffs lacked standing to bring suit. So my suit is the fourth attempt to have the case decided on its merits and, at the Federal District Court level here in the District of Columbia, Judge Greene ruled that I as a Senator did have standing, but also ruled that the five open market committee members need not be confirmed by the Senate. The suit is now on appeal, asking the appellate court to consider the merits of the case. Justice Department and Federal Reserve Board attorneys, in their arguments to the appellate court, requested a ruling that I be denied standing.

It is on this particular point of standing to bring suit before a Federal court on a constitutional matter that I must review Judge Bork's views and decisions.

Mr. President, I have done so carefully. 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 position 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 control.

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

The PRESIDING OFFICER. The Senator may proceed.

Mr. MELCHER. Mr. President, however, in 1985 in his dissenting opinion in Barnes versus Kline, Judge Bork set himself apart from his colleagues on the court and greatly shifted his position on standing for a Member of Congress or States to bring suit on constitutional matters to be decided by the Federal courts. For me, the most disturbing aspect of Judge Bork's decision on standing of Members of Congress 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 regarding Senators who oppose the nomination of Judge Robert Bork to the Supreme Court as being a political decision completely misses the mark. If President Reagan wants to nominate to the Supreme Court a conservative such as Judge Bork who matches his political philosophy, I can accept President Reagan's right to his decision, and I do not criticize him for making that decision nor accuse him of just recommending Judge Bork on the basis of politics.

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

Mr. President, I ask unanimous consent that the article from the Independent Record of Helena, MT, of Wednesday, October 21, 1987, be printed in the RECORD at this point.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Independent Record, Oct. 21, 1987]

SENATOR MELCHER GETS BUM RAP

A full page ad in the *Independent Record* Monday placed by The Conservative Caucus, Inc., carried the headline "You can tell a senator by the company he keeps."

It then named Melcher and tied him to liberal and gay rights groups.

The advertisement also said Melcher is following the wrong crowd and asked readers to urge the senator to abandon the Bork-bashers.

The inference is that Melcher supports the organizations that were named. Maybe

these groups contributed to Melcher's 1982 Senate campaign. However, we have no idea whether that is the case.

In any event, it was a cheap shot.

If those who support Robert Bork's nomination to serve on the Supreme Court want to bash someone, 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, to 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 that record and giving long 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 own 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 it was in my mind a very difficult decision to make, a very close question in terms of the judgment 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 or her 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 time, I stand with my political party 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.

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 consent 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.

I am convinced as 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. I have been committed to assuring the rights of each and every individual American, without regard to race or creed or sex or any other difference between people. Were I convinced that Robert Bork would not be sensitive to those rights and would not adequately and fairly judge every individual case before him on the basis of necessary protection of those rights, I would vote against him. But I think it is wrong to use litmus-test politics.

I have often seen the media report that this is a litmus test about civil rights, of individual rights, or of individual ideology. I reject that. Time and time again, I have seen the litmus test argument used in situations in which individuals become symbols and a fair consideration of that individual's own views and qualifications gets lost in the process.

We are not here casting a vote under some kind of litmus test. We are called upon to fairly judge an individual human being: His views, his qualifications, his integrity, his ability to impartially weigh cases, on a case-by-case basis, that come before him.

It is not right to allow individuals to become pawns in some kind of overriding political litmus test struggle. Frankly, those on both sides of the debate—both sides—have engaged in this litmus test kind of thinking that has made it more difficult for us to fairly assess Robert Bork's individual qualifications without regard to these political considerations.

The Supreme Court is charged with protecting individual rights of all Americans. We must protect the integrity of the process for selecting Supreme Court Justices. If we allow the process to become one of political litmus tests or the popularity of the

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 individuals and groups, even 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 as 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 repair the integrity of the process, avoid polarization, and act with unity as Americans and as U.S. Senators charged with this immense responsibility.

Mr. PELL. 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, narrowly legalistic and removed from the 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 on privacy issues also contain serious implications for the future if he is confirmed. No one can predict the new areas in which the tension between individuals and government will emerge, but a Justice who fundamentally rejects 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 would be 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 and liberties 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 I should vote to oppose his confirmation to serve as an Associate Justice of the Supreme Court.

Mr. DURENBERGER. Mr. President, I will vote to confirm the nomination of Robert Bork to be 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; substance 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 crystalizes 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 rollcall, 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 have done exactly 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 naive, 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 judical 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 that 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. This 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 views of the nominee. The second 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 at the time:

> 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 the standard 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 stops the hanging. Later, everyone learns that they nearly lynched the wrong man. Judges perform that role in our society. The Founding Fathers recognized that 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 these kinds of people to the judiciary, the Founding Fathers carved out a special niche for the judiciary in our Government. Judges were given life 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 Judge Bork has not been in 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, an election, not an appointment. 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 timing 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 fund raising and mass media. The reduction of complicated constitutional legal doctrine to 30-second television commercials unfortunately resulted in a great deal of exaggeration and distortion. Against this vast array Judge Bork was at a great disadvantage because we consider it unseemly for judges to 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 won't have a record. It's sad that 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 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 own judgment 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. Anyone who comes to the floor to support the President's nomination—or even to reduce unresolved issues—is a sure loser. That's not a feeling conducive to deliberative decisionmaking. 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 were outside the glare 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 at the time of 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 will 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 provisions that 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. The drafters of the Constitution wrote a document that was intended to be as important for future generations as for their own.

As our country has grown and matured, so has our understanding of the Constitution. We have made 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 more powerful groups 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 ideological concerns.

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 never tolerate a 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 the eyes of our Supreme Court Justices. 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. HUMPHREY. 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 distortions 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 I think 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 look at the composition 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 four Justices 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 itself and it has been a settled part 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 antilaw enforcement 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 current Court would be 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 against 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 been violated even though the police had fully complied with Miranda, had asked no questions of the 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 sharply divided—four against four—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, shackle 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 Planned Parenthood be placed in the RECORD prior to the vote on this nomination.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NATIONAL ABORTION RIGHTS ACTION LEAGUE,
*Washington, DC, October 20, 1987.*

Hon. HOWARD METZENBAUM,
*U.S. Senate, Washington, DC.*

DEAR SENATOR METZENBAUM: With Judge Robert Bork's decision not to withdraw from consideration as Associate Justice to the U.S. Supreme Court, Senate deliberation on his nomination continues. Certainly, no amount of debate or discussion will change Robert Bork's record or his testimony before the Judiciary Committee.

It is his record, after all, that defeated Judge Bork. No group or groups, no newspaper ads or grassroots organizations made Bork controversial. It was Bork himself, aided and abetted by a President who first politicized the nomination process during last year's election, who created the controversy.

From the outset, the National Abortion Rights Action League (NARAL) has based its opposition to Judge Bork's elevation to the Court on his own record, writings, and criticisms of established constitutional doctrine erected to protect individual rights and liberties.

To faithfully educate the American people on Judge Bork's record and the threat it represented, NARAL and other organizations ran full page advertisements around the country. These ads asked people to involve themselves in the democratic process by contacting their Senators.

I am writing to share with you a copy of the newspaper advertisement paid for by NARAL. Attached to the copy is supporting documentation for every statement and claim made in the advertisement. This responds to allegations made by supporters of the nomination of Robert Bork, that organizations such as NARAL have deceived the American public by distorting his record. Bork supporters have claimed that NARAL and other national organizations have enacted a "campaign of deceit" through our one-day, paid advertisement printed in several of the nation's leading newspapers.

We stand firmly behind the accuracy and appropriateness of our advertisement. We hope you will review the enclosed materials and judge for yourself the substance of the advertisement.

Supporters of the nomination fail to recognize that their efforts to confirm Judge Bork have faltered, not because of the voices of the so-called "special interests", but because Bork's record speaks for itself. 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.*

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[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 childbearing, 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.

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 invade 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 "discriminatory").

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 could 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 denied education and employment opportunities.

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

Whatever your personal feeling about abortion, the decision must be up to you—not imposed by some political appointee.

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.

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.

The choice is stark.

Your Senators can confirm Robert Bork—inviting right-wing extremists to challenge every right we possess.

Or they can reject Robert Bork—and uphold the Constitutional standards of freedom and fairness.

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

Or a man you've never met will decide your future for you.

We're one vote away from losing our most fundamental rights . . . one Justice away from injustice. Your Senators must hear from you. Many are undecided on Bork . . . and wonder if you know how much is at stake. Mail the coupons immediately. Robert Bork must be stopped. And it's your turn to make history.

| Advertisement narrative | Documentation |
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| 1. "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 childbearing, even your career. He must be stopped. Tell your Senators. Our lives depend on it.<br>"If Robert Bork is confirmed to the Supreme Court, he'll be the deciding vote on questions that affect every aspect of our lives.<br>"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." | 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 ultimately means depriving Americans of reproductive autonomy which affects every aspect of women's lives, from the most intimate to the most public.<br>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:<br>"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). |
| 2. "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." | 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 (1965) [re: Bork, see infra nos. 2 and 5]; equal protection of the law, as applied to gender, *Reed* v. *Reed*, 404 U. S. 71 (1971), *Miss. Univ for Women* v. *Hogan*, 458 U. S. 717 (1982) [re: Bork, see infra no. 2]; the right to procreate, *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942) [re: Bork, see *OCAW* v. *American Cyanamid*, 741 F.2d 444 (1984)]; and freedom from sexual harassment at work, *Meritor Savings* v. *Vinson*, 106 S.Ct. 2399 (1986) [re: Bork, see *Vinson* v. *Taylor*, 760 F.2d 1330 (1985) (dissenting from denial of rehearing en banc).<br>2. Personal privacy: "The 'penumbra' [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." *Dronenburg* v. *Zech*, 741 F.2d 1388, 1392 (D.C. Cir. 1984).<br>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).<br>Although Judge Bork wrote this article in 1971, as recently as 1985 he described it as representing his philosophy. See e.g., McGuigan, An Interview with Judge Bork, Judicial Notice, June 1986 at 1, 7-8. |
| 3. "And he's threatened to overturn any Supreme Court precedent that stands in his way." | 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 Constitution ought to prevail over a prior 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. "According to Bork, women can be forced to choose between being sterilized and losing their jobs . . ." | 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. "A state can declare the use of birth control illegal and invade your privacy to enforce the law . . ." | 5. Judge Bork called Griswold (which overturned Connecticut's anti-contraception 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. "You wouldn't even be protected against sexual harassment at work (Robert Bork doesn't believe such coercion is "discriminatory")." | 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 at 1333, n. 7 (1985) |

| Advertisement narrative | Documentation |
|---|---|
| 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." | 7. Since the 1920's the Supreme Court has recognized numerous "fundamental" rights which now allow women to participate freely and equally in society, and to take advantage of statutory gains: Freely: *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (freedom to have children); *Griswold* v. *Conn.*, 381 v.s. 479 (1965) and *Roe* v. *Wade*, 410 U.S. 113 (1973) (freedom to control fertility and to pursue activities other than childbearing and childrearing); *Loving* v. *Virginia*, 388 U.S. 1 (1967) and *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (freedom to marry the person of one's choice); *Moore* v. *East Cleveland*, 431 U.S. 494 (1977) (freedom from arbitrary interference with family living arrangements). Equally: *Reed* v. *Reed*, 404 U.S. 71 (1971) (legal authority to administer estates); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (differential military benefits are unsound); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) (differential social security benefits are unsound); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981) (states may not grant exclusive authority over community property). According to Robert Bork's "original intent" jurisprudence, all of these decisions are constitutionally illegitimate. |
| 8. "Stripped of our most basic Constitutional guarantees of personal privacy and equal protection, women would have no defense against the 'moral majority' extremists." | 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. "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." | 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. "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." | 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. "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." | 11. The Danforth Amendment to the Civil Rights Restoration Act, S. 557/HR 1214 (now pending in Congress) would repeal longstanding 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. "And a Supreme Court dominated by the right would do nothing to stop it." | 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 a new 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 interposing 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 (italic 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). |

| Advertisement narrative | Documentation |
|---|---|
| 13. "Whatever your personal feeling about abortion, the decision must be up to you—not imposed by some political appointee." | 13. As Justice Blackmun explained in *Roe* v. *Wade:* "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer . . ." ". . . new embryological data . . . purport to indicate that conception is a 'process' over time . . ." "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth . . ." "In view of all this, we do not agree that, by adopting one theory of life, Texans may override the rights of the pregnant women that are at stake." 410 U.S. at 159–62. |
| 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." | 14. 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. |
| 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." | 15. 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 choice is stark. Your Senator can confirm Robert Bork—inviting right-wing extremists to challenge every right we possess. Or they can reject Robert Bork—and uphold the Constitutional standards of freedom and fairness." | 16. The White House has allied itself with anti-abortion extremists who have launched a deliberate campaign against *Roe* v. *Wade.* (See attached copies of letters and memorandum by the ACLU Reproductive Freedom Project following their attendance at "Reversing *Roe* v. *Wade* Through the Courts," an Americans United for Life Conference, held in Chicago on March 31, 1984.) |
| 17. "This is your chance to determine the course of our country and the status of women in a free society. Act now." | 17. The Constitution states that appointments 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]. |

PLANNED PARENTHOOD
FEDERATION OF AMERICA, INC.,
*Washington, DC, October 22, 1987.*

Hon. HOWARD M. METZENBAUM,
*Hart 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 there is a supportable method of constitutional reasoning underlying the *Griswold* decision." ("Judge Bork is a friend of the Constitution," *Conservative Digest* interview, October 1985, reported 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 striking down a ban by the State of 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." *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, first session, page 310 (1982). Thus, our ad states: "[Judge Bork] denounces the Supreme Court decision recognizing a woman's right to choose abortion—to make a private medical decision about her own pregnancy—as 'wholly unjustifiable' and 'unconstitutional'."

In *Franz* v. *United States,* 707 F2d 582 (D.C. Cir. 1983) and 712 F.2d 1428 (D.C. Cir. 1983), the Justice Department relocated a federal witness, his wife, and her children by a former marriage, and concealed the whereabouts of the children from their natural father, who had retained visitation rights. The natural father sued for visitation rights. The majority held that the complete termination of the relationship between a non-custodial parent and his minor children, without their participation or consent, violated their right to privacy. Judge Bork issued a separate statement charging that the reasoning underlying the right to privacy doctrine was "ill-defined." Although conceding that "no doubt, there is usually [an emotional bond between the noncustodial parent and the child] and the termination of the relation between the parent and

the child will cause considerable distress," Judge Bork strongly opposed the creation of any constitutional right based upon this emotional bond. And, in *Dronenburg* v. *Zech*, 741 F2d 1388 (D.C. Cir. 1984), writing for the court, Judge Bork held that the Navy's policy of mandatory discharge for homosexual conduct does not violate 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*, discussed above, 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 East Cleveland ordinance which ordained single-family occupancy and defined a "family" to exclude a grandmother. In his dissent, Justice White criticized the language quoted above of Justice Harlan giving a broad reading to the liberty guaranteed by the Due Process Clause. Justice White argued in support of his position that "the ordinance thus denies appellant the opportunity to live with all her grandchildren in this particular suburb; she is free to do so in other parts of the Cleveland metropolitan area." 431 U.S. at 550. Thus, we stated in our ad: "Stripped of privacy protections, we couldn't even choose our own relationships or living arrangements without fear of government intrusion. Bork agreed with a local zoning board's power to prevent a grandmother from living with her grandchildren because she didn't belong to the 'nuclear family.'"

Certainly, all of these instances support the opening statement in our ad that: "If your Senators vote to confirm the Administration's latest Supreme Court nominee, you'll need more than a prescription to get birth control. It might take a constitutional amendment. Robert Bork is an extremist who believes you have no constitutional right to personal privacy. He thinks the government is there to dictate what you can and can't do in highly personal and intimate matters such as marriage, child bearing, parenting." And, as our ad also points out, if no constitutional provision bars states from banning the use of birth control, it logically follows that there is no constitutional provision that would prevent a state from mandating the use of birth control.

Another decision by Judge Bork showing his insensitivity to human rights was *Oil, Chemical and Atomic Workers International Union* v. *American Cyanamid Company*, 741 F.2d 444 (D.C. Cir. 1984). There, the owner of a manufacturing plant was sued because the release of lead into the plant air was hazardous to the sensitive tissue of a fetus that might be carried by a pregnant employee. The company adopted a policy that gave women of childbearing age a choice of being sterilized or losing their jobs. The Secretary of Labor determined that this policy violated the Occupational Safety and Health Act, which requires every employer to furnish "to each of his employees employment and a place of employment which are free from recognized hazards." Judge Bork found that the statute did not apply to the employer's "fetus protection policy," because the various examples of hazards cited in the legislative history all referred to such things as poisons, combustibles, and explosives, whereas the employer's policy was effectuated by sterilization performed in a hospital outside the workplace and was, accordingly, not covered by OSHA. At the hearings, he justified this decision as having "given the women a choice." Thus, we stated in our ad: "In a case involving a company which produced dangerous amounts of toxic lead, Bork refused to strike down a company policy which required female employees to become sterilized, or to be fired from their jobs." And, we pointed out that he is not moved by "The pain and suffering of innocent people."

Judge Bork has also given us reason to believe that he might vote to overturn a large number of cases. In his written testimony 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 trouble is that nobody believes 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" at 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 at 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 there is correct." And he told the Attorney General's Conference in 1986 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 he wins a lifetime seat on the Supreme Court, 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.*

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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 intensions 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.

"Well, the so-called right of privacy was born in the case of *Griswold* v. *Connecticut* . . . I don't think there is supportable method of constitutional reasoning underlying the *Griswold* decision."—"An Interview with Judge Robert H. Bork", *Judicial Notice*, Vol. III, No. 4, June 1986.

Asked recently by TIME Magazine if he found a right to privacy anywhere in the Constitution, Bork's reply was unequivocal: "I do not."—*Time Magazine*, July 13, 1987, p. 11.

2. ". . . but Judge Bork's voting patterns show him to be far more conservative than the average Reagan appointee . . ."

"It has been widely reported, and acknowledged by some Administration officials, that the Reagan Administration has made a more determined effort than any in recent history to appoint judges who share the President's conservative political views and his disapproval of judicial activism."

"The two-part study was perhaps 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.

"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."

"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. Still, Judge Bork will need to explain what we have identified as an apparently one-sided approach in at least a significant portion of his judicial decisions. The average Reagan judge may be within 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.

3. "I must report, however, that after careful reading of *The Antitrust Paradox*, I have reconsidered the integrity of the Bork book, and indeed, must question the intellectual forthrightness of Professor Bork's larger judicial philosophy."

"Indeed, Professor Bork candidly acknowledges that his radical views fall outside the mainstream."—ABA Committee Evaluation and Report to the United States Senate on the Qualifications of Robert H. Bork as Associate Justice of the U.S. Supreme Court. By Leonard Orland, Professor of Law, University of Connecticut School of Law to the Honorable Harold R. Tyler, Jr.

"The proposal to legalize all truly vertical restraints is so much at variance with conventional thought on the topic that it will doubtless strike many readers as troublesome, if not bizarre."—Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, New York: Basie Books, 1978, p. 297.

"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 trouble is that nobody believes the Constitution allows, much less demands, the decision in *Roe* v. *Wade* or in dozens of other cases of recent years."—Prepared Statement of Professor Robert H. Bork, Hearings before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Congress, 1st Session, p. 315 (June 1, 1981), (U.S. Government Serial No. J-97-16)

4. "Courts must accept any value choices the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution."—Robert H. Bork, "Neutral Principles and Some First Amendments

Problems," *Indiana Law Journal*, Fall 1971, p. 11

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 derives a new constitutional right and in the way it defines that right, or rather fails to define it."—ibid., p.9

6. Robert Bork ruled in favor of a chemical company that offered its women employees a choice of being surgically sterilized or losing their jobs. A Court of Appeals decision, written by Judge Bork, 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 unsafe lead levels the 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 that the company is guilty because it offered an option of sterilization that the women might ultimately regret choosing. 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."

He asserted that the OSHA Act "can be read, albeit with some semantic distortion to cover the sterilization exception contained in (the company's) fetus protection policy." *O.C.A.W.* v. *American Cyanamid*, 741 F. 2d 444 (1984)

7. "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 *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 Congress, 1st Session, p. 310 (June 1, 1981) (U.S. Government Serial No. J-97-16)

8. In *Moore* v. *City of East Cleveland*, Justice Powell wrote for the majority in a case involving a woman who was convicted of violating a housing ordinance which limited occupancy of a dwelling to members of a single family. "Family" was defined narrowly, so that the woman was ineligible to live with her son and grandchildren. In ruling for the family and against the city ordinance, Justice Powell cited a range of cases which have acknowledged a "private realm of family life which the state cannot enter." Powell and other justices have spoken and written of a "rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . (Justice Harlan in *Poe* v. *Ullman*). In Contrast, Judge Bork has steadfastly insisted that no generalized right to privacy exists and that the framers could not have intended such derived rights such as that addressed in the *East Cleveland* case.

9. Prior to the *Griswold* decision in 1965, family planning clinics were closed and contraceptive use and distribution were prohibited in the State of Connecticut. Medical providers were arrested and tried in court as a result of the Connecticut statute, contrary to testimony by Judge Bork during the Senate Confirmation Hearings.—Letter to Sen. Joseph R. Biden, Jr., from Harriet F. Pilpel, Attorney at Law, Weil, Botshal and Manges, NY, NY.

10. Direct Quote, *Indiana Law Journal*, p. 3.

Asked recently by Time Magazine if he found a right to privacy anywhere in the Constitution, Bork's reply was unequivocal: "I do not."—*Time Magazine*, July 13, 1987, p. 11

11. Reasonable and rigorously logical conclusion drawn from the entire corpus of Judge Bork's legal and academic work. "State controlled pregnancy" is a legitimate reduction to absurdity of Judge Bork's view that state power is preeminent and not subject to constitutional curbs.

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 Republican leader, Senator DOLE, for bringing the nomination to the floor expeditiously.

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 rise today to elaborate on some of the points that I made during my earlier statement and address some additional issues.

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.

Justices of the Supreme Court have a unique obligation: To serve as the ultimate guardians of the Constitution, the rule of law, and the rights and liberties of every citizen.

America always has set the highest standards for our highest court. The nine individuals who sit on that Court have an awesome task. Judge Shirley Hufstedler described that task in her testimony before the Judiciary Committee. She said:

For that awesome task, we need Supreme Court Justices who understand that the spirit and grandeur of the Constitution lies in its magnificent abstractions and its delicate ambiguities, and who are prepared for the profound work of applying that document to the untidiness of the human condition. We need Supreme Court Justices who understand and accept that "justice," "liberty," "welfare," "tranquility," "due process," "property," and "just compensation" are neither neutral nor static concepts or principles. They are words of passion. They are words of dedication. They are words that cannot be drained of their emotional content and carry any meaning.

The responsibility of preserving the meaning and content of these rights lies with the judiciary; especially, the Supreme Court.

Mr. President, after a review of Judge Bork's extensive writing, his articles and speeches, his opinions as a judge on the Court of Appeals for the District of Columbia circuit, and his testimony before the Senate Judiciary Committee, I have concluded that the judicial philosophy and approach that Judge Bork would bring to the Court are inadequate for these great responsibilities.

What is at stake in the nomination of Judge Bork is a particular conception of the ideal of equal justice under law—one that has its roots in the ideas of the original framers and was further reinforced by the Civil War era amendments, but was developed with special force by the Surpeme Court over the past 50 years.

This is the idea that the Supreme Court should interpret basic constitutional guarantees while always aiming at the ideal of a truly democratic society that seeks to respect and guarantee the liberties of all its members, especially those at the bottom and on the fringes of society.

Majoritarian institutions are essential to democracy, but left unchecked they have a tendency to exclude from full citizenship those who depart from the majority's image of itself. Throughout our history, this tendency has worked to the disadvantage of blacks and other racial groups, of immigrants, of women, of minorities in religious practice and sexual preferences, of the handicapped, of the aged, and of the poor. Historically, these groups have looked to the courts in general and the Supreme Court in particular as the branch of our Government that will listen to them when prejudice or indifference close the ears of the majority.

Americans on the whole think this a better country because the Supreme Court has condemned racial discrimination, has protected privacy, and has said that legislative elections must follow the rule of one person, one vote. These are the central values of our society.

Americans are glad that the Supreme Court, in many bold decisions, has interpreted the Constitution generously to protect individual liberty.

Judge Bork, however, has put his formidable intellect and writing skills behind a fundamental challenge to this conception of the role of the Court and a generous interpretation of the Constitution. In his view, the Court has been too egalitarian and too "permissive"—which is to say, too much concerned with the individual rights and liberties of those who may be different from the majority.

As I have said before, my concern about Judge Bork does not arise from his views about any one of two 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.

Sadly, these speeches, writings, and public expressions reflect a man whose position has been one of unrelenting 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, his newly enunciated 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 making 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 emerge 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 much of what we now proudly identify with America and who would fail 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 him and his 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 occurs on Bob 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—and those who have condoned, 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.

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 this instance have successfully converted the Senate's confirmation process into a political contest.

I have at hand, for example, a copy of the October 2 issue of The Washington Blade, a homosexual newspaper, that boasts of the role played by homosexual groups in defeating Judge Bork. The front-page headline reads, "Behind the Scenes, But Not on the Witness Stand." The entire story brags that homosexuals worked with Senators behind the scenes to defeat Judge Bork.

Mr. President, I ask unanmous 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-

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 serving in the Senate 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 roster of over 100 witnesses to Bork's record.

But behind the scenes, national Gay organizations have been vigorously contacting their members around the country to lobby their senators and one group was able to provide an early dramatic assist to opponents of Bork on the Senate Judiciary Committee.

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 1985 Bork lecture—a recording Kennedy played at the hearings 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 news reports quoted key uncommitted senators as saying they were troubled by Bork's lack of consistency between past opinions and views he offered the Judiciary Committee.

Supplying that tape recording is about as close as Gay organizations got to tangible participation in the hearings.

Three organizations—HRCF, the National Gay and Lesbian Task Force, and the Lambda Legal Defense and Education Fund—requested a chance to address the Judiciary Committee about Bork's position on Gay-related rights issues. But early on, a strategy was developed by the Leadership Conference on Civil Rights—a powerful coalition of civil rights groups, including HRCF, Lambda, and the Task Force—to keep "special interest" groups off the witness stand. The theory behind the strategy, according to a number of activists, was to prevent Bork supporters from characterizing his nomination process as a battle between conservatives versus "special interests."

While activists had little choice but to go along with the strategy, they did so begrudgingly.

"I'm a little disappointed when we're not allowed to speak in our own voice," said NGLTF Executive Director Jeff Levi. He noted that while Gay groups are part of the LCCR which worked with Bork opponents on the Judiciary Committee to line up opposing witnesses, "we've not been part of that inner circle."

"The strategy might be right or might be wrong but it makes me sad," said Tom Stoddard, executive director of the New York-based Lambda group. "It reminds us that Gay people are still outside the mainstream and too fringe to discuss openly in Congress."

Leonard Graff, legal director for the San Francisco-based National Gay Rights Advocates, agreed.

"Everyone avoided mentioning the 'G'-word," said Graff, "even though one of the primary cases which illustrates Judge Bork's position on privacy rights in particular and his constitutional philosophy in general is the *Dronenburg* case. He thinks there is no right to privacy—the right doesn't exist."

The *Dronenburg* case involved a Navy sailor, James Dronenburg, who charged that the Navy violated his right to privacy and right to equal protection when it dismissed him for having engaged in homosexual acts. Judge Bork wrote the 1984 D.C. Circuit Court of Appeals panel decision saying that the Constitution has never been interpreted to include a right to engage in homosexual acts.

Senator Alan Simpson (R-Wyo.) apparently tried to underscore his support for Bork's decision in that case when on Tuesday of this week he told his fellow committee members that Bork did not like the idea of an "abstract" constitutional right to privacy that "has no inherent limits."

"Homosexual sodomy or bestiality in your bedroom," said Simpson, "those are the things he was talking about. . . . Somewhere the right to privacy doesn't mean you just lay around and shoot up and do that to the rest of the American public. . . . Is that a right to privacy? To just, you know, do that? I don't know."

BEHIND THE SCENES

Far away from the bright lights and constant camera watch of the hearing room—even long before the hearings began—Gay organizations were busy urging their constituents to call or write their senators to oppose Bork.

Starting in July, the Human Rights Campaign Fund sent a high-tech direct mail telegram asking donors to send a donation to the Gay political action committee to support its lobby effort and to write or send mailgrams to their senators. Eric Rosenthal, an official with HRCF, said the telegrams were sent to 9,723 of the PAC's most active donors and that about 750 donors indicated they did contact their senators.

One month later, the Lambda Legal Defense and Education Fund sent a letter to their 12,000 members asking that they not send money but send a letter to their senators. With its plea, Lambda sent along a copy of Bork's April 1978 memo to the Yale Law School faculty, where he was a professor, opposing a proposal that the school deny anti-Gay employers the right to recruit employees on campus.

"Contrary to the assertions made," wrote Bork, "homosexuality is obviously not an unchangeable condition like race or gender. Individual choice plays a role in homosexuality . . . and societies can have very small or very great amounts of homosexual behavior depending upon the degrees of moral disapproval or tolerance shown."

That same month, the National Gay Task Force mailed a letter to 8,900 of its members asking for financial support and letters to senators. The Task Force last month began an extensive phone campaign to call 6,700 of those members, particularly those in Arizona, Pennsylvania, and other states represented by senators who have not yet taken a stand on the Bork nomination. Thus far, the Task Force has taken in almost $200,000 as a result of the letter and has received copies of about 70 letters sent to senators.

As of Wednesday, the newly-formed Fairness Fund had recorded 2,660 mailgrams sent by Gays through a special 800-number hotline to oppose the Bork nomination. Fairness Fund leader Steve Endean said it was not yet possible to tell whether Gays were choosing one of the three mailgram 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 media reports of public opinion polls swinging against Bork may have given Gays the impression that the battle is won.

"If we allow ourselves that luxury," said Endean, "we'll let this one slip through our fingers."

But Endean said his group plans to distribute thousands of flyers at the National March on Washington next week urging Gays to send mailgrams. And the National Gay Rights Advocates announced this week that it will launch a campaign targeting its members in states represented by undecided senators.

ON THE HOMEFRONT

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 ebbs and flows of support and opposition, 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 constitutent calls and letters to his office are running 2 to 1 against the nomination.

Only Republican Senator Paul Trible 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.

[From People's Daily World, Sept. 17, 1987]

HIGH STAKES OF THE BORK CONFIRMATION FIGHT

(By James Steele)

The Bork nomination has provoked opposition that is as broad as it is intense. A multitude of mass organizations have drawn accurate conclusions from Judge Bork's judicial and political record as well as his constitutional philosophy: If confirmed, he would become the high court's "swing vote"—as in hanging judge—establishing an ultra-right majority against affirmative action, antitrust regulations, labor-management relations, civil liberties, abortion rights and other key issues. Bork, who is only 61, could be issuing "Reaganism without Reagan" rulings well into the Twenty-First century.

That's why liberal Democratic senators, united with labor, civil rights, women's civil liberties, and other mass organizations, are waging an all-out drive against Senate confirmation. Sen. Alan Cranston (D-CA) promised the toughest fight since the Senate rejection of two of President Nixon's appointees in the early 1970s "because it tips the balance of the Supreme Court and because the president has used right-wing ideology in selecting a candidate." Sen. Edward Kennedy (D-MA) called the nomination President Reagan's attempt "to impose his reactionary vision of the Constitution on the Supreme Court."

Coretta Scott King, reflecting the universal sentiment in the Afro-American community and among the broad mass movements, 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 others. Anti-Bork coalitions are active in 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. Seemingly an administration already crippled by 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 fight to deliver a strategic blow against democratic rights and regain the political initiative through the end of Reagan's term.

The Democrats' inconsistency in the congressional investigation into the Iran-contra affair has a lot to do with this comeback gambit. Instead of utilizing the Iran-contra hearings to mount a resolute defense of democracy, leading Democrats opted for "saving the presidency"—which could only have the practical effect of saving Reagan's presidency.

The very forces that organized the secret government "to carry out the President's policy" now sense a political vacuum of initiative in the failure of the Democrats to deal Reagan a knock-out punch. The Bork 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 confirmation and four undecided. 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 leads the administration to anticipate success when the Democrats hold a 54–46 Senate majority? The fact that it is dealing with a partisan, not a political majority. The shift in the Senate's political balance flowing from the 1986 elections is uneven and an on-going process that has yet to be consolidated.

Thirty-three Senate seats, involving seventeen Democratic and 14 Republican incumbents and two open seats—one held by each party—will be contested next year. This list includes six of the "swing" Democrats: Bentsen, Byrd, Chiles, DeConcini, Proxmire and Sasser; and two "swing" Republicans: Chaffee and Stafford.

The administration is mobilizing big business and other right-wing political action committees, conservative evangelical groups, so-called "right-to-life" and "law and order" activists, and other extremist forces to intimidate incumbents from "below" with the threat: either vote for Bork or face defeat in 1988.

Can the Reaganites succeed? Only if the massive anti-Bork opposition relies on the "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 enough Senate votes to defeat Bork. The coordination of the mass influence and political clout of these forces—combined with the role of those members of the Senate determined not to allow Reaganite extremists to become the high court's majority—can compel the Democratic and a few Republican senators to act in "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 extremists and the big business PACs can target senators "from below," so can mass organizations and coalitions opposed to Bork.

A massive grassroots mobilization that gives the senators' constituents 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, mailgrams, 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 corporate rights. Resources should be combined to buy media time. Special and immediate attention should be focused on members of the Judiciary Committee.

Unlike the ultra/right, the people's movement does not have to resort to threats and intimidation, especially in the case of senators with whom they work on other 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 re-election in 1988 and 1990 can not afford to forget when it comes time to vote for or against confirmation.

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[From the Texas Lawyer, Oct. 5, 1987]

IF "SENATOR SAM" WERE THE NOMINEE

(By William Murchison)

AGREED WITH BORK

"Civil rights laws are . . . repugnant to constitutional and legal equality because they extend to minority races special privileges denied to other members of minority races. . . . Equality and freedom are in reality, irreconcilable. Government cannot extend any equality other than equality under the law to its people without infringing on freedom."

In addition to which:

"The adoption of the Equal Rights Amendment would create constitutional and legal chaos 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 simply to ascertain and 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, homily-spinning 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 retailed in every barber shop and classroom. He was our national sage.

I am beguiled just now by the thought that, were he alive today (he died in 1985), and had Ronald Reagan named him to the Supreme Court (no president ever took this highly logical step), the liberal lobby would be howling for Ervin's blood. A man critical of civil rights laws and of judicial activism—how could this great republic seat such a one on its highest court?

People for the American Way would broadcast television ads calumniating the senator. Joe Biden would accord him an arch grin; Ted Kennedy would deplore the horrible things likley to happen in "Sam Ervin's America."

I mean, they would if they used Senator Sam with the kind of arrogance and obfuscatory intent directed at Bork.

In reality, the clubbiness of the Senate probably would have protected an Ervin nomination. That's not the point. The point is that the man formerly regarded as the Senate's, and maybe America's foremost constitutionalist concurs almost point by point with Judge Bork, the man whose reputation various senators are tearing at like pit bulls.

Ervin's heyday wasn't all that long ago. What's happended to change the equation? The question is answered easily enough. Ervin, back in Watergate days, was the towering adversary of the Nixon White House.

If you were anti-Nixon—as many Americans were—you were pro Ervin.

The trouble was that many in the senator's large and diverse fan club didn't bother to examine the basis of his opposition to Nixon.

Philosophically Ervin was closer to Nixon than to some of his fellow inquisitors on the Watergate committee. Ervin's horror at the Watergate scandal proceeded from a principled dislike of raw power, seized and wielded in definance of constitutional restrictions.

Ervin loved the U.S. Constitution the way others love guns or cars or money. Indeed he titled his autobiography, whence I have drawn these various pronouncements, *Preserving the Constitution.*

"The Constitution," he wrote, "is the most precious instrument of government the earth has ever known. It is designed to secure good government to Americans and freedom from tyranny for Americans."

At Nixon's bidding, or in his name, highly placed men had violated the Constitution; that, for Senator Sam, was enough.

But the president's men weren't alone in their crimes against the Constitution. They had plenty of company. This was the point Senator Sam's liberal admirers never got through their heads.

Ervin maintained that the Constitution, like any good charter of liberty, restrained not Republican presidents alone but also judges and congressmen of all parties and philosophical dispositions.

The Constitution set metes and bounds to human power; across those lines nobody was to step. Nobody.

Ervin didn't oppose freedom for blacks; he opposed attempts to set race against race. American against American. It is interesting that Bork withdrew his early opposition to the civil rights law; Ervin never withdrew his.

Ervin was a keen and discerning critic of the same judicial activism that Bork's opponents favor. He approved of *Brown v. Board of Education,* but he condemned the judicial "usurpations" through which "activist Justices expand their own power to dictate how America is governed, and how Americans must conduct themselves in their private affairs as well as in their public activities."

"Judicial activism of the right or the left," declared Ervin, "substitutes the personal will of the judge for the impersonal will of the law."

Robert Bork never said it more pungently.

The sad truth about Bork's overheated opponents is that they see the Constitution as permitting what they want permitted and restraining what they want restrained. Bork stands for the language of the document, for the intent of its framers—and draws widespread scorn for so standing. Language, in the modern view, is what you bend, intentions are what you reshape, to fit the needs of the moment.

Sam Ervin was not flesh of the liberals' flesh any more than Robert Bork is. A pity he's not here to enliven the Bork hearings with his views of constitutional prudence and probity. There's more to it than that. Pity he's not, and never was, a member of the high court itself.

Mr. HELMS. Mr. President, I have known Judge Bork since I came to this town in 1973. I resent the transparent display of demagoguery, histrionics, hyprocrisy, distortion, and misinformation surrounding this nomination.

Before the merits of the nomination were considered, before even one witness was heard in the hearings, there came a cacophony of protest, from the usual groups across the country, threatening Senators that if they vote for Robert Bork, they will pay for it in the next election. Now we are hearing 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 was pleased to see my friend, 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 bum's rush started. And it was fed day after day by the major news media of this country in a clear orchestration—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 on 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 protested the loudest—know it 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, People for the American Way, and the National Abortions Rights Action League, is launching a major grass-roots effort to stop [Bork's] nomination. The battle, however, is much larger than Bork. If a Reagan nominee 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 coerce the President into appointing a more liberal, activist candidate—one who will help them implement their social agenda.

I am confident that the American people will eventually learn the truth behind the campaign of disinformation that has been waged to keep one of America'a 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 victim 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 20, 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 "Negro 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 in his political philosophy, will 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:

> Judge 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 assault on the integrity of a single American citizen by Planned Parenthood, People for the American Way, and others was beside the point. That wrongful assault, however, will 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 was the first black woman to be graduated from Harvard Medical School where, I might add, she was graduated magna cum laude.

She's had 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 board of directors and three terms as president of the national right to life committee. She is active with many other prolife groups including Americans United for Life Legal Defense and Education Fund.

Dr. Jefferson was the first prolife leader called to the White House for an audience with President Reagan following his inauguration. She has appeared as an expert witness in key trials and significant congressional, State, and municipal hearings.

Dr. Jefferson has been awarded 26 honorary degrees by American colleges and universities. Among other honors, awards and citations, Dr. Jefferson has received the Signun Fidei Medal from La Salle College; the Bicentennial Medal of Mount Mary College; the Briar Cliff College Medal; the Sword of Loyola; and the Father Flanagan Award of Boys Town. Dr. Jefferson is also a member of the board of trustees of Saint Louis University, Loyola University, and Anna Maria College.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

DR. MILDRED F. JEFFERSON, PRESIDENT, RIGHT TO LIFE CRUSADE, INC., ASSISTANT CLINICAL PROFESSOR OF SURGERY, BOSTON UNIVERSITY SCHOOL OF MEDICINE, BOSTON, MA

Tuesday, October 6, 1987, will go down as another "Day of Infamy" in the history of our great land. In 1941, the attack came from a foreign power; in 1987, the attack has come from a force within using radical socialist dialectic and modern saturation advertising techniques to persuade nine members of the U.S. Senate Judiciary Committee to oppose a distinguished jurist because he supports a strict construction in interpreting the U.S. Constitution. By acting against the obligation of Supreme Court Justices to interpret the law and not make the law, these nine members have attempted to cause a majority of the U.S. Senate to act against the Constitution and become "enemies of the people."

Our support for Judge Bork is not new; it has not been visible because we do not have the bloated bank-accounts of our adversaries to support nationwide propaganda campaigns. I say "propaganda" instead of "public education" because the opponents of Judge Bork's confirmation have gone to extreme lengths to revise, distort and misinterpret his speeches and writing. They disregard Judge Bork's honor, integrity and scholarship and rely instead on an emotional lynching to defeat his nomination because they cannot tolerate the power of his mind or the clarity of his thinking. For those of our allies who have not yet supported his confirmation, no matter what questions you have, we are obliged to support an honorable man who is so violently opposed by our adversaries. We want Judge Bork to know that, in addition to our support and our prayers, he has our compliments for the grace and dignity he has brought to this unnecessary ordeal. Judge Bork, the High Court needs the illuminating power of your mind almost as much as it needs your great work capacity.

The member from Massachusetts on the Senate Judiciary Committee has brought an unwholesome personal assault into the confirmation process. Turning back his own words, I say to the senior Senator from Massachusetts: You are wrong about President Reagan, wrong about Judge Bork, wrong on civil rights, wrong on women's rights, wrong on privacy and wrong on the First Amendment. He is wrong on "civil rights" for using emotional intimidation to frighten those who are fighting for access to our democratic system by holding forth special quotas and reverse discrimination instead of equal

opportunity for all. He is wrong on "women's rights" because he does not know true women and he does not understand that by yielding to the demand for the privilege of destroying her reproductive capability, he is denying the female of our species the right to womanhood. He is wrong on privacy because in an organized society such as ours, ruled by law and by custom, there is no constitutional "right to privacy" which will assign to the individual the private right to kill or to choose who will live and who will die. He is wrong on the First Amendment because he is apparently unable to understand why it covers us all and not just the special few who agree with him.

It is not our way to engage in character assassination as our adversaries do. However, the actions of the member from Massachusetts and the Chairman from Delaware have already assassinated any character they may have had beyond anything we might say or need to do. Such personal actions point up that the member from Massachusetts and the Chairman are morally and intellectually unqualified to sit in judgment on Judge Bork or anyone else of his integrity and professional attainments. By announcing his opposition to Judge Bork's confirmation before the hearings began, the Chairman abandoned any standard of fairness toward Judge Bork. I call upon Senator Joseph H. Biden, Jr. of Delaware to resign as Chairman of the U.S. Senate Judiciary Committee.

A few weeks ago, between 1100 and 1400 people from all walks of life and from all parts of the state of West Virginia stood for 2½ hours in the rain in Charleston appealing to Senator Byrd to be fair in his participation in the confirmation process. His negative vote betrays their trust in him to be fair. Senator Heflin of Alabama: You expressed concern that Judge Bork may Harbor "extremist" views and that when in doubt, you thought "don't" was the best course. If you are concerned about extremism, how can you face the people of Alabama voting with the most extremist member of the entire U.S. Senate, the senior Senator from Massachusetts? How will you—Senator Heflin, Senator Byrd and other Senators from the Bible Belt—face your people acting in league with those who removed prayer from the schools but who cannot remove drugs, alcohol, murder and suicide from the schools? We know that some Senators have gone through the pretense of decision-making when, in fact, if they had voted their own minds and consciences to support Judge Bork, they could never have gone home again. We know that some Senators who have indicated opposition to Judge Bork's confirmation were elected with our help. They must understand clearly: their vote with our opposition is a vote against us: when the scores are tallied, their explanations will not be there; they must appreciate the value of their vote in our opponents' efforts against us; if they vote with our enemies, we will not be there for them when they need us.

The people must decide the difficult social issues of our day. Narrow personal preferences are a poor basis for creating public policy positions. To our elected representatives we say:

You will not shunt your responsibilities as elected representatives of the people to that branch of government that does not derive its power from the consent of the governed.

You will not thrust upon us the tyranny of whim or the dictatorship of personal choice mandated by the Supreme Court of the United States.

You will not force upon us the yoke of socialist population-planning by fiat of the U.S. Supreme Court.

We need to restore the balance of powers among our designed-to-be coequal branches of government. We have gone from the Imperial President to the Imperial Court to a now-Imperial Congress. We need Judge 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 announced that I would not vote in favor of his confirmation. I believe that decision is still the correct one.

This is one of the most important votes that the Senate 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 liberties of all Americans. It is a vote about the fate of the Constitution as a living and growing document embodying bedrock American values. It is a vote about the balance of power that accounts 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 concern. How we view liberty is at the core of how we view the relationship between the people and their Government.

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 when a court upholds a claim of individual liberty for one citizen, it increases the liberty of all other citizens and decreases the power of Government to interfere in our private lives. Judge Bork appears to believe the opposite.

To illustrate, in 1985, Judge Bork said "When a court adds to one person's constitutional rights, it subtracts from the rights of others." When asked about this by Senator SIMON during the Judiciary Committee hearings last month, Judge Bork responded that "it's a matter of plain arithmetic."

I think that this comment reflects a very narrow vision of the Constitution. To Judge Bork, the Constitution guarantees the liberty of the majority, that is, the liberty of the Government, to make the laws. I don't believe that most Americans share this point of view. Our values and traditions instead attest to the view that the Constitution protects the liberties of individuals from the excesses of the Government. Because, unfortunately, electoral politics often silence strong voices of moral leadership in the legislative and executive branches of Government, the Supreme Court is the body that the American people have come to look to for the assurance that those constitutional protections will remain intact.

But, from his writings and testimony, it does not appear that Judge Bork holds that view and thus I fear that his elevation to the Supreme Court would weaken that body's full commitment to the safekeeping of those rights.

Judge Bork's majoritarian view of liberty leads him to reject any protection for the so-called unenumerated rights such as privacy.

Judge Bork's view of liberty compels him to interpret the due process and equal protection clauses in the narrowest way.

Judge Bork's view of liberty induces him to resolve any controversy between the executive and legislative branches in favor of the President over Congress.

And it is Judge Bork's view of liberty that prompts him, with few exceptions, to leave the protection of minority freedoms to majority will.

Judge Bork's view of liberty is, I believe, a view of liberty that would lead 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 Supreme 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 embodying 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 controversy over this nomination is unfortunate. The judge is an attorney of considerable attainments. But after much reflection I am unable to give my assent to his promotion to the Supreme Court; I would counsel against it.

When his nomination was first announced, I was dubious whether a jurist of his narrow constitutional views, especially in the realm of civil rights, the rights of women and minorities, 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 left with 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 attainments. 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 both Senators and Presidents in years past.

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 compassion and his intellect haven't fused 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 opinions on the bench.

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 substantial reservations about this 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 H. 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 deliberating a judicial nomination as pivotal as this one, to base its decision on the nominee's judicial philosophy.

This has not been an easy decision. As anyone who listened to his testimony will acknowledge, Judge Bork is a constitutional thinker of the highest order. His knowledge of the Constitution, and of constitutional jurisprudence, is as broad and impressive as we have seen in any judicial branch nominee since I was first elected to the Senate in 1976. In terms of sheer intelligence, he 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 5 years as a judge on the Circuit Court of Appeals for the District of Columbia. In his current position he has respected 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 his record there leads me to conclude that I made 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 is consistent with the traditions 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 of 1973;

Second, the Constitution's protection of the rights of minorities and women; and

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 just for the 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 broadness—the elasticity, if you will—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 he might apply his 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, I have strongly believed in 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 maligned 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: Should a man with Judge Bork's view of the Constitution 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 Judicary 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 fo: me.

I have with me something entitled "1987 Selected Standards on Professional Responsibility." Among other things, this book includes the American Bar Association's Model Code of Professional Responsibility and its Model Rules of Professional Conduct.

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 are only "aspirational" standards. Attorneys should follow them, but are not required to honor these ethical standards. Therefore, any violation of these 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 not 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 one last 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 caution through, that frivolous 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 some degree, 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 out 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 speeches—"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 chose to make them a factor. Judge Bork was selected precisely because of his ideology, not his judicial record.

I listened yesterday as my colleague from Utah, Senator HATCH, cited the ease with which Supreme Court nominees of other Presidents, such as President Eisenhower, were confirmed for the Supreme Court. Indeed, the contrast is striking.

But the reason it is so striking is precisely because those presidents sought accommodation and not confrontation. It is precisely because their nominees were well within the judicial mainstream—not outside of it. After all, it was President Eisenhower who gave us both Chief Justice Earl Warren and Justice William Brennan.

Mr. President, I believe that a dispassionate—nonpolitically motivated analysis of the record makes it clear that Senators did not decide this nomination on the basis of pressure groups and politics. In many cases, Senators have decided in ways that went against their interests, against the easy route to oppose this nomination.

I do not believe that the questions asked by or the doubts expressed by the Senator from Pennsylvania or the Senator from Alabama were or are political questions or interest group doubts. These colleagues and many others have studied the record, read recent articles and cases, re-read the Constitution, weighed days of testimony, and made difficult decisions.

To suggest that so many Senators decided in a different fashion is to challenge, if not insult, the integrity of a majority of this institution in a personal as well as collective way. It is to demean, in a manner unbecoming of this body, a cherished right which falls to us and only to us as U.S. Senators—the right to confirm a nomination.

Perhaps, ironically and sadly, nothing confirms the inappropriateness of this nomination more than the furor it has caused. Nothing excites extremes more than the extreme, and certainly Judge Bork has galvanized opponents and proponents alike.

Mr. President, we consider this nomination as we celebrate the 200th anniversary of our Constitution. That is obviously a time for reflection on the enduring values which that document embodies, and their meaning in our society. I believe that a majority of Senators have considered the nomination in that light.

At the outset let me make clear that this is not a choice between liberal and conservative jurists. I have no objection to the appointment of a conservative to the Supreme Court, and have voted for many of them. Out of over 100 judicial nominations by President Reagan in his second term, I have voted against only 4.

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. His appointment could only 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 reformulations, modifications, and newly expressed doubts concerning his previous views, leaving doubts 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.

His adherence to the doctrine of stare decisis is erratic, and when combined with his unorthodox philosophy, poses a significant threat to a wide range of Supreme Court precedent protecting personal decisions and liberties which Americans, over the course of some 60 years, have come to believe are beyond governmental reproach.

On many matters of substance, one has a choice to make. Either Judge Bork is wrong, or the Supreme Court has been. Moreover, the Supreme Court has on many occasions been exceedingly wrong if one agrees with Judge Bork, who has at various times called its constitutional rulings "unprincipled," "utterly specious," "improper and intellectually empty," and made according to rules of "unsurpassed ugliness"—hardly tempered observations or mainstream characterizations.

During the hearings, I was struck by Judge Bork's exchanges with Senator SPECTER on the issue of "original intent" and 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 nuance, 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 hollowness 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 was raised by Senator HOWELL HEFLIN in his questioning of Judge Bork. As Senator HEFLIN 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 be pretty well free to express your own beliefs as you see fit to do so on the issue that is before you; is that not true?

Judge Bork's response is revealing. He said to Senator HEFLIN:

> 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 HEFLIN 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 confirmation protestations.

Even a cursory review of his record yields numerous contradictions, and raises troubling questions.

Judge Bork has said that the Supreme Court has been wrong many times on civil rights. He has said the Supreme Court was wrong on ruling that the 14th amendment forbids State court enforcement of a private, racially restrictive covenant. He has said the Supreme Court was wrong to adopt the principle of one person, one vote. He has said the Supreme Court

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 ruled 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, wrong when it found a congressional intent under the antitrust laws to protect small businesses, and that even the Congress is wrong on antitrust, accusing Congressmen of being "institutionally incapable of the sustained rigor and consistent thought 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. 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 whose views seem to be rooted in the world of the late 18th century, 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.

Judge Bork has said the Supreme Court is wrong about the right to privacy. The Supreme Court says it's in 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," disapproved of the Supreme Court stopping criminal prosecution of a newsman who published the name of a judge who was being secretly investigated by the State judicial review commission, criticized 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 to 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 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 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 as having any meaning, 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 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, only political speech was protected by the first amendment. 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 . . . to throw constitutional protection around forms of expression that do not directly feed the democratic process. 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.

This is not a mainstream view of the first amendment. It would mean that a town council ban all books by James Joyce, or Ernest Hemingway, or F. Scott Fitzgerald, without fear of challenge on first amendment grounds. It would mean that a legislature could ban books dealing with Darwin's theory of evolution, or Einstein's theory of relativity. It would mean that the works of Carl Jung or Sigmund Freud could be prohibited, because they are not "political" in nature. In Judge Bork's view, that is what the framers of the Constitution intended.

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. And 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 which produces self-gratification.

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 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 body of law."

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 significant limitations on first amendment protection of speech. 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 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—any constitutional case—precedent need not be respected. He would have "no problem whatever in overrulng 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 illegimate, and may be overthrown.

For this reason particulary, 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 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 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 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 speech, privacy, and so many other areas, should be overturned. 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:

There has arisen the myth of the spineless Senate, which says that Senates always rubber-stamp 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 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 Bork to be Associate Justice of the Supreme Court.

I submit their names for the RECORD.

Carol Allemeier, John Bentivoglio, Jane Berman, Sharon Blackman, Paul Bland, Stef Cassella, Michele de Sando, Laurie Gibson, Mark Gitenstein, Scott Green, Diana Huffman, Debra Karp, Kim Lasater, Cindy Lebow, Ron Legrand, Bill Lewis, Diane Lowe, Phil Metzger, Steve Metalitz, Tabb Osborne, Debby Pascal, Kathy Peterson, Jeff Peck, Darla Pomeroy, Tracey Quillen, Andy Rainer, Chris Schroeder, Phil Shipman, Pete Smith, Andy Tartaligno, Marc Ficco, Nanda Chitre, Jodi Tuer, Kevin Wilson, Pete Oxman, John Ungar, Evelyn Ying, Lisa Metz, Duke Short, Frank Klonoski, Melissa Nolan, Jack Mitchell, Dennis Shedd, Linda Greene, and Bill Rothbard.

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Peggy Hammrick, Jackie Agnolet, William Duran, Kelly Dermody, Peter Coniglio, Matt Johnson, George Smith, Edward Baxter, Matthew McCoy, Cecilia Swensen, Mary Hartman, Alice Finn Gartell, Kim Helper, John Somerville, Denise Addison, Ann Bishop, Grace McPherson, Jo Meuse, Jennifer Dickson, Elizabeth Gardner, Wilham "Bill" Hart, Eloise Morris, Tony Biancuzzo, Jennifer Blackman, Tom Young, Mark Kover, Tom McIsaac, Liz Capdevielle, Sam Gerdano, Dort Bigg, Darryll Fountain, Tara McMahon, Lynwood Evans, Elizabeth McFall, John Leader, Tracy Essig, George Carenbauer, Mansel Long, Joyce Biancuzzo, Roger Cole, Betty Lanier, Judith Lovell, Carolton Betenhaugh, Denise Milford, Mary Lucero, Deabea Walker, Wanda Baker, and Tricia Thornton.

JUDICIARY COMMITTEE REPORT FLAWS

Mr. HATCH. Mr. President, at the outset, 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 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 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.

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 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."

Mr. President, I urge my colleague 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 words and structure of the Constitution as amended. The first boat belongs to the first and only woman Justice—Justice O'Connor.

In her dissenting opinion in Akron, a 1983 case invalidating a State law requiring a 24-hour waiting period on abortions, Justice O'Connor said:

Irrespective of what we may believe is wise or prudent policy in this difficult area, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards 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 Hardwick 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.

Let us count still a second boat that stays 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 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 the men's rooms 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 in the home.

He was joined in that opinion by Chief Justice Burger and Justices

Rhenquist and O'Connor. Justice White is not adrift in the rapids of judicial activism.

The next boat safely ashore on 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 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 to look far beyond the language of the Ninth Admendment to find that the Framers vested any such awesome veto powers over lawmaking, either by the States or by Congress. 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.* * *

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 Dronenburg 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.

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.

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 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 "a 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 takes issue with the equal protection reading of Skinner under what he calls inconsistency 15, but it is impossible to take issue with Black's refusal to join the Stone substantive due process rationale for that case.

To return to "Inconsistencies 3-10," 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 not 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: whether the State had valid reason for adopting a different rule for prisoners. 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 Judge Bork's reasonable basis test for equal protection. The clear basis for a reasonable distinction between prisons and law-abiding citizens would be "legitimate penological interests." In the case of marriage, Judge Bork would not find any reason 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, therefore, hardly suggests an 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.

In sum, we need to put this entire 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 my main point. 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 notion 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, 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 within "Inconsistencies 3-10." I will not recite them all, but for instance he did not find any fault in No. 5. The reason is clear.

This is a classic example of sentimental, but decidedly unlegal, reasoning. The report quotes, with great fanfare, the comment of one Senator that "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, we would have no lawsuits.

In every lawsuit, the litigants on each side of the case contend that they possess superior legal rights and liberties. Consider the following examples: 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 currently 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 us look at another example currently before the Court. One litigant asserts the right or liberty to pray si-

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 asserted by the other litigant.

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 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 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 noble-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 license. Then 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 had concerns. 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 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's 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 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.

With respect to 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 as a first amendment decision. Thus, in Griswold versus Connecticut, 1964, 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.

Meyer versus Nebraska, 1923, which held that a State could not prohibit the teaching of foreign languages in the public schools, was originally decided under a substantive 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 a "penumbra" emanating 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. In holding that the State could not compel an individual suspected of drunk driving to undergo a blood test, the Court reasoned that "[t]he 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 have linked 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.

Frankly, the Senator from Delaware 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 challenged 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 deserve a few moments of examination. In the General Electric versus Gilbert

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 1976 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 or turning 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.

Let us look at another example. 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. We all revere him as a great jurist. My point is only that it is short-sighted and misleading to resort to labels to characterize Bork's work on civil rights issues. Those labels may not tell the whole story because often his record was more sensitive on civil rights than the popular perception of Justice Powell.

Rather than list some of the rest of Bork's cases one at a time, I will mention them all together. In Beer versus United States (1976), the judge contended that a New Orleans reapportionment act violated the Voting Rights Act because it diluted black voting strength. In Teamsters versus United States (1977), he argued that a seniority system that perpetuated the effects of discrimination violated title VII. In Pasadena versus Spangler (1975), he contended that even a school district with a busing plan can be ordered to achieve even a better racial balance. In each of these cases, Justice Powell voted against Bork's effort to advance civil rights. And certainly no one would question Justice Powell's commitment to civil rights.

Nonetheless the comparison to Justice Powell—which shows that in the five cases I have just named Justice Powell was less sensitive to civil rights than Judge Bork—illustrates another danger in some techniques of classifying judges by political standards. Someone could read these five cases and conclude that Justice Powell was not in tune with the needs of minorities. The opposite is true. Yet we have often heard one or two isolated quotes—far less authoritative than these five votes—cited to question Judge Bork's record on civil rights.

Mr. President, I would like to employ one more comparison with a current Justice. In the 19 amicus briefs Judge Bork filed as Solicitor General, do you know which Justice—who is still on the Court—sided with Bork most often?

It was actually Justice Brennan. In fact, during the Bork years as Solicitor General, he filed 19 amicus briefs in civil rights cases. By the way, the Solicitor General has no obligation to file amicus briefs, but exercizes considerable 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 policy. As I just stated, however, a Solicitor General does not have to file amicus briefs.

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 versus McCrary outlawing discriminatory private contracts under section 1981. This established that section 1981—a 100-year-old civil rights law—could be applied to racially discriminatory private contracts. 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. This action, better than any words, indicates that he would enforce Federal laws against private activities.

Another great victory for civil rights at that time was United Jewish Organization versus Carey (1977) which established that electoral redistricting 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 hippopotomas 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 and dedication to 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 blazed some of the paths that civil rights advocates take for granted today. Once again, these actions speak louder than words.

Judge Bork also won a victory for women in Corning Glass versus Brennan, 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 similar jobs on different shifts. 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 benefit 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 Albemarle 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 Virginia versus United States (1975) where he required the State of Virginia to comply with special burdens imposed by the Voting Rights Act or Fitzpatrick versus Bitzer (1976) where he established that Congress can even waive sovereign immunity to enforce civil rights or many more such victories for civil rights. Frankly it is impossible to understand how Judge Bork's critics could have overlooked these actions. On the basis of these actions, Judge Bork should be acclaimed as one of the leading advocates for broad civil rights protections in our era.

To recap, the Bork record as Solicitor General is unassailable on civil rights issues. He laid many of the foundation stones for the modern civil rights movement. It is hard for me to imagine why critics would feel such antagonism toward President Reagan that they would be willing to overlook the facts in their rush to condemn the President's nominee. I am confident that as the charges are laid alongside the actual record that the false allegations will quickly be unmasked as distortions.

Mr. President, I would like to next turn to his record as a circuit judge. During his tenure on the D.C. Court of Appeals, the judge has in every instance upheld civil rights laws—including title VII, the Equal Pay Act, and the Voting Rights Act—in a manner consistent with or broader than Supreme Court precedent. In his years on the D.C. circuit, Judge Bork has had dozens of opportunities to construe civil rights statutes. In all but two of these civil rights cases, he has sided with the minority or female plaintiff. Again in both of those cases, the Supreme Court and Justice Powell agreed with Judge Bork that the law required a ruling against the minority plaintiffs. It would once again be valuable to deal in specifics, rather than speculation.

In 1983 Judge Bork participated in the Sumter County versus United State case, a South Carolina voting rights case. This was a major voting rights case. Judge Bork joined a three-judge panel which ruled that a South Carolina county had failed to show an at-large voting plan lacked discriminatory purpose or effect. Thus, the South Carolina County has to undergo preclearance procedures.

It may be of interest to the Senate to realize that Justice Powell, unlike Judge Bork, has continually criticized expansive interpretations of the Voting Rights Act. In fact, Justice Powell has voted against minority plaintiffs in 17 out of 25 voting rights cases he had decided. See, for example City of Rome versus United States (1980). I think that I am beginning to conclude that my critical colleagues would probably not confirm Justice Powell if he were before the committee today. In fact, our memory may be hazy but Justice Powell was opposed by most civil rights groups when he came before the Senate in 1971. After all, he favored many narrower constructions of civil rights laws than has Judge Bork. I mention this not to cast any cloud on the record of Justice Powell. We all revere him as a giant amongst modern jurists. I mention this only to point out the shallow analysis of those who once opposed Justice Powell's nomination and now oppose, for equally unsubstantiated reasons, the nomination of Judge Bork.

To continue, I would direct the Senate's attention to the Palmer versus Schultz case concerning gender discrimination in the Foreign Service.

In this case, the D.C. District Court had granted summary judgment to the Government in a suit by female Foreign Service officers alleging discrimination in promotions. Judge Bork voted against the Government and reinstated this Equal Pay Act case. This type of evidence was dismissed in the Judiciary Committee as an easy case and that as just an example of Judge Bork following established precedent. If this case was so easy and clearly disposed of by precedent, why did the district court rule against the women in the first instance?

In a similar case, Osoky versus Wick, Judge Bork also voted to reverse another district court case and apply the Equal Pay Act to the Foreign Service's merit system. In both of these cases, he found that inferences of intentional discrimination can be based solely on statistical evidence. This is hardly the work of a judge who walks in lockstep with the President. The judge ruled against the Government in both cases and also ruled against the Government on the basis of arguments that the President himself would probably not approve. It is clear that he was making 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 as "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 a woman's total experience. This was another significant victory for women's rights. 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 civil rights, including the case of 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 has been accused 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's judicial record. Indeed, it is interesting to note how many of these cases—Palmer, Wick, Emory—were

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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 that a homosexual was accorded full due process rights. In all of these instances, the judge's critics would be hard pressed to explain why he was insensitive to civil rights. In fact, they are wrong. Bork's actions speak louder than their words. He has consistently voted to preserve fundamental rights. When the facts are known, they are hard to distort.

This is the record that was overlooked by the report. 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 to apply the law any differently. I do not have his exact quote, but Senator RUDMAN spoke a few minutes ahead of me today. He stated that if this were true we would not need appellate courts. As Senator RUDMAN stated, "District courts could try the cases and computers could test the trial decisions for consistency with the Supreme Court." Senator RUDMAN's comments reveal the deficiency of Senator BIDEN's comments. Judging is by its nature a process of judgment and discretion and the application of law. Judge Bork's record on these counts with regard to civil rights is unassailable.

I am glad for the opportunity to discuss in more detail the report's poll tax discussion. As I said at the time, this was a great miscarriage of the staff's professional responsibility. Senator BIDEN did not care to take issue with my main point.

The report incorporates a very deliberate and selective lie on this point. It states: And as Vilma Martinez testified:

> Among the problems with Judge Bork's disagreement with Harper is the fact that the Supreme Court in its decision expressly recognized that the Virginia poll tax was born of a desire to disenfranchise the Negro.

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), we do not stop 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, Butler, Stone, Roberts, Cardozo, Black (Breedlove, 1937), Frankfurter, Jackson, Reed, Burton, Clark, Minton, Vinson, and again Black (Butler, 1951), Harlan, Stewart, and still a third time Black (Harper, 1966).

With regard to "Inconsistencies 22 and 23," Senator BIDEN takes issue with some minor points of my analysis. My point on one-man, one-vote remains:

Judge Bork, despite the erroneous report's insinuation, has not questioned and does not oppose the Baker versus Carr opinion. He feels that the courts should participate in the apportionment process. He would protect the "rules of the game" as Congresswoman Jordan has stated. Nowhere is this found in the report which only reports selectively what it wants.

Judge Bork's position is merely that the Constitution does not require "mathematical perfection" in adhering to a one-person, one-vote standard. Instead he would adopt the standard of Justice Stewart that would strike down any State apportionment decision that would systemically frustrate the majority will. This standard, by the way, would have remedied the situation described by former Congresswoman Jordan. Where is this found in the report?

Once again, the report does not mention the Justices who share Judge Bork's views about the flaws of using a slogan as the standard for constitutional review: Harlan, White, Rehnquist, Burger, and Powell (Kirkpatrick, 1969; Karcher, 1983).

With regard to the literacy test myth, Judge Bork's real views are not reflected in the report. Whether I happen to agree with the Supreme Court on this issue or not—which is Senator BIDEN's main point—is irrelevant. I only wish the record to show Judge Bork's actual position.

Judge Bork has stated clearly that he would invalidate any literacy test used for discriminatory purposes. In this vein, he approves of the Court's South Carolina versus Katzenbach decision.

Judge Bork's sole objection to the other Katzenbach case is that Congress presumed to outlaw nondiscriminatory literacy tests just 7 years after the Supreme Court had declared such tests constitutional. (Lassiter) This amounted to the Congress overruling the Court and changing the meaning of the Constitution by majority vote. Clearly this challenged the principle of Marbury versus Madison that the Court is the final arbiter of the Constitution.

The Supreme Court itself did not follow its Katzenbach rationale 4 years later in the Morgan case dealing with the 18-year-old vote. This much is incontrovertible and completely makes my point.

When discussing "Inconsistency No. 24-25", Senator BIDEN repeats again the misleading quotations—taken out of context—relative to the equal protection clause and women's rights.

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 amendment, by its terms, applies to "any person." Thus, everyone is covered by 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". * * *

By the way, this disposes of the bogus issue that Judge Bork would not cover women under the equal protection clause. As he stated time and time

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, whenever an immutable trait—such as gender—which bears no relationship to one's ability or merit or inherent equal personhood is the basis for discrimination, it will be held to deny equal protection. This means that almost no laws that distinguish on the basis of race or sex will be upheld. As Justice Stevens, who is known as a champion of the rights of the disadvantaged, has written: "We do not need to apply a special standard, or to apply 'strict scrutiny' or even 'heightened scrutiny' to decide such cases." Cleborne (1985). This is because the rights of minorities and women can be and are fully protected by Judge Bork's equal protection without extending special advantages to one group over others.

Perhaps it is best to be specific. In his testimony, Judge Bork repeatedly stressed that men may not be favored over women as estate administrators, Reed versus Reed, that women may not be denied service as jurors, Taylor versus LA., that women may not be denied bartending licenses, Goesart versus Cleary notwithstanding, that women may not be denied credentials as lawyers, Bradwell notwithstanding, and that no other form of invidious discrimination will be tolerated on the basis of sex. Any State or Federal law based on outmoded stereotypes or arbitrary distinctions would be invalidated by Judge Bork. In other words, Judge Bork's equal protection would afford at least as much protection as the Court's current approach against arbitrary and invidious discrimination.

Nonetheless, we have heard that Judge Bork's equal protection is more subjective or malleable than the intermediate scrutiny currently applied by the Court. The intermediate scrutiny test has not been a model of predictability and clarity because each Justice has a different grasp of how much scrutiny amounts to "intermediate scrutiny." For instance, in Mississippi University for Women versus Hogan, the Court split sharply 5 to 4 with four separate written opinions. This hardly bespeaks absolute clarity. The Congressional Research Service's analysis of the Constitution states in characteristic understatement that "adoption of [the intermediate] standard has not made easy the Court's problem of deciding gender cases." page S277. By the way, the result of the Mississippi case was that a State nursing college's policy of only admitting women was struck down. If anything, the Stevens/Bork test, fairly applied, would lead to greater predictability and coherence, with no loss of constitutional protection for minorities or women.

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 state his position, some have jumped to 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 the Ollman case, "it is the task of the judge in this generation to discern how the framer's 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 "the Equal Protection clause probably should be kept to things like race." We have also heard this repeatedly quoted to mean he would not cover women. As we earlier discussed, it has no such meaning. Judge Bork applies the language of the Constitution and thus holds that "any person" is covered by the equal protection clause. In this quote, Judge Bork was not addressing coverage at all, but the separate question of standard of scrutiny. Judge Bork is simply reiterating that the only group to receive a more favorable standard of scrutiny is race. All others will receive equal protection as persons under the language of the Constitution. As we have discussed, this means full and complete protection for women and for everyone else from arbitrary and invidious discrimination. The reason for this misunderstanding is that Judge Bork takes for granted that all persons are covered by the equal protection clause. After all that is what the language says. When he is asked a question off-the-cuff, he immediately begins to answer the more burning judicial question of the day: namely, what standard will apply. It is this second question he was addressing in this quote which some have misread. This was not a recent awakening for Judge Bork, but a view he began to espouse as early as 1971. It has simply taken considerable time for his view to be correctly understood.

I would also like to clarify whether Judge Bork's equal protection is some new notion that he conceived in order to win confirmation. The evidence suggests an entirely different view. In the now famous 1971 Law Journal article, Professor Bork stated that equal protection requires "that government not discriminate along racial lines." The very next sentence continues to say: "But much more than that cannot be properly read into the clause." With this language, Professor Bork was clarifying again that special groups should not receive a special standard of protection under the equal protection clause by analogizing to race. He was not addressing coverage at all because the language of the Constitution is so obvious. His statement, however, leaves ample room for the application of a uniform reasonable basis test to every "person" as the language of the Constitution dictates.

In this connection, it seems only appropriate to conclude with a recitation of Judge Bork's actual record with regard to women. This, better than anything else, indicates his level of commitment to equal rights for women.

In Palmer versus Schults, Judge Bork voted to extend equal pay to women in the foreign service.

In Laffey versus N.W. Airlines, Judge Bork held that a distinction in pay levels between male pursers and female flight attendants violated the Equal Pay Act.

In Osoky versus Wick, Judge Bork held that statistical evidence alone could suffice to prove a sex discrimination claim under title VII.

In Cosgrove versus Smith, 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 coverage, it covers every person 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 Court. Properly understood, Judge Bork's equal protection is yet one more indication of his qualification, sensitivity, and ability to serve on our Nation's Highest Court. Unfortunately neither the report nor the Senator from Delaware presented this picture of Judge Bork's equal protection views.

My time has escaped me and I cannot take the time to refute the rest of Senator BIDEN's points in detail. One or two more, however, will serve to establish my point that the report has not been in all ways complete. In dealing with "Inconsistency No. 36," Senator BIDEN says that he was within his rights to echo the views of Judge Gordon. My problem is not that the report repeats the allegation; my problem is that he does not mention that the ABA thoroughly examined the evidence and found nothing of substance in the charges. This was from the beginning a bogus issue. Judge Bork deserved better than to have charges thrown at him without the full refutation appearing alongside.

Finally, I wish to note again that many of the issues I raised about the report were not rebutted. Perhaps there is a reason for this. For instance, I noted in my very cursory analysis of the report that:

The report cites James Iredell for the notion of the Constitution contains vast "unenumerated rights," a euphemism for legal preferences not found anywhere in the written document. This is a gross misrepresentation of history. In fact, as a Supreme Court Justice, Iredell dissented vigorously when the Court attempted to invent such unspecified dogmas. See *Calder* v. *Bull* (1796). Iredell did not ever foresee the courts in the role of manufacturing new doctrines not included in the written Constitution. He argued instead that the State constitutions and laws should be free to protect rights beyond those found in the language of the Constitution.

I return to this point in conclusion because this is the primary issue before the Senate—namely, will the Supreme Court be comprised of judicial activists who invent unspecified dogmas where none exist in the Constitution or will the Supreme Court be comprised of judges who acknowledge the role of the Constitution and the people who ordained it in defining and enforcing rights.

Thus I would conclude as before. In light of the distortions in the body of the report, the report's conclusion is likewise flawed and inaccurate. One conclusory remark is particularly revealing. The committee staff faults Judge Bork for reading the Constitution "as if it were a rigid legal code." Leaving aside the question of whether law is or is not always "rigid," Judge Bork is faulted for reading the Constitution as if it were law. The staff writers then explain why this bothers them: "There would be no right to privacy. There would be no substantive content to the liberty clause of the 14th amendment." This is indeed the issue: Whether the Constitution will be read as the law of the people reflecting the people's recitation of their rights or whether it will be read to manufacture privacy rights to abortion on demand, privacy rights to homosexual conduct, or the liberty rights of the Lochner era. The people may or may not embrace these homosexuality privacy rights or economic liberty rights, but that ought to be the people's choice, not imposed on the people by unelected judges.

The report's conclusion and Senator BIDEN's critique of my comments betray far too much. They show that Judge Bork has been faulted simply because he does not agree with certain controversial legal doctrines. This committee report betrays an effort to change the results of future Supreme Court cases by choosing only judges that agree with the committee. This severely erodes the independence and integrity of the Judiciary. This committee is attempting to remake the Supreme Court in its own image.

Mr. President, I would like to respond to the comments made on the floor yesterday by the Senator from Oregon [Mr. PACKWOOD].

Throughout the hearings, Judge Bork has indicated his disagreement with judges' using the due process clause as a means of creating new restrictions on the people's right to govern themselves. He also indicated that many decisions decided under the substantive due process rationale could be reached by proper interpretation of specific constitutional guarantees.

In 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 concerning liberty but come to the same conclusion under different constitutional reasoning. The junior Senator from Oregon reported that the Library of Congress had found no such case.

If no such rerationalization 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 rerationalizing the constitutional foundation of particular liberties.

In *Pierce* v. *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 as a first amendment decision. Thus, in *Griswold* v. *Connecticut* (1964), 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* 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 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.

*Meyer* v. *Nebraska* (1923), which held that a State could not prohibit the teaching of foreign languages in the public schools, was originally decided under a substantive 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 a "penumbra" emanating from the first, third, fourth, and fifth amendments of the Bill of Rights. In *Roe* v. *Wade* (1973), the Supreme Court rerationalized the privacy right as a substantive due process right "founded in the 14th amendment's concept of personal liberty."

Similarly, in *Rochin* v. *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* v. *California* (1966), by contrast, the Court protected an individual from a coercive seizure of an individual's blood under a different rationale. In holding that the State could not compel an individual suspected of drunk driving to undergo a blood test, the Court reasoned that "[t]he overriding function of the fourth amendment is to protect personal privacy against unwarranted intrusion by the State." Similarly, in *Winston* v. *Lee* (1985), the Court held that the State could not force a defendant to undergo surgery to remove a bullet which would have linked 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.

Senator PACKWOOD has therefore been given erroneous information by the Library of Congress. Indeed, the Committee Report makes a similar error when it cites Rochin as a substantive due process case. As Professor Campbell has stated: "The Supreme Court today would decide Rochin on fourth amendment grounds." This is precisely Judge Bork's point. The specifically enumerated guarantees of the Bill of Rights offer adequate protection for individual liberty without inventing new, judicially created rights.

Senator PACKWOOD asserted that the Constitution establishes the Federal courts as "common law" courts, empowered to "find" the rights of people as they exist in nature. This theory suffers from several obvious flaws.

First, if the Constitution were just a warrant for Federal courts to "find" constitutional rights as a matter of Federal common law, then there is plainly no need for a written Constitution. Under such a theory, the text of the document is meaningless—every provision in the Constitution is subject to judicial evolution as new rights are discovered under a common law method of reasoning.

Second, it is in direct conflict with settled pronouncement and practice of the Supreme Court. In *Erie Railroad* v. *Tompkins* (1938), Justice Louis Brandeis, writing for the Court, unambiguously stated: "There is no Federal general common law."

The Erie decision has never been disturbed by the Supreme Court, and Senator PACKWOOD was seriously mistaken when he declared that in Brown versus Board of Education, "the Supreme Court was acting as a common law court." In fact, although as Senator PACKWOOD stated, the law had not changed between Plessey versus Ferguson and Brown versus Board of Education, the disparity in result can be readily explained without resorting to a theory of Federal common law. The Court had simply overruled its decision in Plessey, upholding segregation, upon becoming convinced that the case had been wrongly decided.

Third, Senator PACKWOOD's 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 was in the Hirobayashi and Korematsu cases, when the Court tolerated the internment of Japanese Americans during World War II. This shows a remarkable, indeed, incredible, obliviousness to some of the truly shocking and ugly missteps that the Supreme Court has taken when it has strayed from the text of the Constitution. It ignores the Dred Scott decision, in which the Court held that Congress could not stop the spread of slavery to the territories. It ignores Plessey versus Ferguson, which held that segregation was constitutional so long as facilities were separate but equal. It ignores Lochner versus New York, which held that a State could not regulate the sweatshop conditions under which its laborers toiled. If Senator PACKWOOD sincerely wants to rely on the consciences of judges rather than the text of the Constitution to "find" the constitutional rights that we enjoy, it would be well for him to review some of the atrocities that have been committed when judges have in the past strayed from the Constitution's text. Moreover, if the Constitution is irrelevant, as Senator PACKWOOD's argument implies, then there are no constitutional grounds for criticizing Korematsu or any other decision.

Fourth, under a common law theory of constitutional adjudication, there is no way for Congress or the people to correct the mistakes or excesses of judges. Congress cannot by statute override common law decisions with the superior force of constitutional law. And if a constitutional amendment is passed, the common law of the Constitution can simply evolve to eviscerate the force of the amendment if the Court later finds that particular rights do or do not exist as a matter of common law.

Fifth, Senator PACKWOOD's historical argument that the Constitution cannot be read to have forsaken centuries of a common law tradition flagrantly ignores historical reality and conveniently disregards the existence of States in our federal system. The adoption of the Constitution did not eviscerate centuries of common law; rather, that tradition was explicitly perpetuated in the States by the passage of so-called "reception statutes." There was, however, no federal reception of the common law.

Throughout his remarks, the distinguished Senator from Oregon disclosed numerous private statements made by Judge Bork during the courtesy call discussions he held with the judge, including Judge Bork's personal views on abortion. With all due respect, I think that was a reckless abuse of discretion. As I am sure the distinguished Senator knows, it is customary for judicial nominees to conduct courtesy calls and express their views freely on the conditions that their remarks are "off the record." If even one Senator abuses that courtesy, then judicial nominees naturally will be less likely to speak as freely with Senators during these meetings. I think that is a detriment to all Senators and to the process itself.

Senator PACKWOOD adopted a broad reading of the ninth amendment. According to the learned Senator, Wilson and Madison argued against the bill of rights on the ground that the enumeration of some rights might imply that the Federal Government had power to regulate all others not mentioned. As a precaution, therefore, the founders added the ninth amendment. In Senator PACKWOOD's view, the ninth amendment means that "State legislative bodies or the Congress cannot take away any of your rights unless specifically permitted in the Constitution."

Senator PACKWOOD's view ignores the Constitution's establishment of a federal system—one comprised of both State and national governments.

Senator PACKWOOD is correct that Madison feared that enumeration of certain rights would imply that Congress had power over all others, thereby expanding Congress' power well beyond the specific powers granted by article II. But there is no historically respectable, or even logical, argument that the ninth amendment is a restriction on State as well as national power.

Madison made this point clearly in the very quote Senator PACKWOOD read for a contrary proposition. According to Madison:

> It has been objected also against the bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible argu-

ments I ever heard urged against the admission of rights into this system; but, I conceive, that it may be guarded against.

What Madison conceived of to guard against the danger he identified was the ninth amendment. The danger he and others saw in a bill of rights was that it might be implied "that those rights which were not singled out, were intended to be assigned into the hands of the General Government." The General Government. Madison said nothing of the State governments. That is because the framers were concerned exclusively with the scope and potential abuse of the powers granted to the national, or general, government.

This has been the view of the Supreme Court throughout our entire history. For example, Justice Hugo Black has written that "no serious suggestion was ever made that the ninth amendment, enacted to protect State powers against Federal invasion could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs." Similarly, Justice William O. Douglas has written that "The ninth amendment obviously does not create federally enforceable rights." And Justice Potter Stewart said that finding enforceable substantive rights in the ninth amendment was to "turn somersaults with history."

Senator PACKWOOD's suggested reading of the ninth amendment is thus without a single shred of support in the legal or historical materials concerning that amendment. His reading would have two extreme consequences. First, it would deny all legislative power of the States, because individual rights prevail except where the Constitution "specifically" provides to the contrary. Second, as Justice Black stated: "Use of any such broad, unbounded authority would make [the Supreme] Court's members a day-today constitutional convention."

Judge Bork's view of the ninth amendment is thus exactly the same as that which has prevailed in the Supreme Court throughout our constitutional history, including that of every current member of the Supreme Court. It is odd, to say the least, that his position on the ninth amendment is a source of controversy.

It is Senator PACKWOOD's view of the ninth amendment that "[e]very right that you could conceivably have that is not specifically taken away, you keep." This is fine rhetoric, but it is incoherent. This means that all New Deal labor, health and social legislation at both a Federal and State level is unconstitutional since the Constitution nowhere states that it takes away individuals' rights to contract freely with one another. Certainly, the Supreme Court in Lochner versus New York thought that there was an "inherent" right for a laborer to contract to work however many hours he wanted to, and in Adkins versus Children's Hospital, the Court found an inherent right to contract to work at less than a minimum wage. Under Senator Packwood's theory there can be no conceivable argument that these cases were wrongly decided, and the State and Federal Governments could not 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 versus 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 unenumerated rights. 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 hearings 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 lead a filibuster against him, unless Senator PACKWOOD was convinced "beyond a reasonable doubt" that Judge Bork would not vote to overturn Roe versus Wade. It is therefore clear beyond a reasonable doubt that Senator PACKWOOD made his decision about how to exercise the advice and consent power based on a single-issue political litmus test.

Following Senator PACKWOOD's speech, Senator BIDEN added that he had spent more than 120 hours personally researching the privacy question. According to his research, he found that 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. No justice prior to 1965 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 Meyer versus Nebraska, invalidating a State law restricting the teaching of German, and Pierce versus Society of Sisters, which invalidated a State requirement of public school attendance. Neither case mentions privacy. Rather, both were decided on the bais 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 versus 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 * * * 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, morever, numerous justices have rejected a generalized right to privacy. Justices Rehnquist and White for example, dissented in Roe versus 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 pronoucement in the privacy area was as a member of the Circuit Court in Dronenburg versus 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.

Indeed, 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 homesexual sodomy. 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 instruction in 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.

The PRESIDING OFFICER (Ms. MIKULSKI). The Senator from Florida is recognized for 3 minutes.

Mr. CHILES. Madam President, this Member of the U.S. Senate has become well acquainted with the writings and views 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 review 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 LAWTON 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 an 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 between Government powers and individual rights is 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. Judge Bork disagrees. In drawing the line between the powers of Government and the rights of individuals, he too often sides with the powers of Government. That disagreement strikes at the heart of 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 a Supreme Court decision 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 religion 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 business. 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 in the 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 involvment in civil litigation. I filed a brief siding with the information requester. 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 at the expense 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 the 1980's have been characterized by money becoming the be-all and end-all of the political process.

Mr. President, my predecessor to the U.S. Senate was Senator Spessard Holland, a man of great principle and a leading conservative in the Senate. One of his proudest achievements was the sponsorship of the constitutional amendment to eliminate the poll tax in Federal elections.

Senator Holland understood the true and dangerous purpose of a poll tax and sought to insure that no person, regardless of their economic circumstances, would face any barrier to excercising their right to vote. As a Floridian, I took pride in Senator Holland's leadership on this issue.

I thought the question of poll tax a settled issue—and therefore was troubled to find that Judge Bork remains critical of the Supreme Court decision that found a poll tax on State elections to be unconstitutional.

Finally, I would like to comment on the process under which Judge Bork was nominated by the President and considered by the Senate. Much has been made about the extensive lobbying campaign that has taken place concerning the Bork nomination.

I certainly share the view that a decision of this magnitude should not be influenced by television and newspaper advertisements, nor by postcard mailing campaigns. Unfortunately, these days almost every significant issue before the Senate—and even some that are not so significant—are accompanied by a barrage of media and mail efforts to influence the outcome.

This kind of hype is particularly inappropriate with respect to the selection of a member of the U.S. Supreme Court. My door is always open to my constituents. However, I doubt that many Senators have been influenced by the shrill campaigns of the past few weeks and I can assure you that this Senator has given them no notice.

Madam President, as I said earlier when I announced that I could not support Judge Bork's nomination to the Supreme Court, I began my advise and consent duties on this nomination as I traditionally do—hoping to confirm a President's nominee. I regret I cannot do so.

Judge Bork is his own man. This his writings clearly show. While many of his ideas do not mesh with my own, this, in itself, would not cause me to oppose his nomination. I am opposing this nomination because I do not see eye to eye with Judge Bork's constitutional philosophy. In balancing the rights of the individual against the powers of the Government, Judge Bork too often tips the scale in favor of the Government. I join with my colleagues in sincerely hoping that President Reagan will send this body a nominee who will be confirmed to respectfully serve the Court and the people of this country.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Madam President, I yield 2 minutes to the Senator from Nebraska [Mr. KARNES].

Mr. KARNES. Madam President, I have already submitted a long and detailed statement regarding my analysis of the nomination of Judge Robert Bork to be 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 my support is as strong as ever.

Barring a dramatic change of heart of several colleagues, this nomination will fail. I only hope some of them will reconsider, but I am operating under no illusions such will happen.

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 Nation, the President, and 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 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. 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 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 my colleagues.

The PRESIDING OFFICER. Will the Senator withhold? The Senator from Nebraska has exceeded the 2

minutes that have been yielded to him.

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. Barring 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 nominee, and 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 harmed 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 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. 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—who sought a full and complete airing of the pros and cons of this nomination—who 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 blatant 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. This concern is not expressed as much for myself or my colleagues—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 will be tarnished if such aggressive media efforts and partisan accusations become a common occurrence. Make no mistake, such advertising mobilizes and influences Americans, in this instance, against the nominee. I have no problem with public activism surrounding Supreme Court nominees, but I am most troubled about the distortions of this man's record. What I saw in the media is inconsistent with a fair reading of his judicial record, and is inconsistent with my personal discussions with Judge Bork.

The message to future nominees is clear: They should plan to campaign for their nominations in the same way that we campaign for elected office in the legislative branch or the executive branch, regardless of the framers' clear intent to insulate jurists from the rigors and pitfalls of the political process. They should make sure to weigh the political ramifications of their writings, and make sure that anything they say or print is bland, is as noncontroversial as possible, and most importantly, that it represents nothing that could raise the ire of any special interest group capable of mounting a sizable advertising campaign. From now on, they should weigh the cases they hear, not in terms of applying the law to the facts, but rather in terms of the political opportunity presented. And by all means, if a case presents a particularly thorny social issue that might press a judge toward a legally correct but unpopular result, he should use every legal mechanism at his disposal to duck the issue, shove the law or the Constitution aside, and find some way to render the popular result.

With the disposition of the Bork nomination, we are telling future nominees that we want them to be more like us and less like the independent triers of law and fact that they are supposed to be. I feel we are threatening the independence of the judiciary by blurring the distinction between the political 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 of competency, character, intellectual, and 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 jurists should interpret the 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 the doctrine of 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 and should be directly 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.

The American people aren't ignorant, Madam President. They understand very clearly what is going on here. They understand that Judge Bork has fallen victim to politics. And they are right. Ultimately, it will be up to the American electorate to judge the Senate's deportment in rejecting the nomination of Robert Bork.

I will vote for Judge Bork. At this point, I would reiterate the criteria that I considered in making my decision on this nominee, the same criteria that I would look for in any judicial nominee, regardless of the administra-

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.

Lastly, I thank all Nebraskans who took the time to write and contact my offices—pro and con on Judge Bork—for participating in this important national debate.●

I yield the floor back and I thank my distinguished colleague from South Carolina.

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 remarks that I made 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.

(See exhibit 1.)

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 nominees 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 constituents, 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 professionally. 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 unbecoming the office of the Presidency and unbecoming such a fine American as Ronald Reagan. Once this system failed the country there was no hope. But Judge Bork had the courage, as I urged on the Senate floor on October 8, 1987, to fulfill his obligation to his country and himself to call for a final vote. The dignity with which he accepted defeat will be an everlasting tribute to this man and his family.

I visited recently with Judge Bork and I showed him a statement made by the Senator from Alabama, Judge HEFLIN, which has been utilized and referred to by many Senators. I shall quote it:

The history of Judge Bork's life and lifestyle indicates a fondness for the unusual, the unconventional and the strange. It has been said that he is either an evolving individual with an insatiable intellectual curiosity for the unique, the unknown, the different and the strange or, on the other hand, that he is an extremist with a propensity toward radicalism. His history as a young man reveals that he was first an avowed socialist—that he gave considerable attention to becoming a Marxist—then he returned to socialism, after which he moved toward libertarianism. As he grew older, he became next a "New Deal liberal" and then evolved to a strict constructionist—and more recently he has been a self-proclaimed "originalist." It now appears from his oral declarations at these hearings that he has turned another corner and is moving back towards the center.

I said, "Your Honor, I most respectfully have asked many of my colleagues where in the record is the refutation of this, if it is incorrect?"

And he said, "Some facts are accurate, others not," but he added, "I failed," and indeed others failed me not getting it complete and accurate. He is a big man, this judge. He ended: "We failed to set the record straight." That record before the Senate is incomplete as to the character of this man, the reasons for the volatility of his positions and philosophy, particularly in his early career. This record was needed to give us those benchmarks that I think many of us including this Senator needed to determine the philosophical direction this judge will go in the future sitting on the highest bench of our land.

Although I read many of his opinions, and I searched the Senate record extensively, in this violent crossfire of difference of views each Senator has to cast his own anchor to windward. I did it by going back to the opinions of another circuit judge, coincidentally who once sat on the same court as Judge Bork now sits. I was privileged to be his law clerk in 1953. I remember one time he had a landmark case that involved the Nation's Capital, as to whether or not a large portion of this city, classified as a slum was to be leveled, sold to a private developer, and then in turn resold to private people. This was a landmark case under laws of eminent domain.

I saw that judge go through the internal stresses, unlike many men in life ever have to suffer, as to what his guidance would be. The law was not clear.

I remember one day vividly getting in the car with him. He always sat in the front seat with his driver. And we drove down through this area, and while it was clearly a slum, we saw here and there small houses which were loved by the occupants, a curtain, a flower and bright paint. These are the words that he wrote:

The hypothesis in the first phase of this consideration is an urban area which does not breed disease or crime, is not a slum. Its fault is that it fails to meet what are called modern standards. Let us suppose that it is backward, stagnant, not properly laid out, economically Eighteenth Century—anything except detrimental to health, safety or morals. Suppose its owners and occupants like it that way. Suppose they are old-fashioned, prefer single-family dwellings, like small flower gardens, believe that a plot of ground is the place to rear childen, prefer fresh to conditioned air, sun to fluoresent light. In many circles all such views are Considered "backward and stagnant". Are those who hold them "therefore blighted"? Can they not, nevertheless, own property? Choice of antiques is a right of property. Or suppose these people own these homes and can afford none more modern. The poor are entitled to own what they can afford. The slow, the old, the small in ambition, the devotee of the outmoded have no less right of property than have the quick, the young, the aggressive, and the modernistic or futuristic.

Is a modern apartment house a better breeder of men than is the detached or row house? Is the local corner grocer a less desirable community asset than the absentee stockholder in the national chain or the wage-paid manager? Are such questions as these to be decided by the Government? And, if the decisions be adverse to the erstwhile owners and occupants, is their entire right to own the propety thereby destroyed?

There is one mark, when I leave this body, that I think I can turn to with pride, and that is those individuals that I have recommended to Presidents to serve as Federal judges.

Before doing so I put each to the Judge Prettyman standards as reflected in the above opinion. But as I look at this distinguished jurist against my own background in the law against Judge Prettyman whom I consider a father image, I cannot find in Judge Bork's record of compassion, sensitivity, of understanding of the pleas of the people to enable him to sit on the highest Court of the land.

EXHIBIT 1

JUDGE BORK

Mr. WARNER. Mr. 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 have a debate on this issue at the earliest possible date and urge the leadership this morning to renew their efforts to expedite 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

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 out of respect for the nominee, has not declared his intentions as to how he would vote. I have done that for, I believe, valid reasons.

First, I have not had the opportunity, nor do I believe many others have had, to examine with care the record compiled by the Senate Judiciary Committee. While 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 whites of our eyes, and provided one another with the benefits of reasoning, argumentation, and confrontation that are essential to a full debate, 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 100 hours 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 for Presidential 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 a debate of the Senate as a whole.

The constitutional responsibility under advise and consent, in conneciton with the judicial branch, I believe, is unique. It is distinguishable, I believe, from our responsibility to nominees for Cabinet posts, senior military, or ambassadorial posts. Cabinet officers are an extension of the Presidency 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 advise and consent responsibility of the Senate to approve nominations.

The judiciary is an independent third branch of our Government and the role of the Senate in helping to create this branch through its advise 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.

The Senate should 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 Founding Fathers conceived when they established the U.S. Senate. That concerns me.

In the history of this body, there was a time when we did the advise and consent without the benefit of any committee structure. It had not been created, and Members took the floor, exchanged their views, often 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, if each 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 that debate. A 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 nominee and President who made that nomination, has deliberately not made a declaration, nor am I about to announce my intention as to how I would vote. I do 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.

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, managing editor of Policy Review, 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 explains that Mr. Jackson 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 they are 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.

I ask 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,
*Washington, DC, October 22, 1987.*

Hon. DENNIS DECONCINI,
*U.S. Senate, Washington, DC.*

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. Rather, the article solely reflects the opinions of Gordon Jackson, former managing editor of Policy Review. Although many of us here disagree with your views on the Bork nomination, we strongly 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. TRULUCK,
*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 that decision as a lawyer. I am not a lawyer. Before I came here, I was a businessman. My work was guided by laws. I had to know what they were. But, I was not a lawyer.

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 we should have—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 tolerate more doubt.

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 rely on 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 stunt 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 an American can make, about 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 the polls. 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 speech.

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 begrudgingly accepted—in some cases, for the first time at his hearing—some of the Nation's most basic rules to protect civil rights and civil liberties, to end discrimination, and to stop racial injustice.

But, more troubling than each case he would decide the other way, more troubling than each case by itself, is his general approach to our law, to our Constitution. His is a cramped and stingy view of the law. Judge Bork ties himself too closely to the semantics of a 200-year-old text, but not closely enough to the values and aspirations that gave it life, and that have grown and changed and live in us today.

What troubles me the most is his general approach to the law. And what it could mean for Americans has become clearer and clearer as the hearings and the speeches and the debate has worn on. It became clear to Americans who don't go around citing Supreme Court cases for a living. But, they're Americans who know that this is the bicentennial of our Constitution. They have a sense—by being Americans—of what the Constitution means and of the spirit that gives it life.

But, ask them the most elemental question: Do you as an American have certain inalienable rights? Do you have a right to life, liberty, and the pursuit of happiness? Those are the words right out of the Declaration of Independence. Ask any American and he'll say, "Yes, I do."

It is on this most basic principle that 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 skillful 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 is 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 passes 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 that 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 their decisions; 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 ideals of ordered 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 the resolution be considered.

Mr. BIDEN. I object to such a factually flawed resolution being considered.

The PRESIDING OFFICER. As in legislative session, the resolution will go over.

## SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of Robert H. Bork to be an Associate Justice.

The PRESIDING OFFICER. Who yields time?

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 dean of one of the Nation's finest 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 striven 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 appellate 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 his confirmation as a Justice of the Supreme Court.

I share with others an unease about Judge Bork's views on such issues as equality for women. And I must admit to great disappointment that a man of his powers chose to be so muddled 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. The debates were closed. Some notes were taken, but fitfully and subject to all the errors that attend after-the-fact reconstructions. All we know is what 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, never conceived, the possibility that the Court would assert for itself the power to judge the constitutionality of laws enacted by the Congress and approved by the President. There was absolutely no precedent for this in English law. To this day it would be unthinkable, or such is my understanding, for a British court to declare an Act of Parliment unconstitutional. The concept does not exist for the British. In effect, their Constitution consists of whatever basic law parliament enacts, along with traditions of the common law.

Judicial review of federal laws, as it is known, was wholly the invention of Chief Justice John Marshall in the celebrated case of Marbury versus Madison. This was handed down in 1803, some 16 years after the Constitution was adopted in Philadelphia. In a curious twist, the practice developed much as common law develops. It was asserted, then all but fell into desuetude. Then a half century later, it was revived, in the Dred Scott decision, Scott versus Sanford, 1857. Then fell off again, then revived again, and after about a century and a half, came to be seen as an aspect of American governance. To cite Holmes in his study, the common law, "The life of the law has not been logic; it has been experience." Just so. After an extended, tentative experience, the people of the United States gradually got used to the idea that the Supreme Court could declare acts by other branches of the government to be unconstitutional, and that would be that for the time being at least. I myself have written that we are under no obligation to agree with the Supreme Court in such matters; our obligation is simply to obey it until by litigation and other lawful means we can persuade it to change its mind if indeed it is of a mind to do. Which it does all the time. So much for original intent.

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 views. I must say that it is his restricted 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 to the first 10 amendments which dated from 1791, although Massachusetts, Georgia, and Connecticut did not get around to giving their assent until 1939. Sic, as lawyers write. What possibly can the Congress have intended when it resolved in amendment III that "no soldier shall in time of peace be quartered in any house, without the consent of the owner * * *"? Or, in amendment IV concerning "The right of the people to be secure in their persons, houses, papers, and effects * * * ? And amendment IX, which states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." I am no legal scholar, but surely by this time one of the most popular understanding of English common law was summed in the phrase, "the rain may come through your roof, but the King may not come through your door." Save, that is, by invitation or by warrant.

Of all the circumstances of life, privacy is perhaps that most treasured by a civilized people. The great lesson of the 20th century is that the annihilation of privacy is the ultimate goal of the totalitarian state. Any of us who have read George Orwell's 1984, will have experiened this annihilation in its "ideal" form. Any of us who have visited Moscow or Beijing will have encountered a chilling approximation.

Nor are democractic societies by any means immune.

Absent privacy, civilization loses its immume defense, the body politic is ravaged; even memory mutates.

Yet, in his 1971 essay in Indiana Law Journal, "Neutral Principles and Some First Amendment Problems," Judge Bork denies the right of privacy. Evaluating the Supreme Court's decision in Griswold, striking down a Connecticut anti-contraceptive statute, he writes:

"The truth is that the Court could not reach its result in 'Griswold' through principle. The reason is obvious. Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratification of the two groups. 'When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure.' Compare the facts in 'Griswold' with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical.'"

That Judge Bork has persistently rejected a right of privacy is all the more puzzling in light of his recent testimony:

"Oh yes, there are several crucial protections of privacy in the Bill of Rights. The Framers were very concerned about privacy because they had been subjected to a very intrusive British Government, and they were very concerned that privacy be protected against the new national government."

Again, I find this muddled. Either there is or there is not a general right of privacy to be found in the Constitution. On the one hand Judge Bork says there is, on the other hand he says there isn't. Thus, in his testimony before the Judiciary Committee, he asks:

"Privacy to do what, Senator? You know, privacy to use cocaine in private? Privacy for businessmen to fix prices in a hotel room? We just do not know what it is."

Surely not. As Justice Stewart might say, I may not be able to define it, but I know it when I see it. To suggest that no general right on privacy exists simply because one can envision specific situations in which it might not, is logic-chopping and counter to all that experience teaches. Under such a construction, there would be no general right of free speech because we do not protect persons who shout, "Fire!" in a crowded theater, when in fact there is no fire.

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 less troubled by Judge Bork's view that the Constitution does not bar racially restricted covenants or de jure segregation in the public schools of the District of Columbia. It is not sufficient that he is personally opposed to such practices, or that he would not overturn the cases of Shelley versus Kraemer and Bolling versus Sharpe because they are settled policy. Nor 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 substantive rules of equal protection 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 violate due process.

In the context of a libel suit, Judge Bork wrote that:

"It is 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.

I agree. In the world we know, the Constitution will not tolerate racially restrictive covenants or de jure segregation in the public school of the District of Columbia.

We have said goodbye to all that. And without regret. Not long ago Bayard Rustin died in New York City. He who organized the great "March for Jobs and Freedom" here in Washington in the summer of 1963. The weather was glorious; the spirit was glorious. And the spirit truly was upon us. Few of my generation will ever forget Martin Luther King's address, with its great incantation: "I have a dream." Yet, at this moment on this floor I find myself thinking of Roy Wilkins' address on the same day. He was not a man of God, as ministers are described. He was a man of this world and its travail and its triumphs and he sensed triumph. The day is at hand, he said, when the black people of the Southland will be free. And so also will the white people be. That day has come. Carpe diem.

New York City Bar Association President Robert M. Kaufman spoke for many of my fellow New Yorkers when he testified that:

"Judge Bork's fundamental judicial philosophy, as expressed repeatedly and consistently over the past thirty years in his writings, public statements and judicial decisions, appears . . . to run counter to many of the fundamental rights and liberties protected by the Constitution."

I concur. I cannot consent to the confirmation of Judge Robert H. Bork as an Associate Justice of the Supreme Court.

Mr. MOYNIHAN. Madam President, I have two other documents, or rather entries, which I would also ask unanimous consent to have printed in the RECORD.

First is a statement by the Ad Hoc Committee for Principled Discussions of Constitutional Issues, which is chaired jointly by two of our most luminous and deeply patriotic scholars, Nathan Glazer and Sidney Hook. It may be objected that patriotism is an odd ascription in this context: Are we not all patriots? Indeed, I so grant. But some persons give their lives to the study of national character and purpose that goes well beyond what most can achieve, and far less aspire to.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

AD HOC COMMITTEE FOR PRINCIPLED DISCUSSIONS OF CONSTITUTIONAL ISSUES,
*New York, N.Y., October 1987.*

Hon. ROBERT C. BYRD,
*Majority Leader, U.S. Senate, Washington, DC.*

Hon. ROBERT DOLE,
*Minority Leader, U.S. Senate, Washington, DC.*

HONORABLE GENTLEMEN: The signers of the attached statement who are of varied political persuasions have different views on the substantive issues discussed by Judge Bork. But all are convinced, despite what has been said in the media and on the Senate floor, that Judge Bork's position on judicial restraint is an integral part of the mainstream of American jurisprudence, and that he is well qualified to serve as a justice of the United States Supreme Court.

The argument has been made repeatedly that the politicization of the Bork confirmation proceedings is nothing new, that the same was true of the Fortas, Thornberry, Haynesworth, and Carswell nominations. This is a gross distortion. While there was some idelogical element to those four proceedings, only a minority of Senators considered that their opposition could legitimately rest on such grounds. In all those cases, the decisive element was either a financial ethics issue or an issue of character.

In the case of both Fortas and Haynesworth, the issue was financial ethics. Fortas accepted the very large honorarium for a seminar at American University; Haynesworth had voted on one or more cases in which he had a financial interest. (The withdrawal of the Thornberry nomination was as a result of the domino effect: the withdrawal of Fortas as Chief Justice meant there was no Associate Justice vacancy for Thornberry to fill.) In the case of Carswell, the issue could be described as ability (of the sixty-seven district court judges in the Fifth Circuit with 20 appealable decisions or more, only six had a worse reversal record) and character (adherence to white supremacy).

Also in so far as ideological arguments were made against Fortas, Haynesworth, and Carswell, they were based on their judicial opinions. None of the critics have been able to find fault with Judge Bork's judicial opinions.

These are very important distinctions from the current case which need to be made forcefully. I hope someone will step forward and do it.

Sincerely,

SIDNEY HOOK,
*Emeritus Professor of Philosophy, New York University; Senior Research Fellow, Hoover Institution.*

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AD HOC COMMITTEE FOR PRINCIPLED DISCUSSIONS OF CONSTITUTIONAL ISSUES

STATEMENT OF SUPPORT

We are witnessing an incredible assault on a distinguished nominee to 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 toward a wise judgment.

Judge Bork is assaulted for being outside the "mainstream" of American constitutional interpretation and for threatening liberties and rights confirmed by previous decisions of the Supreme Court and by federal and state legislation. This is nothing less than an effort to impose one controversial theory of constitutional interpretation as the only legitimate one, and to exclude as beyond the pale all who challenge it. For the last 15 years or more we have witnessed many 5 to 4 or 6 to 3 decisions on important issues, with majorities and minorities split in their reasoning two or three ways. What is the "mainstream" in such split decisions? It is specious to argue the 5 or 6 Justices in the majority in these decisions represent the mainstream of constitutional interpretation, and that if the decisions were to have gone 5 to 4 or 6 to 3 the other way the Republic and our liberties would be in danger.

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 liberty—to insist 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, and however 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 Supreme 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 redress wrongs and expand rights as they see fit, and those who see a more limited role for the Court, closer to the text and intention of the framers of the Constitution and the Amendments, and who support a larger role for the democratic branches of government. To read out of the "mainstream" the latter is to shortcircuit what should be a debate over principles, and pronounce an unjustified edict of excommunication from the democratic political community.

Henry J. Abraham, University of Virginia.
Samuel Abrahamsen, CUNY, Grad. Ctr./Brooklyn College.
Howard Adelson, CUNY, City College.
Judah Adelson, SUNY, New Paltz.
Stephen H. Balch, CUNY, John Jay College.
Andrew R. Baggaley, University of Pennsylvania.
Fred Baumann, Kenyon College.
William R. Beer, CUNY, Brooklyn College.
Aldo S. Bernardo, SUNY, Binghamton.
Walter Berns, American Enterprise Institute.
Brand Blanshard, Yale University.
Thomas E. Borcherding, Claremont Graduate School.
Yale Brozen, University of Chicago,
Stanley C. Brubaker, Colgate University,
R.C. Buck, University of Wisconsin.
John H. Bunzel, Hoover Institution.
Nicholas Capaldi, CUNY, Queens College.
James S. Coleman, University of Chicago.
Werner Dannahauser, Cornell University.
Harold Demsetz, University of California, Los Angeles.
Gray Dorsey, Washington University.
William A. Earle, Emeritus, Northwestern University.
Ross D. Eckert, Claremont McKenna College.
Ward Elliott, Claremont McKenna College.
Charles Evans, CUNY, City College.
Solomon and Bess Fabricant, New York University.
Robert K. Faulkner, Boston College.
Milton Friedman, Hoover Institution.
Lowell Gallaway, Ohio University.
L.H. Gann, Hoover University.
Jules B. Gerard, Washington University.
Hilail Gildin, CUNY, Queens College.
Nathan Glazer, Harvard University.
William C. Green, Boston University.
C. Lowell Harriss, Columbia University.
Louis G. Heller, CUNY, City College.
Gertrude Himmelfarb, CUNY, Graduate Center.
Jack Hirshleifer, UCLA.
Sidney Hook, Hoover Institution.
K.D. Irani, CUNY, City College.
Erich Isaac, CUNY, City College.
Robert Kagan, University of California at Berkeley.
Howard Kaminsky, Florida International University.
Thomas Kando, California State University, Sacramento.
Benjamin Klebaner, CUNY, City College.
Benjamin Klein, University of California, Los Angeles.
Fred Kort, University of Connecticut.
Robert P. Kraynak, Colgate University.
Paul Oskar Kristeller, Columbia University.
Nino Languilli, St. Francis College.
Charles Lofgreen, Claremont McKenna College.
Herbert I. London, New York University.
Joseph A. Mazzeo, Columbia University.
John McCarthy, Stanford University.
Paul McGouldrink, SUNY, Binghamton.
Bernard D. Meltzer, University of Chicago.
Marvin Meyers, Brandeis University.
Stuart Miller, San Francisco State University.
Katharina Mommsen, Stanford University.
Aurelius Morgner, University of Southern California.
Allan Nelson, University of Waterloo.
Rev. Richard John Neuhaus, Rockford Inst./Ctr. on Religion in Society.
W.V. Quine, Harvard University.
Steven Rhoads, University of Virginia.
Ralph A. Rossum, Claremont McKenna College.
Eugene V. Rostow, Yale University.
Arnold M. Rothstein, Emeritus-CUNY, City College.
Halley D. Sanchez, University of Puerto Rico at Mayaquez.
Wolfe W. Schmokel, University of Vermont.
George Schwab, CUNY, City College.
Paul Seabury, University of California at Berkeley.
John R. Searle, University of California at Berkeley.
Frederick Seitz, Rockefeller University.
Malcolm Sherman, SUNY, Albany.
Charles Sherover, CUNY, Hunter College.
David Sidorsky, Columbia University.
Philip Siegelman, San Francisco State University.
Gerald Sirkin, CUNY, City College.
Thomas Sowell, Hoover Institution.
Edward Taborsky, University of Texas, Austin.
Miro M. Todorovich, CUNY, Bronx Community College.
Stephen J. Tonsor, University of Michigan.
Richard K. Vedder, Ohio University.
Arthur Vigdor, Emeritus-CUNY, City College.
George Weigel, Catholic Theologian,
Judy Wubnig, Cambridge, MA.
Cyril Zebot, Georgetown University.
Marvin Zimmerman, SUNY, Buffalo.

ADDENDUM

Peter Ahrensdorf, Kenyon College.
Armen A. Alchian, UCLA.
Maurice Auerbach, St. Francis College.
Ronald Berman, UCLA.
Allen Bloom, University of Chicago.
R.K. Boutwell, University of Wisconsin.
Harry Clor, Kenyon College.
Robert Greer Cohn, Stanford University.
Kirk Emmert, Kenyon College.
Arnold Harberger, UCLA.
Lawrence W. Hyman, Emeritus, CUNY, Brooklyn College.
Rael Isaac, Irvington, NY.
Pamela Jensen, Kenyon College.
Alphonse, Juilland, Stanford University.
George L. Kline, Bryn Mawr College.
David Leibowitz, Michigan State University.
Sullivan S. Marsden, Jr., Stanford University.
Arthur Melzer, Michigan State University.
A. Mizrahi, Indiana University Northwest.
Dean Mores, Columbia University.

JoAnn Morse, Barnard College.
Allan Nelson, University of Waterloo.
Norma L. Newark, CUNY, Herbert Lehman College.
Allan Ornstein, Loyola University.
Ibrahim Oweiss, Georgetown University.
Thomas L. Pangle, University of Toronto.
Jacob M. Price, University of Michigan.
Jeremy Rabkin, Cornell University.
Bogdan Raditsa, Fairleigh Dickinson University.
Harold P. Rusch, University of Wisconsin.
Edward Shils, Chicago, IL.
Dr. George Schultz, Stanford University.
Morris Silver, CUNY, City College.
Martin Trow, University of CA at Berkeley.
George J. Viksnins, Georgetown University.
Jerry Weinberger, Michigan State University.
Arthur J. Weitzman, Northwest University.
Bradford Wilson, Ashland College.
Richard M. Zinman, Michigan State University.
Rev. Joseph Zrinyi, SJ, Georgetown University.

Mr. MOYNIHAN. Finally, Madam President, I wish to have printed in the RECORD a petition signed by some 23 U.S. district judges from New York. These are eminent men, three of whom I have had the honor to recommend for appointment. They are much concerned—let me use their words—they are "disturbed by the nature of the debate that has attended the nomination of Judge Robert Bork to the Court." Herewith their petition.

There being no objection, the petition was ordered to be printed in the RECORD, as follows:

NEW YORK,
*October 20, 1987.*

We, the undersigned judges of the Second Judicial Circuit of the United States, are fully mindful of the fact that confirmation of Supreme Court justices is the obligation and prerogative of the Senate. However, as citizens concerned with the rule of law and the independence of the judiciary we are disturbed by the nature of the debate that has attended the nomination of Judge Robert Bork to the Court. If the process of choosing judges comes to be dominated by partisanship rather than a regard for individual learning and temperament, our courts will be left without the judicial excellence on which they vitally depend. If the process pays too much deference to outside influences, the courts will lose their integrity and Senators will become unable to perform one of their most solemn duties under the Constitution.

We hope that in the last stage of the debate over Judge Bork the participants will show respect for these principles and come to the Senate floor with minds open to arguments on the merits.

Jacob Mishler, Senior DJ; Raymond Dearie, EDNY; Peter Leisure, SDNY: Lloyd MacMahon, Senior DJ; Charles L. Brieant, CJ-SDNY; Reena Raggi, EDNY; John R. Bartels, Senior DJ; Edward R. Korman, EDNY; Howard Schwartzberg, Bkrty. NY; Charles S. Haight, SDNY; Richard J. Daronco, SDNY; William C. Conner, SDNY.

John F. Keenan, SDNY; John E. Sprizzo, SDNY; John Walker, SDNY; Thomas C. Platt, EDNY; Howard B. Munson, NDNY; I. Leo Glasser, EDNY; Mark Constantino, EDNY; Thomas P. Griesa, SDNY; Milton Pollack, Senior DJ; Shirley Kram, SDNY; Thomas J. McAvoy, NDNY.

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 was 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 tele-computer 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. Tell them you 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 your Senator ——— at ——— in ——— immediately. Urge him to vote in favor of Judge Robert Bork.

"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, or certainly was, 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, and to have changed the composition of the Senate, he was openly contemptuous of Federal election law. If I may paraphrase, he used to say that by the time they catch up with us, "the election is over and it's too late." By this he meant, that if his vicious campaign tactics—lies, insinuations, defamation—succeeded (as evidently they often did) the defeated candidate would have small consolation in pursuing civil remedies against his tormentors; and should they fail, no great misfortune would befall Mr. Dolan's organization.

It happens that in 1982 I was "targeted" by NCPAC, that being their term. 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 Southern District of 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 coconspirator 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, May 15, 1986

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's campaign, though committee claimed 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 shared goals and parallel strategies of the two efforts, demonstrated impermissible

degree of coordination which overstepped wording of advisory opinion.

Charles N. Steele, Gen. Counsel to the Federation Election Com'n, Washington, D.C. by Ivan Rivera, Asst. Gen. Counsel, Lisa E. Klein, of counsel, for the plaintiff.

Herge, Sparks, Christopher & Biondi, McLan, 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 with exclusive 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 ("NCPAC") seeking declaratory and injunctive relief. NCPAC 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—August 1982), NCPAC was registered with the FEC as a multicandidate political committee ("MCPC").[1] The FEC contends that during the 1982 New York senatorial campaign, NCPAC contributed more than $5000 to a single candidate in violation of section 441(a)(2)(A) of the Act.[2] In failing to report these contributions, NCPAC allegedly violated section 434(b)(4)(H)(i) of the Act as well.[3] This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (1982).

Both parties now cross-move, pursuant to the Fed.R.Civ.P. 56, for summary judgment. NCPAC also moves, pursuant to Fed.R.Civ.P. 15 to amend its answer. For the purposes of this motion, the defendant's answer is deemed amended. For the reasons stated below, the plaintiff's motion for summary judgment is granted.

*I. Background*

The following facts are not in dispute. During the 1981-82 election cycle, NCPAC established "New Yorkers Fed Up With Moynihan," a political action committee dedicated to defeating the reelection bid of New York's United States Senator, Daniel Patrick Moynihan. NCPAC hired Arthur J. Finkelstein Associates ("Associates"), a polling and political consulting firm owned and operated by Arthur J. Finkelstein, to develop a media strategy, to conduct and analyze polls and to select election issues on which Senator Moynihan was most vulnerable. Finkelstein himself wrote the script for NCPAC's main radio commercial urging the defeat of Senator Moynihan. From April 1981 until August 1982 NCPAC funnelled $73,755 to Associates to urge Moynihan's defeat.

In March 1981, prior to the commencement of NCPAC's anti-Moynihan effort, Bruce Caputo announced his intention to seek the Republican nomination for the U.S. Senate seat in New York. On or about that time, Caputo and his political committee, the Caputo for Senate Committee (the "Committee"), retained Finkelstein, a longtime friend of the candidate, as a paid political consultant. Between March 1981 and March 1982, when Caputo withdrew from the race,[1] the Committee paid Finkelstein's firm $28,000 to assist in all of the aspects of Caputo's campaign including formulating election strategy, hiring campaign staff, and utilizing the media.

Finkelstein and NCPAC also had long been associated,[5] and, during the time NCPAC retained Finkelstein, it knew that Finkelstein who recruited Robin Martin, a Caputo campaign volunteer, to head the "New Yorkers Fed Up With Moynihan" media campaign.

In January 1982, the FEC received a complaint from the New York State Democratic Committee alleging that independent expenditures reported by NCPAC for its anti-Moynihan campaign were actually inkind contributions to Caputo and his authorized committee.[6] The complaint further alleged that these contributions exceeded section 441a(a)2)(A)'s $5,000 limit on contributions to a candidate and that NCPAC had violated section 434(b)(4)(H)(i) by failing to report the contributions. The FEC found reason to believe these allegations and, in April 1982, began an investigation.[7] In September 1983 the FEC found probable cause to believe that NCPAC had violated FECA's contribution and disclosure requirements and attempted to correct those violations through informal methods.[8] These methods failed[9] and, on February 6, 1984, the FEC brought this action to enforce the provisions of the Act.[10]

*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."[11] 2 U.S.C. § 441a(a)(7)(B)(i) (1982). FFC regulations clarify this language.[12] According to those regulations, the aforementioned definition of contribution includes any expenditure "[m]ade with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent . . . of the candidate. . . ." 11 C.F.R. § 109.1(b)(4) (1986). This definition, in turn, encompasses.

[a]ny arrangement, coordination or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is—

(A) Based on information about the candidates plans, project's or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made;

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent. . . .

*Id.* at § 109.1(b)(4)(i). The FEC argues that the $73,755 NCPAC expended through Finkelstein, who was Caputo's agent, actually constituted contributions to the Caputo campaign. NCPAC thereby exceeded the $5,000 limit on contributions[13] and violated the corresponding disclosure provisions.

NCPAC does not dispute that, on their face, the statute and the relevant regulations forbid its conduct. It, nevertheless, maintains that it can prevail on its crossmotion for summary judgment because it relied on an FEC advisory opinion.[14] Under the Act,

any person involved in the specific transaction or activity with respect to which [an] advisory opinion [has been] rendered . . . [and] who [has] relied upon [that] advisory opinion . . . and who act[ed] in good faith in accordance with the provisions and findings of [that] advisory opinion shall not, as a result of any such act be subject to any sanction provided by [FECA].

2 U.S.C. §§ 437f(c)(1)(A) & (2) (1982). NCPAC claims to have relied in good faith on a December 1980 advisory opinion and asserts that it would not have exceeded the $5000 contribution limit had it believed it was acting contrary to the provisions of the Act.

In December 1979, NCPAC wrote to the FEC requesting an advisory opinion with regard to certain proposed activities it was contemplating. NCPAC was particularly concerned about whether an agency relationship between a political consultant or any other vendor and a candidate would jeopardize its ability to use the same consultant or vendor to oppose the candidate's opponent.[15] NCPAC posited nine, fact-specific questions to the FEC. It now contends that it relied on the FEC's responses to two of those questions in taking the actions that are the subject of this suit.

The first question (or "situation," as NCPAC termed it) posits NCPAC hiring an advertising firm to design advertisements which advocate the defeat of a candidate campaigning for the Democratic nomination for President. This same agency is working for a candidate seeking the Republican nomination. Although the Commission did not have enough information to determine whether the firm was an "agent" of the Republican candidate, it noted that since these "are two separately distinct races . . . and the Democratic candidate and the Republican candidate are not opponents at this point" it would be permissible to retain the same advertising agency.[16] NCPAC's Memorandum of Law, Exhibit A at 4.

The eighth situation posits NCPAC contributing a poll undertaken as part of an independent expenditure campaign against a candidate for the Democratic senatorial nomination to a candidate for the Republican nomination in the same state. The FEC stated that contributing the pool results "would, of course, constitute a contribution in-kind by NCPAC to the candidate's campaign committee." *Id.* at 9-10. However, during the primary campaign, NCPAC could "communicate" with the Republican candidate.[17]

The advisory opinion contained the caveat that "an expenditure that appears to be independent on the facts presented [by NCPAC] may not in fact be so [in a different factual setting]". *Id.* at 4. Moreover, section 437f(c)(1)(B) of FECA provides that an advisory can be relied on only if the "specific transaction or activity [is] indistinguishable in all its material aspects from the transaction or activity . . . [about] which the advisory opinion [was] rendered." 2 U.S.C. § 437(c)(1)(B) (1982). Thus, NCPAC can prevail in this action only if it can establish that the situation at bar is indistinguishable from the situations reviewed in the advisory opinion.

Careful analysis reveals substantial disimilarities between the facts in issue and those posited in the FEC's advisory opinion. First, Finkelstein's role was far more crucial than that of the specified "agents" in situations 1

Footnotes at end of article.

and 8. Second, NCPAC's coordination with Caputo, through Finkelstein, far exceeded the "communication" sanctioned by the FEC. Finally, Caputo and Moynihan were more like opponents than like the candidates in "separate and distinct races" envisioned by the FEC.

A. Finkelstein's Role

In the two "situations" upon which it relies, NCPAC hypothesized an advertising firm that would simultaneously for NCPAC and for a Republican candidate and a polling concern working for NCPAC that would contribute a poll to the Republican candidate. The role of Finkelstein and his firm in both the NCPAC and Caputo efforts was far more significant than that of a vendor of advertising services or a polling concern. Finkelstein was NCPAC's key strategist. He formulated and directed the execution of NCPAC's plan to defeat Senator Moynihan. Finkelstein drafted NCPAC's radio spots and recruited the chairman of NCPAC's anti-Moynihan effort. Simultaneously, he served as the chief architect of Bruce Caputo's campaign. Finkelstein helped prepare the candidate's announcement speech and initial fundraising letter. He also chaired staff meetings, made recommendations with respect to staff assignments, and authored, in large part, the Caputo Committee's campaign commercials. Although the general questions with which NCPAC prefaced its request for an advisory opinion referred to "consultants," *see supra* n. 15, neither that general reference, nor the specific references in situations 1 or 8 to an "advertising firm" or a "poll," can reasonably be interpreted to apply to a key campaign strategist for both a candidate and a committee making independent expenditures designed to defeat that candidate's future opponent.

B. Communication v. Coordination

NCPAC asserts that it communicated with the Caputo campaign in reliance on the FEC's answer to situation 8 which stated, "During the primary election period NCPAC may communicate with the Republican candidate. . . ." *See supra* n. 17. According to NCPAC's Chairman, John T. Dolan: "We believed all communications . . . between [us] and [the] agents for the Caputo for the Senate Committee were 100 percent legal up until the time . . . Mr. Caputo got the nomination." FEC Memorandum of Law, Exhibit No. 4, Deposition of John T. Dolan at 46. In fact, NCPAC believed the advisory opinion permitted NCPAC and the Caputo committee to "coordinate" their activities. Dolan thus asserted,

> If someone can tell me the difference between communication and coordination, I would like them to tell me what it is.
>
> I can't believe when we asked this opinion the Federal Election Commission thought we meant communications discussing the weather. We were very specific in the types of information we asked about in that Advisory Opinion, and communications to any normal, rational human being, I am sure, would imply as related to political information.

FEC Memorandum of Law, Exhibit No. 4, Deposition of John T. Dolan at 53.

As part of its strategy, NCPAC commissioned a poll from Finkelstein to assess Moynihan's strengths and weaknesses and to determine the best way to oppose him. NCPAC then shared the results of its poll, which revealed Moynihan's vulnerabilities and profiled public attitudes about critical issues, with the Caputo campaign. Were this the extent of NCPAC's consultation with the Caputo committee, it might fall within the realm of communication sanctioned by the advisory opinion. But NCPAC went much further.

A comparison of the NCPAC and Caputo campaign materials evidences extensive consultation and coordination. The materials are remarkably similar in style, content and language. In Caputo's announcement speech and initial fundraising letter, for example, Senator Moynihan is said to have "voted to give away the Panama Canal" and "voted against capital punishment." Exhibits to Defendant [sic] Federal Election Commission Motion for Summary Judgment, Exhibit 22. Senator Moynihan is also labelled the "father of the runaway welfare system," rated by the American Conservative Union as "the most liberal Senator, tied with George McGovern, more liberal in fact than Ted Kennedy." Id., Exhibit 21. NCPAC's radio spot repeats these same allegations almost word for word. Moynihan is depicted therein as having "voted to give away the Panama Canal," as having "voted against capital punishment," and as "the father of our runaway welfare system." NCPAC's radio spot also refers to Moynihan's American Conservative Union rating, and contrasts Moynihan's record with those of Senators Kennedy and McGovern. Id., Exhibit 17.[18]

According to NCPAC, the advisory opinion permits communication and coordination between NCPAC and a Republican candidate, the result of which are a NCPAC "independent expenditure" campaign and a campaign for the Republican nomination that are mirror images of one another. That NCPAC overstates the scope of permissible communication is made plain by the degree of coordination that NCPAC would have the advisory opinion sanction.

C. The Primary/General Election Distinction

NCPAC's final contention is that it relied on the advisory opinion's distinction between (1) a political consultant who works for NCPAC in opposing a Democratic candidate for the nomination while also performing services for a candidate for the Republican nomination and (2) a consultant who supports the Republican candidate during the general election and, at the same time, assists NCPAC in opposing that candidate's opponent. No doubt the answers to both situations 1 and 8 recognize the primary/general election distinction. And, indeed, Moynihan and Caputo were candidates in separate primary races. However, the primary/general election distinction is blurred beyond recognition in this case. Caputo and Moynihan were, for all practical purposes, opponents. When Caputo announced his candidacy in September 1981, no other Republican was seeking that nomination.[19] Two months later, in November 1981, NCPAC announced its drive to unseat Moynihan. At that time, Moynihan was the only Democratic candidate.[20]

Finkelstein's strategy makes clear that Caputo and Moynihan were more than simply candidates in separate primaries. Before his withdrawal, Caputo was the frontrunner to win the Republican nomination. Thus, Finkelstein's strategy for Caputo was to preempt the field and make Caputo the only viable Republican candidate. Finkelstein consciously set out to make Caputo Moynihan's tacit opponent during primary period.[21] Thus, Finkelstein had Caputo open his campaign with an attack on Moynihan. NCPAC ignores the reality when it contends that Caputo and Moynihan were in two distinct races 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 important for our purposes, they were increasing Caputo's chances for success in any future general election confrontation with Moynihan. The FEC's concern about coordination between contributions to a candidate and expenditures against that candidate's opponent is clearly implicated by NCPAC's anti-Moynihan activities.

It matters not that Caputo never actually opposed Moynihan in a primary or general election. Had Caputo not departed the race, Moynihan and Caputo may well have remained opponents through the general election. Caputo's withdrawal prior to the primary does not negate the impact of any prior conduct that may have violated the federal election laws.

The distinctions between the facts as they actually unfolded and the facts addressed in the FEC's advisory opinion are patent. 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 the Caputo/Moynihan contest together demonstrate an impermissible degree of coordination and preclude any reliance on the advisory opinion. Any such reliance would overstep 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 common political consultant, nearly identical campaigns—regardless of whether those campaigns take place during the primary or general election season.[22]

| "Issue" | Caputo campaign materials | NCPAC campaign commercial |
|---|---|---|
| Panama Canal | "voted to give away the Panama Canal" | "voted to give away the Panama Canal" |
| Capital Punishment | "voted against capital punishment" | "voted against capital punishment" |
| Foreign Aid | "voted for foreign aid to Communist Cambodia, Cuba, Laos and Viet Nam" | "even voted foreign aid to communist countries like Cuba, Cambodia and Vietnam" |
| Tax Cut | "against giving you a 10% income tax cut" | "supports increased taxes" |
| Welfare | "father of the runaway welfare system" | "helped develop our runaway welfare system" |
| Spending | "opposed the President's plan to reduce federal spending" | "opposed cutting back on government spending" |
| ACU Rating | "ranking him the most liberal Senator" | "the most liberal Senator" |
| Kennedy-McGovern Comparison | "tied with George McGovern, more liberal in fact than Ted Kennedy" | "more liberal than Ted Kennedy . . . tied McGovern for most liberal" |

*III. Conclusion*

NCPAC's anti-Moynihan expenditures must be deemed contributions to the Caputo campaign. NCPAC thus exceeded FECA's $5000 limit on contributions by a multi-candidate political committee to a candidate or its political committee and violated the Act's disclosure requirements by failing to report its contributions. The plaintiff's motion for summary judgment is granted. The defendant's cross-motion for summary judgment is denied.

The plaintiff will enter judgment accordingly.

FOOTNOTES

[1] Section 441a(a)(4) defines a multicandidate political committee ("MCPC") as "a political committee which has been registered for a period of not less than 6 months, which has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal office." 2 U.S.C. § 441a(a)(4) (1982).

[2] Section 441a(a)(2)(A) restricts the amount a MCPC may contribute to a candidate as follows: "No multicandidate political committee shall make contributions—to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000." 2 U.S.C. § 441a(a)(2)(A) (1982).

[3] Section 434(b)(4)(H)(i) requires multi-candidate political committees to disclose all "contributions made to other political committees," including those to a candidate's political committee. 2 U.S.C. § 434(b)(4)(H)(i) (1982).

[4] Caputo exaggerated his military record and was forced to resign from the race after the press exposed the exaggerations.

[5] Finkelstein served on NCPAC's board of directors from May 1978 until May 1979.

[6] Section 437g(a)(1) of the Act provides, in pertinent part,

Any person who believes a violation of [FECA] . . . has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint . . . Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. . . .

2 U.S.C. § 437g(a)(1) (1982).

[7] If the Commission, upon receiving a complaint . . . determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act . . ., the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. The Commission shall make an investigation of such alleged violation. . . .

2 U.S.C. § 437g(a)(2) (1982).

[8] Sections 437g(a)(3) and 437g(a)(4)(A)(i) provide, in pertinent part,

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause. . . .

(4)(A)(i) [I]f the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed . . . a violation of [FECA] . . . . [T]he Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. . . .

2 U.S.C. §§ 435g(a)(3); 437g(a)(4)(A)(i) (1982).

[9] The New York State Democratic Committee had also alleged that the Caputo Committee had accepted in excess of $5,000 in in-kind contributions from NCPAC and had failed to report those contributions in violation of Sections 441a(a) and 434 of the Act. 2 U.S.C. §§ 441a(a) & 434 (1982). The Caputo Committee entered into a conciliation agreement with the Federal Election Commission ("the Commission") on December 2, 1983.

[10] Section 437g(a)(6)(A) provides, in pertinent part,

If the Commission is unable to [informally] correct or prevent any violation of this Act . . . the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

2 U.S.C § 437g(a)(6)(A) (1982).

[11] The term "contribution" 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(8)(A)(i) (1982). An "independent expenditure" is defined in section 431(17) (1982) as an "expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17) (1982). Independent expenditures are exempted from the Act's contribution limits.

[12] Section 438(a)(8) of the Act charges the Commission with prescribing "rules, regulations, and forms to carry out the provisions of [FECA.]" 2 U.S.C. § 438(a)(8) (1982). The FEC's interpretations are entitled to deference. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981).

[13] NCPAC spent $16,500 after Caputo withdrew from the race. Since it could lawfully contribute $5,000 to Caputo's campaign, its contribution exceeded the lawful limit by $52,255.

[14] Pursuant to section 437(a)(1), the FEC, upon the request of any person, "shall render a written advisory opinion relating to [a specific transaction or activity.]" 2 U.S.C. § 437(a)(1) (1982).

[15] NCPAC prefaced its inquiry with three general questions:

1. Whether, in light of the independent expenditures regulations, NCPAC is prohibited from engaging a particular consultant or vendor of goods or services, in connection with making independent expenditures advocating defeat of a clearly identified candidate, if that consultant or vendor has also been separately engaged (1) by an opponent of that candidate, or (2) by a potential opponent of that candidate?

2. does NCPAC have an affirmative duty to inquire of prospective consultants whether or not they have been so engaged?

3. Must NCPAC impose a contractual restiction on a consultant or vendor regarding for whom they may provide services or goods?

Exhibit A at 1. NCPAC's Memorandum of Points and Authorities [hereinafter "NCPAC Memorandum"]. The Commission's response to these general questions simply reiterates the presumption of coordination detailed in the Commission's regulations. *See supra* p. 4. Neither NCPAC nor the Commission place any reliance on the Commission's response to the general questions.

[16] Situation one and the response thereto is excerpted below.

*Situation 1.* NCPAC proposes to engage an advertising firm for the purpose of designing the layout and text of print advertisements advocating the defeat of a candidate for the Democratic nomination for President. The firm would do all the research and creative work involved in designing the advertisements. The advertising firm has previously been engaged by the authorized campaign committee of a candidate for the Republican nomination for President. Is the advertising firm an "agent" as defined in 11 CFR 109.1(b)(5)? Would the response to that question be different if the same advertising firm renders a distinctly different type of service to the authorized campaign committee of the candidate for Republican nomination for President, e.g. operates and manages a telephone bank for the purpose of soliciting contributions to the committee?

*Answer 1.* The request does not present sufficient information for the Commission to determine whether the advertising firm is an agent, as defined in 11 CFR 109.1(b)(5), of the Republican candidate. Moreover, the situation presented concerns an advertising firm engaged to do work for what in 1980 are two separate, distinct races; that is, provide services for NCPAC to make independent expenditures advocating the defeat of a candidate for the Democratic nomination for President when the firm has previously provided services to the campaign committee of a candidate for the Republican nomination for President. Since these are two distrinct races the Democratic candidate and the Republican candidate are not opponents at this point. Thus, the Commission concludes that it does not appear from these facts that the prior engagement by the Republican candidate's committee of the firm would preclude NCPAC from engaging the firm to make independent expenditures in opposition to the Democratic candidate for nomination. If, however, this Republican candidate for nomination becomes the nominee, NCPAC would presumably be precluded from engaging the advertising firm to make independent expenditures during the general election. The same response applies to the activity raised in your request as an example of a different type of service.

NCPAC Memorandum, Exhibit A at 4.

[17] Situation eight and the response thereto is excerpted below.

*Situation 8.* 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, conducted a poll. Among other things, the poll results showed certain data relevant to a particular candidate for the Republican nomination for election to the Senate in State A. May NCPAC contribute the poll to the Republican candidate in accordance with 11 CFR 106.4(b)? May NCPAC engage in any communication with the Republican candidate or with the Republican party committee in State A?

*Answer 8.* The Commission is of the opinion that NCPAC may contribute poll results to a candidate for the Republican nomination for election to the Senate in State A if done in accordance with Commission regulation 106.4(b). This would, of course, constitute a contribution inkind by NCPAC to the candidate's campaign committee. During the primary election period NCPAC may communicate with the Republican candidate or with the Republican party committee in State A. However, if the Republican candidate should become the nominee, that communication could preclude NCPAC from making independent expenditures regarding the candidates in the general election in State A. Moreover, depending upon the communications NCPAC has with the Republican party committee in State A and the party committee's relationship with the Republican candidate, NCPAC could be precluded from then making independent expenditures in the general election in State A.

NCPAC Memorandum, Exhibit A at 9.

[18] The following table illustrates the similarity of the anti-Moynihan and pro-Caputo media campaigns.

FEC Memorandum of Law, Appendix A.

[19] *Senator Moynihan Gets Challenger for 1982*, N.Y. Times, Sept. 16, 1981, § 2, at B5, col. 1. Whitney North Seymour, Jr., Muriel Siebert, and Florence Sullivan thereafter entered the Republican primary—but not until at least two months after Caputo withdrew from the race. *See Seymour Begins Race for Moynihan's Seat*, N.Y. Times, May 4, 1982, § 2, at B2, col. 6; Lynn, *Muriel Siebert Joins G.O.P. Race for U.S. Senate*, N.Y. Times, May 26, 1982, § 2, at B1, col. 3; *State Legislator From Brooklyn in Bid for Senate—Florence Sullivan Seeks a 3-Party Candidacy*. N.Y. Times, June 3, 1982, § 2, at B2, at col. 1. Fed.R.Evid. 401 empowers this Court to take judicial notice of these indisputable facts.

[20] Pursuant to rule 401 of the Fed.R.Evid., this Court takes judicial notice of the fact that Moynihan was unopposed for the Democratic nomination until at least January 1982. *Klenetsky to Seek Moynihan's Job*, N.Y. Times, January 28, 1982, § 2, at B13, col. 3. No opponent presented a viable challenge for the nomination.

[21] NCPAC contends that Congressman Jack Kemp was its preferred candidate. Kemp, in fact, never entered the race.

[22] In 1980, the Commission's General Counsel recommended that the Commission adopt an interpretation of the advisory opinion in issue, which interpretation NCPAC contends is similar to that proferred by the FEC in this case. The Commission, nevertheless, declined to pursue the matter. NCPAC asserts that it relied on the Commission's rejection of its General Counsel's interpretation of the advisory opinion. However, reliance on the Commission's rejection of a particular interpretation provides no support for NCPAC's position. Nowhere does the Act sanction such reliance.

Mr. MOYNIHAN. Madam President, I do not state that the 23 Federal judges who have petitioned us were specifically disturbed by the NCPAC campaign on behalf of Judge Bork, but if they were not, they should have been. So should my friend from Utah who first introduced their petition into the debate. May I say, the Senator from Utah, Mr. HATCH, is a person of such transparent integrity that I cannot doubt he would be disturbed.

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; I yield 6 minutes to the Senator from West Virginia, 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 the Constitution, and because that is what democracy 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 has been 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 concerened, 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 that Judge Bork is not an extremist and, I might add, he will make a difference on the Court.

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 believe in 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 Rehnquist; Justice O'Connor, 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's opponents have stopped at nothing to 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, White, 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 first 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 right.

White—President Kennedy's nominee, too, has voted 8 times against privacy. He said in the Bowers case against homosexual 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 Dronenburg case 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.

Poll Taxes—Neither Harper case nor Judge Bork approved of discriminatory poll taxes yet we hear in Judiciary Committee report that this case had something to do with "keeping minorities from voting." This is an outrageous distortion.

Literacy tests—Judge Bork never addressed literacy tests at all but only criticized the reasoning of the case that allowed Congress to change the Constitution by majority vote. In fact, he opposed the Human Life bill on this same basis.

*Shelley* v. *Kramer*—Judge Bork actually won the Supreme Court case providing enforcement against 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 or as judge advocate taken 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 Judge Bork used the "reasonableness" standard of Justice Stevens.

Judge Bork struck down gender discrimination at State Department. (Palmer, Osoky)

Judge Bork won meaning for equal pay for equal work as Solicitor General. (Corning Glass) Moreover he enforced that law as Judge. (Laffey)

Judge Bork defended LaFontant, a black woman, at the justice Department.

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 around the nation swooned 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, telethon campaigns, distorted polls, extensive lobbying by outside groups, postcard campaigns, political threats, and counter threats.

I have had to consider a new amendment based on this proceeding. We may have to consider 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 these campaigns are going to be 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 independence and integrity of the Federal judiciary 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 proceeding. 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 partial truths presented over and 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 committe report is sophomoric and slanted.

Madam President, permit me to elaborate. In what Senator BIDEN refers to as "Inconsistencies 3-10," 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 colleague 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'Connor.

In her dissenting opinion in Akron, a 1983 case invalidating a State law requiring a 24-hour waiting period on abortions, Justice O'Connor said:

Irrespective of what we may believe is wise or prudent policy in this difficult area, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards 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.

Let's count still a second boat that stays 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 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 rooms 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 in the home." He was joined in that opinion by Chief Justice Burger and Justices Rhenquist and O'Connor. Justice White is not adrift in the rapids of judicial activism.

The next boat safely ashore on 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:

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 to look far beyond 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. 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.

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 Dronenburg 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.

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.

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 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 "a 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 takes issue with the equal protection reading of Skinner under what he calls "Inconsistency 15," but it is impossible to take issue with Black's refusal to join the Stone substantive due process rationale for that case.

To return to "Inconsistencies 3-10," 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 not 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: whether the State had valid reason for adopting a different rule for prisoners. 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 Judge Bork's reasonable basis test for equal protection. The clear basis for a reasonable distinction between prisons and law-abiding citizens would be legitimate penological interests. In the case of marriage, Judge Bork would not find any reason 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, therefore, hardly suggests an 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.

In sum, we need to put this entire 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 my main point. 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 notion 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, 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 to discuss within "Inconsistencies 3-10." I will not recite them all, but for instance he did not find any fault in No. 5. The reason is clear.

This is a classic example of sentimental, but decidedly unlegal, reasoning. The report quotes, with great fanfare, the comment of one Senator that

"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, we would have no lawsuits.

In every lawsuit, the litigants on each side of the case contend that they possess superior legal rights and liberties. Consider the following examples: 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 currently 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 currently before the Court. One litigant asserts the rights or liberty to pray silently 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 asserted by the other litigant.

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 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 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 noble-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.

Madam 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 license. Then 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 referring to the Nazis, it may be too late. On both points, Judge Bork had concerns. 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 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 discounted it—as I earlier mentioned—if the Senator 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 articles were 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.

Preface: 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 such qualifications are 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.

ALTERNATIVE 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.

Judge 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]

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[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 verbatim quote. 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 federal judge. These qualifications are more important than whether I agree with every opinion he has expressed.

Judge Bork has consistently opposed court decisions that substituted the political opinions of the Supreme Court for the judgment of both Congress and the Constitution. His confirmation would help to restore the kind of government—of laws, not of men—envisioned by the Founding Fathers.

All in all, if you had to say, do you think the U.S. Senate should confirm or turn down the nomination of Judge Bork to be on the U.S. Supreme Court?

Results:

(1) Confirm: 29 percent. (1) Confirm: ?

(2) Turn down: 57 percent. (2) Turn down: ?

(n) Not sure: 14 percent. (n) Not sure: ?

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[From the Wall Street Journal, Oct. 22, 1987]

THE BORK TROPHY

As the Senate takes up Robert Bork's nomination to the Supreme Court, we would like to believe that there might be some Senators among his declared opponents with the statesmanship to admit they were initially misinformed. Sadly, the more evidence that accumulates, the more heatedly they seem to deny it.

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 bedroom spy in his careers as Yale law professor, U.S. solicitor general or appeals judge. His civil-rights record? As judge, he's sided with the minority plaintiff in seven of eight cases. As solicitor general, he argued more civil-rights cases than any Supreme Court nominee since Thurgood Marshall, urging an extension of a civil right in 17 of 19 cases.

Women? Judge Bork ordered Northwest Airlines to pay stewardesses as much as male pursers for comparable jobs. He wants a new reasonable standard for the 14th Amendment that would effectively adopt the Equal Rights Amendment. Privacy? He ridicules the flighty excesses of the Warren Court, but refers to settled First, Fourth and Fifth Amendment rights to privacy.

The bloody campaign of distortion now lies dissected. Ralph Neas was already gunning for whoever was nominated to replace Lewis Powell when Teddy Kennedy rallied the troops with his outrageous speech. The lobbyists actually did a poll to find the best issues for distorting Judge Bork's views. Even Harvard's Laurence Tribe got into the game by mischaracterizing Judge Bork's Ninth Amendment views, not to mention Justice Black's.

A Howard Metzenbaum staffer successfully and possibly criminally intimidated a black law professor into canceling his testimony. Jewel LaFontant had to risk a threatened boycott of Revlon to testify for Judge Bork. A Harris Poll that includes a falsified quote from Judge Bork was trumpeted to "prove" that most Americans opposed Judge Bork.

Now, to justify supporting this assault, the supposedly statesmanlike Howell Heflin is attacking Judge Bork from the right. He told an Alabama radio station that he "was troubled by Judge Bork's extremism—an admission that he had been a socialist, a libertarian, that he nearly became a Communist, and actually recruited people to attend Communist Party meetings, and had a strange life style. I was further disturbed by his refusal to discuss his belief in God—or the lack thereof."

The liberal Advocacy Institute has scheduled a seminar for Monday on how the left beat Judge Bork. The theme is that "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 they created for Judge Bork were brazen lies about a distinguished jurist. His opponents will take the nation's finest legal scholar for mounting as a trophy. But in our experience, this is the sort of victory for which the victors eventually pay.

Mr. THURMOND. I yield 4 minutes to the able Senator from Wyoming, Senator SIMPSON.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. SIMPSON. Thank you, Madam President.

Well, we are ready to conclude our activities on this vote. I want to thank the majority leader for arranging the time to do this, and I am fully aware that it could have been delayed and stretched out. There was no intent on the part of the proponents of Robert Bork to do that, and I think we have proven that by reaching a time certain to vote.

What was wanted and what has been attained, regardless of the vote, is the opportunity to have this matter discussed in the U.S. Senate. For this is the arena, by constitutional fiat, that we fulfill our advise and consent role and we cannot do that in the Judiciary Committee, no matter how fairly that may have been conducted or in any other way that others may think it might have been conducted.

So the opportunity to present the matter before the Senate is what we were here for and one of the key issues in the nomination process is the role of the Supreme Court and the legislative body in our system of government. That is where we have defined the issue of separation of powers. But it is here where we are to do our advise and consent.

The important thing to me, Madam President, is that 86 persons in this Senate who were not on the Judiciary Committee were able to speak their piece. They were able to tell their side, give their interpetations of this situation and we have heard from them. We have heard, I think, some superb debate—I thought rather reasoned debate from the proponents.

Senator DANFORTH gave a powerful series of remarks here this morning, and who would know the man better than Senator DANFORTH, who was a student of his at Yale University.

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.

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 yeast 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 hours, 3 hours, or 4 hours. They said that minds were made up, that we ought to move on to other business.

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 might be somebody on the other side of the aisle. 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 is certainly 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 questionable 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 process was upheld.

But at the same time, there was an extensive campaign being waged on television, radio, in the newspaper, just like a political campaign. There may have been bumper strips. I did not see any. There may have been buttons. There were a lot of advertisements.

Some were sponsored by a group called The American Way. I know some of the good people in The American Way. What The American Way—it means to me—is fairness; it means objectivity; not jumping to some conclusion; nor some slick radio ad showing a family standing there with Gregory Peck's voice in the background saying, "This man will affect your lives in the future," and on and on and on.

I think what we really have to determine, and I hope the American people now understand, is that the real debate has been over the proper philosophy of judging, debate about whether our course in the future will be charted by unaccountable judges or elected representatives of the people.

Finally, I hope that everyone now understands the real Judge Bork, the exceptional jurist and the very good and decent man whose outstanding record demonstrates he is uniquely qualified for services on our Nation's highest Court.

Some have risen during this debate to praise Judge Bork and others have risen to bury him. I rise as a former leader of the Senate to thank him.

There was a danger that 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 Bork guaranteed that the Senate would live up to its responsibilities.

Through this week's debate, many of my colleagues for the first time had the opportunity to study the committee report and the hearing record. When before, they and the public had only the intense public campaign to work from, a public campaign that the Washington Post condemned for its "intellectual vulgarization and personal savagery * * * of the attack" and for its profound distortion of the record and the nature of the man."

I think it is clear that the entire confirmation process has been colored, and in some ways compromised, by the misinformation and distortion about Judge Bork's views on key issues and about his overall record.

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 President, 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 Judge Bork wants to reverse 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 a substantive issue under the Federal civil rights laws; 17 of those briefs urged the Supreme Court the relevant law and rule broadly in favor of minority and women plaintiffs. In a word, Solicitor General Bork did not retreat on civil rights.

To the contrary, he was in the forefront of the charge. In fact, in the 10 cases in which both Solicitor General 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 rendered or 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.

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 LaFontant, and 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 most unfair criticisms leveled at Judge Bork suggests that he is an "extremist who believes—Americans—have no constitutional right to personal privacy." This charge is absurb on its face, since, as Judge Bork has noted, the Constitution explicitly protects certain rights of personal privacy, including, for example, the "right of people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures."

What Judge Bork has found unsettling is the judicial creation of a vague, generalized right to privacy based on the "penumbras"—the vague, indefinite borderline areas—of these specific constitutional guarantees.

Now, like Justice Hugo Black, I value my privacy as much as the next person. But, also like Justice Black, I get concerned when courts start poking around in vague, borderline areas looking for new constitutional violations.

Whether or not one agrees with Judge Bork's positions on Griswold versus Connecticut or Roe versus Wade, it is simply irresponsible to label those positions as extreme or unsupported. In taking those positions, he is in good and numerous company with some of the best legal thinkers in our Nation. The brickbats that been hurled at him on this subject, therefore, are simply one more example of slogans passing for legal reasoning.

Mr. DOLE. Madam President, how much time have I remaining?

The PRESIDING OFFICER. The Senator has a minute and a half.

Mr. DOLE. I would just say in that minute and a half——

Mr. BYRD. Do you need more time?

Mr. DOLE. A couple of minutes.

Mr. BYRD. Madam President, I ask unanimous consent that the distinguished Republican leader have an additional 5 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

NOW THE VOTE

Mr. DOLE. That leaves us with the vote. Nobody is in doubt about the vote. Judge Bork is not 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 deserves 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 that issue from coming into focus during this confirmation process. Had this debate not occurred, they would have succeeded. But the debate has confirmed what the minority report of the committee states so clearly: The fundamental issue involved here is who governs America.

Will our most difficult and important choices be made by judges appointed 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 subjective views of liberty and morality? That is one side.

On the other side, will we require that judges faithfully follow the written law and preserve for the elected representatives of free 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 generally been, if the Constitution is silent, the decision is for the people and their elected representatives.

My colleagues would not readily relinquish 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 Constitution? It is far more difficult to correct an error in constitutional interpretation 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 understand that the scales have been tilted toward 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 protected because of it. They understand that judicial activism is a formula for denying them a say on issues like the death penalty and restrictions on pornography. Attention has been diverted from these and other fruits of judicial activism, 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 important question quite clear. We should confirm this nominee.

We are not going to do it but we should. And again I would say thanks to Judge Bork for saving the process and I thank Senators for saving the process for the next judge. Maybe in 10, 20, 30 years it will then be a Democrat President and they will send up a liberal nominee.

That would be a little early—10, 20, 30 years.

So we have to keep in mind that history is going to move on. This one vote is important but we have saved 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 Supreme Court. Indeed, it is my very great hope that the spirit of cooperation that we are trying to build with the President on solving the budget crisis will carry over to the next choice to the Supreme Court.

I hope that we have all learned from this experience that controversial nominations breed controversy. There has been an excess of charge and countercharge. The actions of the outside interest groups, on both sides of the debate, have contributed to the controversy. 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 began the politicization of the process at the start.

I know some Senators are disturbed by the outcome of this nomination. They may feel frustrated that they did not do enough on Judge Bork's behalf. They may have been caught off guard by the intensity of the opposition to Judge Bork. They may even feel that Judge Bork was not given a fair shake.

But if my colleagues allow those feelings to overflow into the next debate, it can only be unsettling. It will not be positive or healthy for the country, the Supreme Court, or the Senate. So, I urge my colleagues to think ahead.

We all need to begin to look down the road toward the next nominee. It is time to start the healing.

I urge the President to back away from a policy of defiance. And I urge we all back away from a policy of recrimination and retaliation.

I have tried to set the right tone on this nomination. Whether I have been successful or not, I do not know, but I have never asked any Senator on either side of the aisle to vote against Judge Bork. I have not asked any Senator how he would vote. I have not asked anybody about any vote count. I have said just the opposite in my caucuses, namely, that we ought not make this a litmus test of party loyalty. We are not electing a Democratic Court. We are not electing a Republican Court. But we are acting to fill a vacancy thereon, and we do share in the appointment. Let those who think otherwise read the Constitution. The President shall nominate and, by the advice and consent of the Senate, shall appoint Justices to the Supreme Court.

A policy of confrontation will only breed further controversy. Let us all lower our voices. I urge the President to actively engage in a new spirit of consultation with the Senate. I urge the President to put aside old animosites, to seek a new tone and a new sensitivity. Justice can only be enlarged if we work together.

The President has a right to nominate a conservative judge. No Senator denies the President the right to nomi-

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 these nominations unsettled the majority 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 Judiciary Committee. 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 appointment 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 the 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. I am entering separate statements into 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 footnote in Judge Bork's elegant theory of the law to be expended at an "intellectual feast." Indeed when Judge Bork was asked why he wanted to serve on the Court his answer was, "It would 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 seem 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 its less than 2 million people, that is a lot of calls. But by the way, the calls were not coming from West Virginia. 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 jurisprudential views none ranks 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 and 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 said:

> All men are created equal * * * endowed by their Creator with certain unalienable rights * * * among (which) are life, liberty, and the pursuit of happiness.

As many philosophers and scholars have pointed out, the propounders 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 secure 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 them made alienable at the mere whim of the majority unless we had in the charter by which we formed the Government taken infinite care to list each one, cross every "t," dot every "i," and reiterate at the end "we really mean it."

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 recognition that it was prudent to add 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 ones were protected, that unlisted 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 operate as a limitation upon 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 and the fact that 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 mater 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 under Chief Justice Hughes, Justice and then Chief Justice Stone, Justice Cardozo, and Justice Frankfurther, 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 1961, 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 the specific prohibitions.

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 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."

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 cases, runs through the United States Reports. A State, caught up in a natavist 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 the rights abridged to be a protected liberty and struck both State actions down. A State provided for the sterilization of some convicted defendants but not others in an apparently random, purposeless 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 grandmother the right to have in her household two grandchildren of different sons, and the Court, in an opinion by Justice Powell, whom Judge Bork would replace, found that our history and tradition contained a respect for the existence of the nuclear family which a government could not abridge, except on a showing stronger than the one the city proffered in this case. A State enacted a statute which denied an individual who owed unpaid support payments to a child he had fathered the right to marry, and the Court, in a case Justice Powell joined, held that the right to marry was such a fundamental liberty protected by the due process clause that the statute was void.

What radical interests these decisions protected, Mr. President. The right to have your child taught a foreign language or educated in a religious school. The right not to have your powers to conceive children taken away. The right to have your grandchildren in your home. 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 pounced 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.

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.

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. Although he valued the standard of proof, if it was not expressly in the Constitution, Government could adopt a lesser standard.

Now, I do not know where Judge Bork stands on Winship. If he 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.

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 concur in the sentiment. 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 here as elsewhere carry us only 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 strictures of the fourth amendment's 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 and we have a reasonable expectation not to have our privacy intruded upon by electronic means. It was not too activist for the Supreme Court to hold that defamation actions could infringe upon freedom of the press, even though the framers and ratifiers knew and approved of defamation actions. The fact was that the possibility of enormous judgments awarded by juries against the press deterred the press from pursuing the truth into areas where it should have gone.

These are not my examples. Judge Bork has argued persuasively both positions. He has said that interpretation of constitutional provisions in a new way to protect against abridgment of values that are implicit in those provisions is properly the essence of the judicial function.

Judge Bork, however, is not so disposed to recognize the function of the judiciary to resolve constitutional disputes between the executive and the Congress at the behest of one or both Houses or at the behest of individual Members suing on behalf of Congress. "We ought," he wrote in Barnes versus Kline, "to renounce outright the 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.

Standing, as many of my colleagues know, is not an express constitutional requirement. That is, nowhere in article III or elsewhere does the Constitution say that before one can bring a case or controversy to court one must show that he has suffered an "injury in fact" or is to certain of suffering one as to amount to the same thing. 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.

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 institutionally, by executive action, although, to be sure, in the hearings, in response to my prodding, he did suggest that in the event of a total executive-congressional impasse or some "terrible emergency" he just did not know that he would be wholly adamant. If the terrible consequences which he could foresee from granting congressional standing would not occur, he also suggested, a lot of his opposition would diminish or disappear.

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 so 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 had the power to act or if we transgressed some limitation of the Constitution in so acting. The Court did just that with Gramm-Rudman-Hollings, with the campaign finance reform laws, with the legislative veto. The Supreme Court did precisely what it was supposed to, even though there are those who think it may have come to the wrong decision in one or more of those cases.

Similarly, when President Truman seized the steel mills during the Korean war the steel companies went to the court to challenge his power to act under the Constitution or laws enacted by Congress, and they won.

The Supreme Court and the lower Federal courts are there to adjudicate concrete disputes over the meaning of constitutional provisions. They do it frequently. If there were always private plaintiffs who could come forward, we in Congress might rest easy at least in the knowledge that congressional-executive disputes would be presented to the courts and we could present our views by filing amicus briefs or by intervening. Yet, we know that there are disputes in which no private plaintiffs will have standing, because they cannot show the requisite injury.

I do not contend that just because no private party can raise a claim then automatically Congress or the House or Senate or a Member or group of Members should be able to. No, I believe that Congress or a Member must always have to show an injury, either personal or institutional. That is my understanding of what the Constitution requires. Where I part company with Judge Bork is that I totally disagree with him that the injury is a phantom. He does not believe that any dispute between Congress and the ex-

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."

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 court judges 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 preventing the increase from going 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 properly should have on its interpretation of the Constitution. Would anyone, would Judge Bork, argue that the judges should have been denied standing to bring their suit?

Now, 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), would anyone, would 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 prevents 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 congressional adjournment prevented him from returning a bill and it was thus dead, thus pocket vetoed. In Barnes versus Kline, the adjournment was for approximately 2 months between the first and second sessions. Kennedy versus Sampson involved an intrasession 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 Barnes versus Kline, the Senate intervened 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 as to make out an injury. 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. Thus, it is evident that 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. Under the pure doctrine, 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 it 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 not be able to override. In order 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 prevented the President 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 congressional arena. To permit the President to enlarge his power beyond those limits reduces congressional power and imbalances the scale of the 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 power of Congress to vote whether 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 adventitious 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 clause which removes it from judicial construction. So, here, the Congress will have its power enlarged or diminished, held to its proper scope or

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 not Congress and its Members entitled to the same rule? Are we to be treated as second class citizens, simply because it is Congress complaining?

The potential for disputes between President and Congress is legion. Most of them are suitable for political resolution and need never concern 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 commission a judge or another appointee without complying with the advice and consent requirement of submitting the name to the Senate. The President may choose to conclude an arms treaty or some other treaty as an "executive agreement" and refuse 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 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 that was the view of the Justice whom Judge Bork has been named to replace. In Goldwater versus Carter, Justice Powell noted that the courts, the Supreme Court, should take care not to intrude where it should not but that there was a role.

"Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should and almost invariably do, turn on political rather than legal considerations. The judicial branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse." The Justice continued: "By defining the respective roles of the two branches in the enactment process, this Court will help to preserve, not defeat, the separation of powers."

Justice Powell had it right and Judge Bork, I am afraid, has it wrong. It is peculiarly the province of the Court to preserve the boundaries of separation of powers by redressing injuries done to the constitutional powers of one branch by another.

JUDGE BORK AND THE SPECIAL PROSECUTOR ACT

Mr. President, among my many difficulties with 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 a office to be inherently executive, constitutionally committed to the discretion and power of the President, and not subject for any reason to be surrounded 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" battlers 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 or to dismiss the action. 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, public pressure caused 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 took office that prosecutions 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.

No, Mr. President, the act is implemented by the Attorney General 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.

Judge Bork 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 position. 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 remove from officials high up in the 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 of this 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. But it certainly can provide against corruption and coverups and conflicts of interest and the appearance of those things. It has the obligation to do so. It found that it was "necessary" and that it was "proper" to provide in specific, triggering circumstances for the appointment, by a court of law, as authorized in the appointments 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 much potential and actual harm 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 place on the Supreme Court which eventually will have to decide the constitutional issue a man who so departs from this consensus.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Madam President, I believe I have 5 minutes left.

The PRESIDING OFFICER. The Senator has 5 minutes and 55 seconds.

Mr. THURMOND. Madam President, the distinguished chairman of the committee has agreed 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 smears, Robert Bork has not been a racist, sexist, sterilizer, 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 argued more civil rights cases than any Supreme Court nominee since Thurgood Marshall, urging an extension of a civil right in 17 of 19 cases. Women? Judge Bork 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 flighty excesses of the Warren court, but refers 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 that "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 they created for Judge Bork were brazen lies about a distinguished jurist. His opponents will take the nation's finest legal scholar for mounting as a trophy. But in our experience, this is the sort of victory for which the victors eventually pay.

Madam President, I wanted to read that excerpt because it sums up briefly I think the situation.

I want to remind the Senate that Judge Bork was approved by the largest bar association in the world, the American Bar Association. He recieved their highest commendation, the highest rating they could give him, for integrity, judicial temperament, and professional competence. I would remind the Senate that no one has questioned his character. He is a man of unquestioned character. He is a man of tremendous courage. He is a man of exceptional capacity. He is a man of unfailing courtesy, and he is a man of true compassion. No one has raised any point as to those qualifications.

I would remind the Senate that a former President of the United States testified for him, and even introduced him at the hearing, President Ford. Everyone in the Congress who knows 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.

I would remind the Senate that 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 ax 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 I might say in the mainstream according to most people.

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. Brownell 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——

Mr. BIDEN. May we have order in the Senate? The Senator is making an important statement.

The PRESIDING OFFICER (Mr. REID). The Senate 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 were the head of this largest 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 this 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 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 passing up a scholar; we are passing up a patriot; we are passing 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, a few years ago, 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 make a great Supreme Court Justice, and 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 of the same nature and 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 nothing more than a test case. The Griswold case arose because a doctor sought 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 concededly "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.

Again, this is an outrageous charge, which has no bearing on the actual case or Judge Bork's criticism of it.

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 rights to privacy recognized by the Court, 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's criticism of this case is that 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-oriented jurisprudence. 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 his theoretical view. Judge Bork has stated:

> As the result of the responses of scholars to my article, I have long since concluded that many forms of discourse, such as moral 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 materials 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 they defamed him 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 in a concurring opinion 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 those clauses. Perhaps the framers did not invision the libel action as a major threat to that freedom. . . . But if over time, the libel action 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 inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate 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 hyperbold" and therefore not actionable.

In McBride versus 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's opinion invalidating a regulation requiring cable television operators to carry general television programming of local broadcasters.

In Lebron versus Washington Metropolitan Transit Authority, Judge Bork, joined by Judge Scalia and Judge Starr, ordered the Washington, DC, subway system to lease space to an artist to display a poster highly critical of President Reagan and members of the administration. He held that the subway authority's decision not to lease the space requested was based on a judgment about the content of the message and that the authority's action amounted to an impermissible prior restraint on free speech. After an independent examination of the whole record, Judge Bork rejected the subway authority's defense.

Mr. President, the charges that Judge Bork takes a narrow view of the first amendment protections afforded to speech and to the press are just not true.

Allegation. Judge Bork would overrule many of the Supreme Court's important cases.

Fact. Mr. President, again we have a distortion of Judge Bork's true views on precedent.

Judge Bork has demonstrated in testimony, writings and speeches a view of precedent that is in full accord with the dominant tradition in American jurisprudence. That tradition reflects a recognition that there will be occasions on which a reconsideration of precedent will be appropriate, but that respect for continuity and stability in the law require that overruling of prior decisions be done sparingly and cautiously.

The literature and the Supreme Court case law, indicate two distinct approaches to the role of precedent in constitutional cases. The first position is that precedent should be given no weight when the Supreme Court is convinced of prior error in interpreting the Constitution. The other, more conservative, position is that precedent must be given some, although not dispositive, effect in deciding whether to overrule a prior constitutional decision. Judge Bork adheres to the latter approach.

The Supreme Court articulated its views on the subject in Smith versus Allright, an 8 to 1 decision overruling Grovey versus Townsend, a unanimous decision handed down only 9 years earlier. The issue in these cases was the constitutionality of the white primary. Grovey has rejected the challenge, reasoning that to deny a vote in a primary was a mere refusal of party membership with which the State need have no concern. The dissent in Allright took pains to point out that "Not a fact differentiates [the prior] case from this except the names of the parties." Nevertheless, the majority felt no obligation to abide by Grovey, looking instead to the constitutional provisions dealing with the right to vote. Convinced of its prior error, the Court overruled Grovey, commenting on the role of precedent as follows:

> In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its 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 overturned the rule of separate but equal laid down 58 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.

This is a position which Judge 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 is *Brown* v. *Board of Education,* voiding 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, standing alone, to justify its being overruled. At his hearings for the Surpreme 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-

trict 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 commerce clause would still be as limited as it was in 1936. 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 prior decisions 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 for a judge to ignore or overturn 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. There is a need for stability and continuity in the law. There is a need for predicability in legal doctrine. And it is important that the law not be doctrine. And it is important that the law not be considered as shifting every time the personnel of the Supreme Court changes.

Judge Bork also made a distinction at the hearings between pecedent in the area of constitutional law and precedent in the area of statutory law. As he noted in his taped remarks at Canisius College in 1985: "* * * If you construe a statute incorrectly, the Congress can pass a law and correct you. 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 prior precedent. He neglected to add, as he always had before, that many areas of law are too settled to be overturned. Much was made of this 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 hands speech after speech and interview 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 very high degree of respect 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 Judiciary Committee of 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, with notable lack of success, as 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 order to discharge Cox as 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 lawfully order the discharge of Cox, who was an employee of the executive branch. Richardson previsously 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 inclined 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 if he resigned, the dominoes could fall indefinitely, far down the line, leaving the Department without a strong and adequately qualified leader. That was a very practical concern. We had a situation in which not only Ruckelshaus and I, but all my top staff, were picking up and leaving. The question really, as a practical matter was, how do you maintain the continuity and integrity of the investigation in these circumstances.

Philip Lacovara, Archibald Cox' 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 he was "satisfied that Judge Bork acted for what were reasoned and reasonable motives and that his conduct was in all respect 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 hearing there were 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 Gerhard 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 strained decision in the court of appeals. The court of appeals accordingly 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 I don't question 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 "wish[ed] 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 hearing:

"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 holds 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 committed no "illegal" act and that 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 resumed their grand jury sessions as scheduled 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 Justice Department and 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 which, Lacovara and Deputy Special Prosecutor Henry Ruth attended on Monday, October 22, 1973, and 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 unrebutted testimony based on discussions 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, exceptional ability and professional 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 investigation 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 inpugn 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 sudden-

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 that controversy 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—58, 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 live with her grandchildren, a basic right of privacy, which can only occur, that finding, if one acknowledges it exists in the Constitution, which Judge Bork does not.

I would respectfully submit that the American people think, unlike Judge Bork, that a divorced father has a constitutional right to see his blood child, as Judge Bork does not think he does, constitutionally.

I respectfully suggest that the American people believe, unlike Judge Bork, that Congress has the power to say to all States, "You cannot, under any circumstances, have a literacy test for voting."

I believe that the American people believe, unlike Judge Bork, that even a small poll tax, even a $1.50 poll tax—which would be $5 today—in Virginia, is wrong. I believe this is a debate about principle, the principle of how one interprets the Constitution.

We are about to begin our solemn duty of voting on the nomination of Robert Bork, and the principle which began these hearings for this Senator, I believe, ends the debate for this Senator.

I believe that all Americans are born with certain inalienable rights, certain God-given rights that they have, not because the Constitution says they have them. I have rights because I 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 content * * *. None can be cabined without destroying the soul of the constitution and its capacity to encompass changes in time, place, and circumstance.

They include such 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 rights, 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 Frankfurter, Brandeis, Harlan, and Powell. 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 concerns voiced 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 Senator SIMPSON and I would disagree a little 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 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 strayed outside 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, that 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 INOUYE 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 them 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 Andy 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 and his 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 unrepresented 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? Almost every Senator who spoke in support suggested that at the least the Senate is succumbing to political pressures and utilizing ideological and political litmus tests.

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 repudiate 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 labeled 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's views, 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.

In 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, "the deepest exploration 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. But let me quote from one of the most distinquished 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 cabined 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, Frankfurther, 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 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.

Can the Senate take the risk of confirming to the Supreme Court someone who does not recognize certain fundamental rights that are imbedded in the fiber of our Constitution—that are embedded in the fiber of our Nation?

I think 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 an 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 the conflict in deep constitutional principle that I have with Judge Bork.

But let me make this clear: I do not consider what has happened here to count against Judge Bork's honor and integrity, and I hope no one in the country does. Still, it is with a heavy heart for the man and his family that I urge my colleagues to vote against Robert Bork, for I suspect this is a post he wanted very much, and I fear others might 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 congratulate 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 can all 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 he yield back his 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.]

YEAS—42

| | | |
|---|---|---|
| Armstrong | Grassley | McConnell |
| Bond | Hatch | Murkowski |
| Boren | Hatfield | Nickles |
| Boschwitz | Hecht | Pressler |
| Cochran | Heinz | Quayle |
| Cohen | Helms | Roth |
| D'Amato | Hollings | Rudman |
| Danforth | Humphrey | Simpson |
| Dole | Karnes | Stevens |
| Domenici | Kassebaum | Symms |
| Durenberger | Kasten | Thurmond |
| Evans | Lugar | Trible |
| Garn | McCain | Wallop |
| Gramm | McClure | Wilson |

NAYS—58

| | | |
|---|---|---|
| Adams | Fowler | Packwood |
| Baucus | Glenn | Pell |
| Bentsen | Gore | Proxmire |
| Biden | Graham | Pryor |
| Bingaman | Harkin | Reid |
| Bradley | Heflin | Riegle |
| Breaux | Inouye | Rockefeller |
| Bumpers | Johnston | Sanford |
| Burdick | Kennedy | Sarbanes |
| Byrd | Kerry | Sasser |
| Chafee | Lautenberg | Shelby |
| Chiles | Leahy | Simon |
| Conrad | Levin | Specter |
| Cranston | Matsunaga | Stafford |
| Daschle | Melcher | Stennis |
| DeConcini | Metzenbaum | Warner |
| Dixon | Mikulski | Weicker |
| Dodd | Mitchell | Wirth |
| Exon | Moynihan | |
| Ford | Nunn | |

The PRESIDING OFFICER. On Rollcall No. 348, the nomination of Robert H. Bork, the yeas are 42, the

nays are 58, the nomination is not confirmed.

Mr. BYRD. I move to reconsider 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 1988

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 and for the Department of Defense for the fiscal year ending September 30, 1988, 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 show 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, 1988, for military construction functions administered by the Department of Defense, and for other purposes, namely:

MILITARY CONSTRUCTION, ARMY

(INCLUDING RESCISSIONS)

For acquisition, construction, installation, and equipment of temporary or permanent public works, military 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, **[**$908,160,000**]** *$974,630,000,* to remain available until September 30, 1992: *Provided,* That of this amount, not to exceed**[** $133,120,000**]** *$120,120,000* 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, $6,800,000 is hereby rescinded: *Provided further,* That of the funds appropriated for "Military Construction, Army" under Public Law 99-173, $28,000,000 is hereby rescinded.

MILITARY CONSTRUCTION, NAVY

(INCLUDING RESCISSIONS)

For acquisition, construction, installation, and equipment of temporary or permanent public works, naval installations, facilities, and real property for the Navy as currently authorized by law, including personnel in the Naval Facilities Engineering Command and other personal services necessary for the purposes of this appropriation, **[**$1,380,855,000**]** *$1,505,072,000,* to remain available until September 30, 1992: *Provided,* That of this amount, not to exceed **[**$148,655,000**]** *$130,000,000* 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, Navy" under Public Law 98-473, $6,800,000 is hereby rescinded: *Provided further,* That of the funds appropriated for "Military Construction, Navy" under Public Law 99-173, $19,400,000 is hereby rescinded.

MILITARY CONSTRUCTION, AIR FORCE

(INCLUDING RESCISSIONS)

For acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property for the Air Force as currently authorized by law, **[**$1,115,950,000**]** *$1,179,014,000,* to remain available until September 30, 1992: *Provided,* That of this amount, not to exceed **[**$121,036,000**]** *$115,000,000,* 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 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 401st Tactical Fighter Wing from Spain to another country.*

MILITARY CONSTRUCTION, DEFENSE AGENCIES

(INCLUDING TRANSFER OF FUNDS)

(INCLUDING RESCISSIONS)

For acquisition, construction, installation, and equipment of temporary or permanent public works, installations, facilities, and real property for activities and agencies of the Department of Defense (other than the military departments), as currently authorized by law **[**$564,886,000**]** *$597,865,000,* to remain available until September 30, 1992: *Provided,* That such amounts of this appropriation as may be determined by the Secretary of Defense may be transferred to such appropriations of the Department of Defense available for military construction as he may designate, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: *Provided further,* That of the amount appropriated, not to exceed **[**$62,800,000**]** *$55,000,000* 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, $1,900,000 is hereby rescinded: *Provided further,* That of the funds appropriated for "Military Construction, Defense Agencies" under Public Law 99-173, $5,300,000 is hereby rescinded.

NORTH ATLANTIC TREATY ORGANIZATION INFRASTRUCTURE

(INCLUDING RESCISSION)

For the United States share of the cost 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 headquarters) and for related expenses for the collective defense of the North Atlantic Treaty Area as authorized in military construction Acts and section 2806 of title 10, United States Code, **[**$376,000,000**]** *$386,000,000,* to remain available until expended: *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.*

MILITARY CONSTRUCTION, ARMY NATIONAL GUARD

(INCLUDING RESCISSION)

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, **[**$158,052,000**]** *$194,925,000,* to remain available until September 30, 1992: *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

(INCLUDING RESCISSIONS)

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 September 30, 1992: *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

(INCLUDING RESCISSION)

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, to remain available until September 30, 1992: *Provided,* That of the funds appropriated for "Military Construction, Army Reserve" under Public Law 99-173, $1,800,000 is hereby rescinded.

MILITARY CONSTRUCTION, NAVAL RESERVE

(INCLUDING RESCISSION)

For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the reserve components of the Navy and Marine Corps as authorized by chapter 133 of title 10, United States Code, and military construction authorization Acts, [$67,637,000] *$73,737,000*, to remain available until September 30, 1992: *Provided*, That of the funds appropriated for "Military Construction, Naval Reserve" under Public Law 99-173, $1,200,000 is hereby rescinded.

MILITARY CONSTRUCTION, AIR FORCE RESERVE

(INCLUDING RESCISSIONS)

For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the Air Force Reserve as authorized by chapter 133 of title 10, United States Code, and military construction authorization Acts, [$69,620,000] *$79,300,000*, to remain available until September 30, 1992: *Provided*, That of the funds appropriated for "Military Construction, Air Force Reserve" under Public Law 98-473, $200,000 is hereby rescinded: *Provided further*, That of the funds appropriated for "Military Construction, Air Force Reserve" under Public Law 99-173, $1,800,000 is hereby rescinded.

FAMILY HOUSING, ARMY

(INCLUDING RESCISSIONS)

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, [$316,090,000] *$355,190,000*; for Operation and maintenance, [$1,267,277,000] *$1,248,277,000*; for debt payment, $2,906,000; in all [$1,586,273,000] *$1,606,373,000*: *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 98-473, $900,000 is hereby rescinded: *Provided further*, That of the funds appropriated for "Family Housing, Army" under Public Law 99-173, $19,400,000 is hereby rescinded.

FAMILY HOUSING, NAVY AND MARINE CORPS

(INCLUDING RESCISSIONS)

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, [$244,914,000] *$194,281,000*; for Operation and maintenance, [$534,223,000] *$526,790,000*; for debt payment, $2,022,000; in all [$781,159,000] *$723,093,000*: *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 98-473, $400,000 is hereby rescinded: *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

(INCLUDING RESCISSIONS)

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, [$166,120,000] *$139,860,000*; for Operation and maintenance, [$694,809,000] *$688,809,000*; for debt payment, $1,584,000; in all [$862,513,000] *$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 98-473, $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, DEFENSE AGENCIES

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, extension 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, [$19,514,000] *$18,514,000*; in all [$20,700,000] *$19,700,000*: *Provided*, That the amount provided for construction shall remain available until September 30, 1992.

HOMEOWNERS ASSISTANCE FUND, DEFENSE

For use in the Homeowners Assistance Fund established pursuant to section 1013(d) of the Demonstration Cities and Metropolitan Development Act of 1966 (Public Law 89-754, as amended), $2,800,000.

[FOREIGN CURRENCY FLUCTUATIONS, CONSTRUCTION, DEFENSE

[For foreign currency fluctuations, construction, Defense, $125,000,000, to remain available until expended.]

GENERAL PROVISIONS

SEC. 101. None of the funds appropriated in this Act shall be expended for payments under a cost-plus-a-fixed-fee contract for work, where cost estimates exceed $25,000, to be performed within the United States, except Alaska, without the specific approval in writing of the Secretary of Defense setting forth the reasons therefor.

SEC. 102. Funds herein appropriated to the Department of Defense for construction shall be available for hire of passenger motor vehicles.

SEC. 103. Funds appropriated to the Department of Defense for construction may be used for advances to the Federal Highway Administration, Department of Transportation, for the construction of access roads as authorized by section 210 of title 23, United States Code, when projects authorized therein are certified as important to the national defense by the Secretary of Defense.

SEC. 104. None of the funds appropriated in this Act may be used to begin construction of new bases inside the continental United States for which specific appropriations have not been made.

SEC. 105. No part of the funds provided in this Act shall be used for purchase of land or land easements in excess of 100 per centum of the value as determined by the Corps of Engineers or the Naval Facilities Engineering Command, except; (a) where there is a determination of value by a Federal court, or (b) purchases negotiated by the Attorney General or his designee, or (c) where the estimated value is less than $25,000, or (d) as otherwise determined by the Secretary of Defense to be in the public interest.

SEC. 106. None of the funds appropriated in this Act shall be used to (1) acquire land, (2) provide for site preparation, or (3) install utilities for any family housing, except housing for which funds have been made available in annual military construction appropriation Acts.

SEC. 107. None of the funds appropriated in this Act for minor construction may be used to transfer or relocate any activity from one base or installation to another, without prior notification to the Committees on Appropriations.

SEC. 108. No part of the funds appropriated in this Act may be used for the procurement of steel for any construction project or activity for which American steel producers, fabricators, and manufacturers have been denied the opportunity to compete for such steel procurement.

SEC. 109. No part of the funds appropriated in this Act for dredging in the Indian Ocean may be used for the performance of the work by foreign contractors: *Provided*, That the low responsive and responsible bid of a United States contractor does not exceed the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum.

SEC. 110. None of the funds available to the Department of Defense for military construction or family housing during the current fiscal year may be used to pay real property taxes in any foreign nation.

SEC. 111. No part of the funds appropriated in this Act may be used to pay the compensation of an officer of the Government of the United States or to reimburse a contractor for the employment of a person for work in the continental United States by any such person if such person is an alien who has not been lawfully admitted to the United States.

SEC. 112. The expenditure of any appropriation under this Act for any consulting service through procurement contract, pursuant to 5 U.S.C. 3109, shall be limited to those contracts where such expenditures are a matter of public record and available for public inspection, except where otherwise provided under existing law, or under existing Executive order issued pursuant to existing law.

SEC. 113. None of the funds in this Act may be used to initiate a new installation overseas without prior notification to the Committees on Appropriations.

SEC. 114. None of the funds appropriated in this Act may be obligated for architect and engineer contracts estimated by the Government to exceed $500,000 for projects to be accomplished in Japan or in any NATO member country, unless such contracts are awarded to United States firms or United States firms in joint venture with host nation firms.

SEC. 115. None of the funds appropriated in this Act for military construction in the United States territories and possessions in the Pacific and on Kwajalein Island may be used to award any contract estimated by the Government to exceed $1,000,000 to a foreign contractor: *Provided*, That this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor ex-

ceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum.

SEC. 116. The Secretary of Defense is to inform the Committees on 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 occurring, 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 per centum 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 are hereby made available for construction authorized for each such military department by the authorizations enacted into law during the first session of the One Hundredth 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, 1988, containing details of the specific actions proposed to be taken by the Department of Defense during fiscal year 1988 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 for obligation, expired or lapsed 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 to the House and Senate Appropriations Subcommittees on Military Construction *and budgetary and fiscal management of the Military Construction and Military Family Housing appropriations* in a manner identical to the method employed 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 financial management for 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 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 474th 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 Intercepter Squadron, stationed at Minot Air Force Base, North Dakota.*

*SEC. 126. It is the sense of the Congress that all facility construction costs associated with the relocation of the Tactical Fighter Wing at Torrejon Air Base, Spain, to another location, should be the responsibility of the North Atlantic Treaty Organization.*

*SEC. 127. None of the funds appropriated in this Act for planning and design activities may be used to initiate design of the Pentagon Annex.*

*SEC. 128. Notwithstanding any other provision of law, the Secretary of Defense shall notify the Committees on Appropriations within twenty-four hours after a determination by the President or the Secretary to utilize premobilization construction authority.*

*SEC. 129. None of the funds appropriated by this or any other Act for the Department of Defense may be obligated or expended for the National Test Bed Components of the National Test Facility at Falcon Air Station, Colorado, until the Strategic Defense Initiative Organization (SDIO) has begun the development of the Phase One Strategic Defense System (SDS) 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 on the capability 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 components 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 ballistic 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. 130. 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. 131. In addition to the purposes for which it is now available, the property account established by section 12(b) of the Act of January 2, 1976, as amended (43 U.S.C. 1611 note) shall be available hereafter for purposes involving any public sale of property by any agency of the United States, including the Department of Defense, or any element thereof.*

*SEC. 132. (a) 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.*

*(d) Notwithstanding any regulation, order, or directive to the contrary, the operations of the chapel shall not be subject to the supervision or control of the post chaplain.*

*(e) The Secretary of the Army may impose such terms and conditions on the construction, operations, and maintenance of the chapel 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 (1), 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 (8)(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 2,000 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 2,100 family housing units, and the Secretary of Transportation, for the Coast Guard, may enter into one or more contracts under this subsection for not more than a total of 300 family housing units.", and*

*(c) in paragraph (9), by deleting "September 30, 1988" 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 of a military department, Secretary of Transportation with regard to the Coast Guard, or Director of a Defense Agency,",*

*(b) in subsection (b)(3), by deleting the word "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 renewal period may not exceed the original contract term",*

*(d) in subsection (b)(11), by deleting "military department" and inserting in lieu thereof "military department, the Secretary of Transportation with regard to the Coast Guard, or the Director of the Defense Agency", and*

*(e) by (1) deleting subsections "(f)" and "(g)", and (2) by relettering subsection "(h)" as subsection "(f)".*

*SEC. 135. (a) IN GENERAL.—Subject to subsection (b) through (g), the Secretary of the Navy may lease, at fair market rental value, to the Port of Oakland, California, not more than 195 acres of real property, together with improvements thereon, at the Naval Supply Center, Oakland, California.*

*(b) TERM OF LEASE.—The lease entered into under subsection (a) may be for such term as the Secretary determines appropriate, with an initial term not to exceed 25 years and an option to extend for a term not to exceed 25 years.*

*(c) REPLACEMENT AND RELOCATION PAYMENTS.—The Secretary may, under the terms of the lease, require the Port of Oakland to pay the Secretary—*

*(1) a negotiated amount for the structures on the leased property requiring replacement; and*

*(2) a negotiated amount for expenses to be incurred by the Navy with respect to vacating the leased property and relocating to other facilities.*

*(d) USE OF FUNDS.—(1) Funds received by the Secretary under subsection (c) may be used by the Secretary to pay for relocation expenses and constructing new facilities or making modification to existing facilities which are necessary to replace facilities on the leased premises.*

*(2)(A) Funds received by the Secretary for the fair market rental value of the real property may be used to pay for relocation and replacement costs incurred by the Navy in excess of the amount received by the Secretary under subsection (c).*

*(B) Funds received by the Secretary for such fair market rental value in excess of the amount used under subparagraph (A) shall be deposited into the miscellaneous receipts of the Treasury.*

*(e) AUTHORITY TO DEMOLISH AND CONSTRUCT FACILITIES.—The Secretary may, under the terms of the lease, authorize the Port of Oakland to demolish existing facilities on the leased land and to provide for construction of new facilities on such land for the use of the Port of Oakland.*

*(f) REPORT.—The Secretary may not enter into a lease under this section until—*

*(1) the Secretary has transmitted to the Committee on Armed Services of the Senate and of the House of Representatives a report containing an explanation of the terms of the lease, especially with respect to the amount the Secretary is to receive under subsection (c) and the amount that is expected to be used under subsection (d)(2); and*

*(2) a period of 21 days has expired after the date on which such report was received by such Committees.*

*(g) ADDITIONAL TERMS.—The Secretary may require such additional terms and conditions in connection with the lease authorized by this section as the Secretary considers appropriate to protect the interests of the United States.*

*SEC. 136. Of the amounts appropriated by this Act, where local planning resources are not sufficient, the Secretary of Defense may provide community planning assistance, not to exceed $3,000,000, in behalf of the Army Light Divisions and Navy Strategic Dispersal activities.*

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 H.R. 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, in terms of outlays, the bill 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. The full Appropriations Committee reported the bill out last Friday and I believe that Members are familiar with its provisions. I will say that we have made almost 2,000 separate recommendations which affect military activities throughout the United States and, indeed, around the world.

I want to take just a few moments to point out the priorities that the committee places on securing more equitable burden-sharing from our allies.

Mr. President, I think my colleagues are aware that I have had a longstanding concern that the United States and the American taxpayer is asked to pay more than its share of the burden of defending the free world. During the last few days, we witnessed great turbulence in the stock markets around the world.

It is common wisdom that that turbulence has been created, at least in part, due to apprehension regarding the enormous Federal budget deficits here in the United States.

The budget deficit has, in turn, been fed by a relatively unrestrained period of defense spending over the past 6 years.

Many of the increases in defense spending that we have had to make in this country have been necessary because our allies simply have refused to do what we perceive to be their share in the defense burden-sharing bargain. They refuse to fully hold up their end of defending the free world, or at least paying their share of the defense of the free world.

Our European allies and Japan represent 52 percent of the free world's gross domestic product. Yet these European allies and Japan provide only 30 percent of the free world's defense spending.

It is the American taxpayer who has been forced to pay for the defense of the free world. Mr. President, that is a trend that simply cannot continue.

We must have more equity in sharing the international defense burden.

In the report that accompanies this military construction appropriations bill we have made nine separate recommendations designed to improve defense burden sharing among the allies.

Among the recommendations 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 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 throughout the world, the United States will 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 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 proceeded to call the roll.

Mr. SPECTER. 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. SPECTER. Mr. President, I stand to support the military construction appropriations bill for fiscal year 1988 as reported by the committee.

The bill before the Senate today will provide the Department of Defense with $8.5 billion for fiscal year 1988 to operate and maintain military family housing as well as to renovate and construct housing and other facilities.

The committee bill as reported is within the allocation for budget authority and outlays as determined by our committee subject to the Budget Act.

The committee has been forced to make some very difficult decisions to stay within the allocations provided for this bill. However, I believe that the bill before us today is fair and well-balanced and that it contains the most vital projects in support of our national defense.

The bill is some $336 million in budget authority over last year's appropriation, but is $1.5 billion below the President's request. The reduction is substantial, and the need for more funding is justified. However, the economy dictates that all agencies of Government tighten their belts in order to bring down the deficit. I believe that the committee has recognized their responsibility in reporting out this bill. The bill also conforms to the authorization as passed by the Senate.

Mr. President, the distinguished chairman of our subcommittee, the gentleman from Tennessee [Mr. SASSER] has already provided the Senate with much detail on the bill, and therefore, in order to move the bill expeditiously, I will not go into any specifics.

I do, however, want to commend Senator SASSER for his fine work and leadership in getting this bill to the Senate today. He has been most cooperative with Members from both sides of the aisle to ensure that all concerns are met. I also want to thank the majority clerk of the subcommittee, Mr. Mike Walker, for his valuable assistance and cooperation in working with the minority staff.

Mr. President, as we are all aware, this bill is on the floor today under a unanimous-consent agreement with only four amendments in order. All of these, I believe are acceptable to both sides and can be adopted quickly.

I, therefore, urge my colleagues to support the reported bill and the amendments.

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 ranking 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 rendered. In particular, however, it is evidence of the hard work and excellent leadership of subcommittee Chairman SASSER and the ranking minority member, Senator SPECTER. I also wish to compliment 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 items 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 appropriations 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 that is 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 other words, 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 read 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. . LAND CONVEYANCE, FORT JACKSON, SOUTH CAROLINA

Subsection (e)(1) of section 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 $2,300,000, 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 for outlays.

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. 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 "$597,865,000" 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 balance of 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 $8,492,398,000 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 $11,235. This facility was intended to last 5 years. Forty-five years later, it will cost double what it would in a modern building to maintain and provide utilities for this dilapidated structure. This is merely one of hundreds of such structures thereby multiplying the costs to maintain, heat, and cool these facilities. A tragic fire, one of the worst peacetime disasters on a U.S. Army base, destroyed 23 of these buildings this summer. While this bill has dealt with this fire and a reprogramming request, something must be done about these remaining facilities.

Mr. SASSER. I thank the Senator for his comments and convey my respect to him for his persistent and articulate communication on this issue. This is an issue which is imperative to address and resolve for a number of reasons, including the cost to the U.S. taxpayer. It has already become wasteful and nonproductive for us to continue to invest in these World War II dated buildings. They need to be replaced now.

Another reason for my concern, and Senator DECONCINI as a member of the Intelligence Committee has talked to me about this, is for security and safety of military intelligence. Most of the Army's technical intelligence training is accomplished at Fort Huachuca. Much of this is conducted under highly protected and insulated screens and contained devices to secure the facilities. Given today's environment, we need to assure that highly classified information does not get into the wrong hands.

Mr. DECONCINI. The Senator makes a very good point. The Army conducts a great deal of its technical training at this school at Fort Huachuca. The sad part is that much of this training is taking place in structures that may have been used by the fathers and grandfathers of today's soldiers. Many of these facilities are maintained at a bare minimum, thereby retarding the training opportunities for our soldiers. This school cannot carry out the proper mandate of preparing, educating, and training our soldiers in military intelligence until something is done about this situation. I would request that the chairman make this a priority in conference, convey this next year in bill and report language, and in the future stress this to assure our military security with respect to training our soldiers in intelligence activities. Report language a few years ago should be followed-up on.

Mr. SASSER. I say to the Senator that as chairman of this committee I will strongly support his efforts to replace the 23 buildings that were destroyed by fire, under reprogramming of funds under title X, as you have requested in this bill. Moreover, I will also strongly support his efforts to replace the remaining World War II structures at Fort Huachuca that threaten our national security, cost U.S. taxpayers double the cost of maintenance and utilities, and downgrade the teaching facilities of future soldiers in military intelligence.

Mr. DECONCINI. I thank the distinguished chairman of the Military Construction Subcommittee and look forward to working with him to address this mutual concern in the future.

Mr. QUAYLE. I rise to address my distinguished colleague, Senator SASSER, the senior Senator from Tennessee and chairman of the Appropriations Committee's 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. The Senator from Indiana is correct.

Mr. QUAYLE. As I am sure my colleague can understand, these projects are important for both the military facilities concerned and the State of Indiana. I would ask my colleague whether the Appropriations Committee has knowledge of any grave problems with these projects or other pressing reasons why the projects cannot go forward.

Mr. SASSER. I can assure my colleague 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 constructions appropriations bill did allow for them. In fact, these projects are currently the subject of deliberations by the House and Senate Armed Services Committee as part of their conference on the fiscal year 1988 and 1989 Department of Defense authorization bill.

I can assure the Senator from Indiana, however, that if these projects are authorized by the Armed Services Committees, that the Senate will recede 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 Senator 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 of the United States access to the markets of the foreign country)

Mr. SPECTER. Mr. President, on behalf of Senators MURKOWSKI and STEVENS, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will read the amendment.

The assistant legislative clerk read as follows:

The Senator 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 bill, add the following:

SEC. . 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—

(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. 2241(b)), 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 bidding,

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.

(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 Representatives 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 maintained under paragraph (1) 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 any 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 constuction 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 use engineering, 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.

As new leadership comes to power, we must send the signal that this issue remains one of the most troublesome in United States-Japan trade relations. That message is clear: We are willing to use the leverage of our markets in seeking a resolution.

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 bid on public works projects in Japan.

And it's not because our firms aren't competitive—on 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 nonexistent—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 each and 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 to home this issue is for me. Very recently, the Army Corps of Engineers awarded a $14 million construction contract at Fort Wainwright, near Fairbanks, AK.

The contract was awarded to Konoike 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 home town, 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 Osaka.

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 Defense Department 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.

That is a clear, simple, and compelling message that must be sent. The situation isn't going to get any better unless we act now.

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). 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. Is there 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 appropriations bill this year.

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 commending 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

Silkworm hit Kuwait's main oil terminal causing heavy damage to offloading facilities. Only good luck prevented a major conflagration in the terminal and the loss of more American lives. Tomorrow, there may well be another attack with more casualties.

Meanwhile, the United States has become an important supplier of military technology to the People's Republic of China. Most notable has been our agreement to supply 55 avionics packages to upgrade the capability of Chinese fighter aircraft, the F-18. It is time we sent a message that United States military sales to China may not continue if China continues its Silkworm sales to Iran. Since the attack, the administration has suspended efforts to ease United States technology exports to China. Passage of this resolution means that the administration and the Congress are speaking with one voice in warning China of serious consequences if Silkworm sales continue.

Recently, the Senate called upon the President to impose an arms embargo on Iran if Tehran used Silkworm missiles to attack United States ships. It is only consistent if we consider analogous sanctions on the suppliers of the Silkworms.

Mr. President, this resolution supports the United Nations by calling for actions that will persuade China to endorse a U.N.-sponsored arms embargo of Iran. It is not an anti-China initiative. It does nothing more than call for responsible action by our good neighbor China as a permanent member of the U.N. Security Council.

Mr. President, I applaud my colleagues for joining Senator CRANSTON and me in adopting Senate Resolution 84.

The PRESIDING OFFICER. The Senator from Kentucky.

## INDEPENDENT FAA

Mr. FORD. Mr. President, I ask unanimous consent that Senator MELCHER 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 BARNS

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, DC.*

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, 126 E. Main St., Carlisle, Ky. 40311, in our little town of about 1,520 people and Nicholas County of less than 8,000 souls 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 representation of "Our Kentucky."

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.

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[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."

Taking that Sunday afternoon drive thru rural Kentucky, to be more precise, over the backroads of beautiful and picturesque Nicholas County (God's country you know), a strange notion struck my mind. As many times as I have traveled down these roads I never realized the warmth, beauty and individual personality of each one of these predominantly constructed buildings, commonly referred to in "our neck of the woods" as a tobacco barn.

Motoring along the Jackstown Road (my old stomping grounds in my courtin' days), in "Doc's old 1970 Buick La-Sabre, I seemed to be drawn by some sort of mysterious powers beyond my control to," pull her over and stop for a spell and "have a chat" with this lonesome looking tobacco barn (not expecting a visitor of course), and she seemed particularly pleased that I stopped.

Somewhat still under a superconscious sort of a spell, I glanced about the country side to see if their might be any witnesses to substantiate my reason for coming to such an abrupt halt with my remaining sanity leaning more toward a "look out" for a vicious dog or a landowners long barrel shotgun.

Feeling somewhat safe and secure from these catastrophes I decided to "hang loose", continue under this spell and have a "Sunday afternoon chat with this barn."

First off, I glanced around the area one more time and then proceeded to introduce myself. I told her I was just a feller' that "ran" (as we call it) a drug store in town and had passed her many times and sorry I had never stopped. She (the barn), said that's alright I've seen you drive down the road for years and thought someday he will stop for a visit. After our informal introductions, I walked around this huge and majestic standing building and felt somewhat inspired by her magnificents in size and durability. She told me, I'm only made of rough wood and have a tin roof but I withstand the hottest beams of summer Sun and the heaviest cold-windy snow storms old man winter can produce. "I've done it for years", she told me but my master tells me (words of wisdom passed down to him from higher up feller's in power, trade balance and all that stuff you know), that my days could be numbered and the future looks somewhat bleak for us tobacco barns.

I ventured, cautiously with my first question (knowing you skate on thin ice when you mention age to a lady), so, old G.C. just opened his mouth and asked, "How old are you". "I'm 110 years old", she said. "Good Lord, I would never have guessed it", (escaping that personal probe)—she certainly didn't look her age. "She asked me if I could stay a spell, she had a few things to tell me". So, I seated myself on the fender of "Doc's" La-Sabre—perked my ears—and got myself a real education. Now, she said, "have you ever seen any two tobacco barns that look alike?" Pondering on this for a minute I told her that, "Come to think of it, I don't believe I have". They all seem to look a little different in their own unique way. Some are high on a hill, some down in the valley, some well painted, some in need of, some strategically placed along the road, each one built where it's master thinks best. "You know", she told me, "many barns sit empty most of the year and earn their worth 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 Wilkinson negotiated with the Spanish for the privilege of shipping tobacco, hams and well 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 1, 1792. It's no wonder that tobacco barns (like so many things we see every day, take for granted they will always be there and don't appreciate), 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 master speak of one he saw in western Kentucky, Daviess County she thinks, that was over 150 years old. "Round barns," she said, "withstand the strongest of winds you know." Makes sense to me, I thought.

She told me that back in the old days, the majority of barns were painted only one color, red. 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 very red color and so known as barn red. Red sort of become the standard color, got a firm foothold on the farmer and hung on year after year, from father to son and down the line with barn red. "Of course,"

she said, "in the earliest settlements," it was considered "showy" and vulgar to paint a barn and coated them with a homemade wood preservative." The Virginians used lampblack to protect the wood that resulted in a coloring known as barn grey.

Realizing the time of day had gotten away from me, I told her how much I enjoyed our visit and I would stop again sometime. As I pulled off in "Doc's" La-Sabre, I glanced back at her thru the rearview mirror and the red sunset shinning on her tin roof made her sparkle like a "jewel from Tiffany's" of New York City. Driving back to town, I was thinking, what an education that visit was, and searching my mind for a word to describe this structure I had visited. Ragged—(well, maybe a little), Dirty—(no, she was too proud to be dirty), Majestic—(she must have been, or she wouldn't have drawn me to her), Proud and Honorable—(most certainly), Sympathetic, Loyal—(yes, overwhelmingly), For she was in all her glory her "Master's Castle," She was a Nicholas County Kentucky Tobacco Barn. "In God we trust". "I love Nicholas County."

Thank you

Paid for by G.C. MYERS,
*Carlisle, KY.*

## 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.

The Senator from Minnesota.

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: "The 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 have added 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 Americans who have suffered 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 8 million beneficiaries each year, the average out of pocket costs are $4,030. This is too much for most seniors to pay. We must add this protection to the Medicare Program.

There are four reasons: 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 Americans 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 if you are going to provide catastrophic protection is where we start today, 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 protection, 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 effort to providing 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 or not we are not opening the door to 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.

In exchange for eliminating the fear and in exchange for eliminating the waste and in exchange for giving them a more sensible, more reasonable product, they will be paying, through premiums, the cost 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 supplemental 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; or

(2) refund to the employee or retired former employee an amount equal to the actuarial 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 have been advised, 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 further 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 been involved in the 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 serves 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.

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.

I urge all of my colleagues to join with us in supporting this amendment.

I understand that the amendment now is cleared on the minority side as well.

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 level of effort by paying some or all of the catastrophic premiums, or by offering the employee the opportunity to have additional alternative benefits of an equivalent amount, or to refund, if you will, or to pay to the employees involved, a dollar denominated equivalent amount in cash for the value of that benefit.

Since the employer-employee relationship is so valuable to all of us in holding down the cost of health care in this country, I certainly endorse his approach.

I must say, maybe it is the time of the day or the time of the week but I am now informed that we have another objection to the current consideration of this amendment at this particular time which, if my colleagues on the majority side will indulge me, I will try to get greater definition on. But I must at this time withhold my support for the amendment from the minority side.

Mr. BENTSEN addressed the Chair.

The PRESIDING OFFICER (Mr. WIRTH). The Senator from Texas.

Mr. BENTSEN. Mr. President, I am disappointed, of course, to hear of the delay. I must say that without this amendment, you would have a situation where employees would be paying an extra premium for catastrophic illness, particularly where they had a comprehensive insurance plan. It is a well thought out amendment and it really addresses that problem. The other side of it is you could have a windfall to the employer, of course. What you are trying to do is get a constant maintenance of effort. It is a valuable contribution to the bill, and I am personally delighted to have it.

Mr. RIEGLE. I thank the chairman.

Mr. President, perhaps if there is no other amendment that is waiting to come forward and if it looks as if we will have the clearance on the minority side shortly, maybe we can leave the amendment pending and if there is a requirement to set it aside to take up another, certainly that would be appropriate to do.

Mr. BENTSEN. Mr. President, I do not know of another amendment forthcoming at the moment.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BENTSEN. 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. BENTSEN. 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 a 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. ROTH is interested in the pending 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 205.

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.

The assistant legislative clerk read 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.

On November 10 we will have 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 Israel 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 inappropriate because our 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 Israel in 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 1 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 horrendous and, in a way, a defining event. It was, as I said at the time, an epiphany 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 has not yet appeared. As big 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 Chaim Herzog. 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, antisemitism 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. He fought his way into and across Europe, and into those very scenes. He is, 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 Israel, where he was active 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 cast a pall over the organization. That pall is there to this day. November 10, 1975, marked a decline in the United Nations' fortunes and reputation.

Many of the nations which participated in that historic event, which was surrounded by comparable but not equal events, today realize what they have done to the United Nations. The world now looks to it, but it is a diminished and weakened institution.

The action called for by the resolution now before us is what we can do. I understand that the present Secretary General of the United Nations, Perez de Cuellar, would very much like to see this blemish erased, this fundamental defect overcome. There are many nations which would reconsider what they did.

I cannot imagine that today Mexico, for example, would vote as it did on that occasion. There are now members who have no commitment to that action. Indeed, it is more than likely that the votes can be got to overturn that resolution by formally declaring it to be invalid.

Now, how to do that? Obviously, we are talking about multilateral diplomacy. We have to get the votes in the General Assembly, as we have to get the votes on the floor of the U.S. Senate.

It occurs to me that the Australians have led the way, and that all such democratic congresses should begin to adopt the Australian resolution word for word and send it roundrobin, as you could say, from one democratic institution to another. I hope that we will pass it in the Senate here today, send it to the House, and pass it there. We would be the second nation to adopt the Australian resolution.

Then look to Ottawa; look to Dublin, where Mr. Herzog has addressed the issue. Send it to Westminster; to Paris; to Rome; to Bonn; to The Hague; to New Delhi, which could consider the mistake the Indian Government made and surely regrets; to Singapore, which was with us; to Japan, which was with us; to other nations that ought to have been and were not.

Let the countries of the world define themselves. Are they free and representative democracies or are they not? This would be the first time, to my knowledge, that something of this kind has ever been attempted. I take great heart that this resolution, which was put in just days ago in the Senate, 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 would have the necessary votes 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 you like 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 so 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 signed into law 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 [U.N.G.A. 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 this resolution.

UNGA Resolution 3379 on Zionism singles out for slanderous attack the national movement which gave birth to the State of Israel. Worse, it provides pseudolegitimacy to anti-Semitism around the globe.

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 of Israel, Chaim 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 visitor by unanimously passing this joint 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 no further 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; and

(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 see that it gets exactly that? 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, it happened. 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 or bantering with grad students. 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 that does not make for being 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, 1870-1903," 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, then proved, 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 investment in people: 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 should not be a bit surprised with the remarks of the distinguished Senator from New York. Talk about a man for all seasons. I have served on the Joint Economic Committee for some 26 years, the Banking Committee for 30 years, and so forth. Here is a man who has not served on either who probably knows more about economics than the rest of us. He knew more about Robert Solow, far more than I ever dreamed anybody knew. He is my seatmate sitting next to me. I am deeply impressed, very grateful and certainly picked the right time to come to the floor.

## MILITARY CONSTRUCTION APPROPRIATIONS, FISCAL YEAR 1988

Mr. PROXMIRE. Now, Mr. President, on another subject, very briefly. As I understand it, the military construction bill is still pending before this body; is that correct?

The PRESIDING OFFICER. The Senator is correct.

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 out 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 important bill language and 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 SDIO says costs $100 million to build, would be a key facility for the entire 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 some type of facility or test 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.

If an SDI defense 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 those criteria.

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 goals 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 project is about 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 strategic defense 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 SDS 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 test 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 affected by the type of 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 1 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 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 President's objective 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 architectures 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 bachelors degree in sociology and history from the University of Illinois. She has a masters 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. I understand that Ms. Beckett has already accepted a position for the fall of next year with the Washington, D.C., firm of Finley, Kumble, Wagner, Heine, 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 not merely survived, but prevailed despite a revolutionary birth, a Civil War, two World Wars, a Great Depression, and more than one constitutional crisis. All the while, the United States has maintained a democratic republic in which the rights of 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[1] and federalism. It must be emphasized, however, that these are not perfect 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 individual liberties.

Opposition to separation of powers has a long, distinguished history. For two centuries its critics have pointed out that the system results in stalemate and confrontation, denies accountability, and inhibits the government in formulating and sustaining coherent policy. Skeptics of separated powers included early American giants such as Benjamin Franklin, Patrick Henry and Thomas Paine.[2]

At the turn of the twentieth century, Woodrow Wilson questioned the system. He charged that separated powers had led to congressional supremacy, and because congressional power is distributed among committees, it had resulted in government by committee.[3] Wilson later challenged the basic premise of the doctrine because it pitted the branches of government against each other. "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.[4]

Wilson was typical of many political observers of his time. In 1920, an author noted that his contemporaries "dispute the value and even the reality of the theoretical division of governmental institutions. * * * [They consider it] largely unworkable."[5] Recently, Lloyd Cutler has called for restructuring the American political system along the lines of the British parliamentary system. He charges that because separated powers fractionalizes power, it constitutes a structural weakness in government.[6]

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 boudaries 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. *Usery*[7] and *Garcia* v. *San Antonio Metropolitan Transit Authority*[8] which deal with the question of wheth-

[1] Footnotes at end of articles.

er state sovereignty restricts Congress in exercising its power under the commerce clause, reveal the current difficulties in deriving who has what power. Furthermore, Garcia reveals the distance the American 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." [9] In fact, Garcia has one scholar writing of the "demise of a misguided doctrine" [10] and another pronouncing the "second death of federalism." [11]

Despite the problems of both separation of powers and federalism, however, these constitutionally ordained doctrines should be praised, not buried. So many of the features of these doctrines that have been so criticized were not merely foreseen by the Fathers, they were intended. That is, it was the Framers' intention that these doctrines, and hence, the American government, would work in the nature that they have.[12] What the Framers feared was a government that would work too effectively, that changes in law could be easy and swift.

To understand these doctrines, it must be understood that while the Constitution is the "wonderful document" that Gladstone proclaimed it to be, it is misleading to think of it as being "struck off at a given time" by the mind of man. This brilliantly formulated document was the product of history, not visionary dreams.[13] The Founding Fathers were aware that governments collapsed, as well as rose. Gibbon's 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 goodness of man was degenerating into a "Reign of Terror." "Experience must be our only guide. Reason may mislead us," warned John Dickenson at the Constitutional Convention.[14]

World history as well as the failings 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 in forming our confederation," noted George Washington in 1786.[15] "if men were angels, no government would be necessary," explained Madison.[16]

The Founding Fathers were not antidemocratic. 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 located in a single branch. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands," Madison declared, "may justly be pronounced the very definition of tyranny." [17]

The Framers understood the oppressive nature of governments, even ones operating under written guarantees of rights. They had just fought a revolution because King George had usurped power and abused individual liberty. To insure that the government they were creating would not end up 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 enable the government to control the governed; and in the next place oblige it to control itself. * * * [E]xperience has taught mankind the necessity of auxiliary precautions." [18]

Thus, they designed a system to block the overreach—a system of government that safeguards liberty by avoiding the 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.[19] Thus, the Fathers designed a system wherein those passions would check each other, rather than a system that would collapse under uncontrolled ambitions. Legislative power is balanced by an executive veto. The executive power of appointment is balanced by the congresssional obligation to advise and consent. The judiciary checks both the legislative and executive branches with its ability to nullify acts of either branch. These "precautions" serve to block the adoption or continuation of unwise policy.

Today, there is talk of the presidency and the Supreme Court having become "imperialistic." The fact is that throughout American history, each branch of government has alarmed different sections of the people. Some Founding Fathers most feared what James Wilson termed "legislative despotism." [20] In the 1930's, liberals wanted more power in executive branch; today, they are concerned with an "imperial presidency." [21] In the early 1930s, the Supreme Court was the conservatives best friend; in the 1950's, they came to oppose the High Court's authority. The truth also is that no branch of government is imperialistic. Thanks to the Framers' foresight, no branch can override any other.

While this is a system of separated institutions checking each other, it also is "separated institutions sharing power." [22] These shares of power were not casually distributed, they were "carefully related to the capacities of each branch, to its constituency, and to its intended role in the system," explains Donald Robinson.[23] The size and committee structure of Congress assures that the people have an institutional voice in the daily functioning of the national government. The presidency places national leadership in a single individual, and this insures that government can heed the dictates of that voice more aggressively and efficiently. The bicameral and committee structures of Congress insures that legislation will be openly derived and that involved interests will be consulted. The executive branch gives the government the ability to act energetically, directly, and, if need be, unilaterally.

By balancing one branch against another, the Framers slowed the operation of government. They frustrated the machinery of government so that foolish or sinister schemes would be exposed and defeated. That innovation or departure would be difficult without deep and broad consensus. That the accumulation of power in a single branch or by a single interest would be difficult, if not impossible. That the goals of those in government will be modest. Two branches of government must cooperate before laws destructive of liberty can be enacted. And two branches of government must cooperate in the enforcement of the law.

The "Madisonian clockwork," as Laurence Tribe describes it,[24] guaranteed friction in the workings of the government. Indeed, the relationship between the executive and legislative branches has been so combative that it has been characterized as "guerrilla warfare." [25]

This warfare has involved the judiciary as well as the executive and legislative branches. Presidents and congressmen have assailed the judiciary. "We must take action to save the Constitution from the Court and the Court from itself," exclaimed President Franklin Roosevelt.[26] In reference to *Consumer Energy Council of America* v. *FERC*, Senator SCHMITT lashed out that the D.C. Circuit Court had "an idealized conception of the separation of powers that is neither historically accurate nor has, until now, been actually applied to overturn an act of Congress." [27] On the other hand, Judge Mikva of D.C. Circuit Court has attacked Congress for "pass[ing] over the constitutional questions, leaving the hard decisions to the courts." "Such behavior by Congress," he writes, "is . . . an abnegation of its duty of responsible lawmaking." [28]

These conflicts between the branches of government and the national and state governments, however, should be viewed as good, not bad. The cooperation in government theoretically desired by so many is not, in reality, the makings of safe government. One scholar has explained:

The notion that check and balance should involve thwarting, hampering, interfering, criticizing, opposing, will naturally seem to many a little perverse and wrong-headed. But the whole point is that it is the making of mistakes which may thus be hampered, the commission of errors thwarted, the imposition of onesided and unfair decisions interfered with, the adoption of wrong policy opposed.[29]

In other words, the friction between the branches is constructive, not destructive, of good government. "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power," wrote Justice Brandeis in *Myers* v. *United States:* "The purpose was, not to avoid friction, but * * * to save the people from autocracy." [30] Thirty years later, in *Bowsher* v. *Synar*, Chief Justice Burger noted that the division of powers "produces conflicts, confusion, and discordance at times * * * but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of government power." [31]

The Supreme Court's shift in approving New Deal legislation demonstrates Chief Justice Burger's point. While this reversal is commonly viewed as the Court succumbing to political pressure, it was a more complex, constructive affair that involved "full, vigorous, and open debate" on a great issue and the nation benefited. It involved an intellectual, as well as a political challenge to the High Court's interpretation of the commerce clause. No less of a constitutional scholar than Corwin warned that the country faced a "constitutional crisis of unpredictable gravity. * * * [The Court] will it

have to enlarge its conception of public power to include economic power." [32]

The New Dealers delivered their own intellectual assault. In Harvard Law Review, Justice Department Solicitor General Gerald Stern challenged the Court's basis for its interpretation of the commerce clause.[33] Going back to the Framers for guidance, he argued that in the commerce clause the Founding Fathers provided the national government with the power it needed to resolve the problems of trade that the states could not solve on their own. Therefore the New Deal was consistent with the constitutional order established in 1787. In speeches and government briefs, New Dealers cited Stern's argument as they challenged the Court for a broader interpretation of the commerce clause.[34]

Thus, a "switch in time that saved nine" did come, but it was a positive, not a negative one. It involved a constitutional confrontation of the first order that brought forth the best creative instincts from the administration and the best judgment of the High Court.

The New Dealers' confrontation with the Court also illustrated the wisdom of the Framers in scattering the time frames in which the members of each branch hold office: the President for four years, Senators for six years, 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 1932 and 1936, he was overhelmingly elected and reelected president, and his political party gained significant majorities in both Houses of Congress. Thus, Roosevelt and his party controlled 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 "Madisonian Clockwork" allowed for New Deal reforms, but curbed the potential for legislation that may well have transformed American government and society. Furthermore, the system permitted FDR to put through the New Deal, but it blocked him when he tried to pack the Court.

Separation of powers has not always been successful in stopping abuse of power and protecting individual liberty. The system, for example, enabled Senator Joe McCarthy to trample upon the executive branch as well as upon the rights of individual Americans. For the most part, however, the system has controlled the abuse. In *Kilborn* v. *Thompson*,[35] the Court had already restricted congressional investigatory abilities by limiting its delving into the lives of private individuals, and in *Watkins* v. *United States* [36] to "expose for the sake of exposure." In *Youngstown Sheet & Tube Co.* v. *Sawyer*,[37] the Court stopped the executive branch from usurping legislative authority. In *Immigration and Naturalization Service* v. *Chadha*, the Court stopped Congress from usurping executive authority.[38]

During the most serious constitutional crisis of recent decades, even countries with democratic heritages like Western Europeans could not understand American concerns with the Nixon Administration's transgressions of power. But Americans were alarmed, and the checks and balances locomotive went into high gear. Congress investigated, the courts interpreted the law, and the press, protected by the first amendment, reported the developments that resulted in the downfall of a government.

Despite the warfare, the genius of the American separation of powers is that it does, in fact, allow for cooperation among the branches of government. The different branches do work together far more than is commonly assumed. Stephen Stathis amply documents the cooperation between the President, Congress, and the Court in investigatory matters. "One of the most significant characteristics of our constitutional system," he writes, "is that genuinely workable decisions are often reached only after inquiry, consultation, and compromise." [39] In the realm of foreign policy, Peter Schultz points out: "congressional and presidential power supplement and complement each other in a way too little appreciated." [40] Much of the "history of the separation-of-powers doctrine is also a history of accommodation," wrote Justice White in Chadha.[41]

Federalism, like separation of powers, has a valuable role in the workings of the American government and protecting liberty. While Garcia has one scholar pronouncing its "second death," [42] the fact is that federalism has had a number of obituaries. But like Mark Twain remarked, rumors of deaths can be exaggerated.[43] President Carter's anti-Washington theme and President Reagan and the "Sagebrush Rebellion" have shown that federalism, while maybe momentarily comatose as a constitutional issue, is alive and well as a political one.

In the 1840's, Alexis de Tocqueville lauded federalism for reasons taken for granted today, but weighed heavily upon world history. He explained that small nations have "always been the cradle of political liberty," and liberty is lost as they grow in size, strength, and wealth: "The history of world affords no instance of a great nation retaining the form of republican government. * * * All the passions that are most fatal to republican institutions increase with an increasing territory." But, under the "most perfect federal constitution that ever existed," as he called it, the United States had found a way to grow in size and power without succumbing to the deadly passions because federalism preserved the virtues of the smaller state. Consequently, "the Union is happy and free as a small people, and glorious and strong as a great nation." [44]

So much of what the French observed wrote still holds true today, for reasons he cited and others. Like separation of powers, federalism obliges government to control itself. Under federalism, local majorities curb the power of national majorities, thus making seizure of power by a national majority difficult. States, John Roche explains, "provide political obstacles to centralization that are far more effective than their constitutional position might indicate."[45]

Federalism provides a viable framework for reconciling majority power and minority rights. The "genius of this double system," according to James Burns, is its ability to "morselize sectional and economic and other conflicts before they become flammable. [It keeps] the great mobiles of ideological, regional, and other political energies in balance" until accommodation is achieved.[46] Therefore, the essence of the federalism has been balances and compromises, and this is vintage American politics. The system did collapse in the 1850s and 1860s, but over moral, not political or constitutional issues.

Federalism constitutes what Justice Brennan has termed a "double source of protection" for the rights of American citizens. Each level of government must heed the injunction that no person may be deprived of life, liberty or property "without due process of law," he points out. This "double protection" was revealed with the increased activism of state courts in the 1960s. Early in the decade, according to Justice Brennan, the Supreme Court enhanced individual rights and liberties as the Warren Court imposed tougher standards on states in criminal procedures, reapportionment, and civil liberties. But as the High Court began to "pull back from * * * the enforcement of the Boyd principle," state courts began extending the protections provided in their own state constitutions.[47]

Because the national government has constantly intruded into the internal affairs of states, federalism cannot be considered an equal partnership. For the most part, however, the intrusions have been in the interest of enhancing liberty. "Historically, most limitations upon personal liberties have come from the states," note Morison and Commager, and the national government has constantly striven to eliminate these denials.[48] *Brown* v. *Board of Education* [49] and *Baker* v. *Carr* [50] are well known examples of how the national government, via the Supreme Court, has guaranteed constitutional rights for minorities. The national government also has exercised its authority to abolish child labor and sweatshops, and to strengthen the freedoms of the first and fourteenth amendments.

By virtue of their own sovereign power, states still control many of the choices that immediately and directly affect the lives of its citizens. They control municipal and local governments, chart corporations, and administer civil and criminal law and the education, health, safety, and welfare of the people.

With this emphasis on local rule, federalism encourages political experimentation. States serve as "laboratories of democracy" because reforms can be attemped locally before becoming national policy, thereby reducing the cost of political reform. Failures are confined to a local basis. Successes, such as expansion of voting rights, and labor law and regulatory reforms, become national policy. "It is one of the happy incidents of the federal system that a single courageous state may . . . try novel social and economic experiments without risk to the rest of the country," Justice Brandeis explained in *New State Ice Co.* v. *Liebmann*.[51]

This emphasis on local rule gives different interests stronger voices in how their lives are governed than would be possible strictly at the national level. Furthermore, it allows for local policy in areas where uniform national policy would be disastrous, if not tyrannical. "If there is any fixed star in our constitutional constellation," wrote Justice Jackson in *West Virginia State Board of Education* v. *Barnette*, "it is that no official * * * can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." [52] As long as federalism is alive and well—which it is—there will be no national orthodoxy.

The keystone of the constitutional process is the judiciary. The Supreme Court's role was deemed so important that the Founding Fathers gave the Justice life tenure, thus insuring the High Court's independence, although it has no separate constituency. It is the Court that insures that the Constitution, and hence, the doctrines of separated powers and federalism are properly construed.

The Court provides the valuable check upon government by giving citizens power over the laws that govern them. Since *Marbury* v. *Madison*,[53] when Justices became the interpreters of the Constitution, an individual citizen has the power, through a lawsuit, to check a law passed by Congress and approved by the President. Before becoming a Justice, Robert Jackson noted: "Lawsuits are the chief instrument of power in our system. Struggles over power that in Europe call for regiments of troops, in America call out battalions of lawyers." [54]

This instrument of power has enhanced liberty for all Americans. From the 1940's to the 1960's, black Americans found the courts to be the one branch of government willing to force America to live up to its promises to all of its citizens. Likewise, unsuccessful with the other government branches, environmental, consumer and labor groups have turned to the courts.

You cannot eat the Bill of Rights goes an old saying, and the tragic events in Europe during the 1930's revealed the reality of the phrase. In the United States, however, the three branches of government, with the Supreme Court leading the way, have shown that individual liberty and economic security need not be incompatible. While a lot of attention has been given to the Roosevelt Court's role in economic matters, 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 liberties it guarantees.[55] The Roosevelt Court strengthened the dicta of *Gitlow* v. *New York* which extended the Bill of Rights to the states.[56] *De Jonge* v. *Oregon*[57] expanded the right of assembly. *Herndon* v. *Lowry*[58] and *Thornhill* v. *Alabama*[59] enhanced free speech. *Chambers* v. *Florida*[60] helped guarantee fair trials to black Americans. In *Grosjean* v. *American Press Co.*,[61] the Court broaden the guarantee of the free press. "The Constitution is what the judges say it is," Chief Justice Hughes explained in his immortal phrase, "and the judiciary is the safeguard of our liberty * * * under the Constitution." [62]

The emphasis on individual rights displayed by the Roosevelt Court has been typical of the American government since Day One, 1787. The people, said Jefferson "are the only sure reliance for the preservation of our liberty." [63] "A dependence on the people is, no doubt, the primary control on the government," wrote Madison.[64]

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 ills of democracy are best cured by more, not less, democracy. This is what the Fathers intended for the Constitution begins: "We the people in order to form a more perfect Union." The people, not institutions or states, are sovereign.

In this sense, Chief Justice Warren could consider *Baker* v. *Carr* [65] the decision of his tenure of greatest consequence for all Americans.[66] Based on the equal protection clause, this landmark case further insured that each American is armed with the means to make his or her view felt. Chief Justice Warren was typical of the Supreme Court, which in recent decades has abolished the "white primary," [67] racial gerrymandering,[68] and tax as a condition for political participation.[69] The Court has been typical of the United States, in general. Through constitutional amendments, suffrage has been extended to include people without property, blacks, women, and eighteen-year olds, and the "poll tax" has been abolished. By the 1950's and 1960's, Congress was on board with the passage of legislation strengthening statutes protecting the right to vote. By 1965, the executive branch was fully on board as President Johnson appealed for federal action to guarantee 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 federalism, 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 constructing a framework of government saturated with "precautions." For 200 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

[1] Although separation of powers and checks and balances are not necessarily the same doctrines, for sake of brevity, they are treated somewhat synonymously in this paper.

[2] Sharp, "The Classical Doctrine of Separation of Powers," 2 U. Chi. L. Rev. 385, 395-96 (1935).

[3] W. Wilson, Congressional Government 28-31 (1960); J. Rohr, To Run a Constitution 60-65 (1986).

[4] W. Wilson, Congressional Government 54-57 (1911).

[5] Green, "Separation of Government Powers," 29 Yale L.J. 369, 369-70 (1920).

[6] Cutler, "To Form a Government," 59 Foreign Aff. 126 (1980).

[7] 426 U.S. 833 (1976).

[8] 105 S. Ct. 1005 (1985).

[9] The Federalist No. 17, at 112 (A. Hamilton) (O. Leigh ed. (1901).

[10] Field, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 99 Harv. L. Rev. 84, 84-85 (1985).

[11] Van Alstyne, "The Second Death of Federalism," 83 Mich. L. Rev. 1709 (1985).

[12] For the Framers' intention to build efficiency into the system, *see* Fischer, "The Efficiency Side of Separated Powers," 5 J. Am. Stud. 113 (1971).

[13] For the Framers' use of history to develop and defend their product, *see* The Federalist Nos. 18 and 19 (A. Hamilton) (O. Leigh ed. 1901).

[14] L. Fischer, Constitutional Conflicts Between Congress and the President 4 (1985).

[15] G. Wood, The Creation of the American Republic, 1776-1787 472 (1969).

[16] The Federalist No. 51, at 354 (J. Madison) (O. Leigh ed. (1901).

[17] The Federalist No. 47, at 329 (J. Madison) (O. Leigh ed. (1901).

[18] Supra note 16, at 354-55.

[19] Id.

[20] Parker, "Historic Basis of Administrative Law," 12 Rutgers L. Rev. 449, 460 (1958).

[21] A. Schlesinger Jr., The Imperial Presidency (1973).

[22] R. Neustadt, Presidential Power, 33 (1960).

[23] Robinson, "The Renewal of American Constitutionalism," in Separation of Powers—Does It Still Work? 41-2 (1986).

[24] L. Tribe, American Constitutional Law 15 (1978).

[25] A. Schlesinger and A. Grazia, Congress and the Presidency, 2-3 (1967).

[26] Fireside Chat, 1937 Pub. Papers 126 (March 9, 1937).

[27] 128 Cong. Rec. S2578 (daily ed. March 23, 1982) (statement of Sen. Schmitt).

[28] A. Mikva, "How Well Does Congress Support and Defend the Constitution?", 61 N.C.L. Rev. 587, 609-10 (1983).

[29] Dexter, "Checks and Balances Today," in Congress: The First Branch of Government 83 (1967).

[30] 272 U.S. 52, 293 (1926).

[31] 106 S. Ct. 3181, 3187 (1986).

[32] Corwin, "The Constitution as Instrument and as Symbol," 30 Am. Pol. Sci. Rev. 1071, 1084-85 (1936).

[33] Stern, "That Commerce Which Concerns More States Than One," 47 Harv. L. Rev. 1325 (1934).

[34] J. Rohr, supra note 3, at 117-34.

[35] 103 U.S. 168 (1881).

[36] 354 U.S. 178, 200 (1957).

[37] 343 U.S. 579 (1952).

[38] 462 U.S. 919 (1983).

[39] Stathis, "Executive Cooperation" 3 Law & Pol. 187, 282 (1986).

[40] Schultz, "Separation of Powers in Foreign Affairs," Separation of Powers, supra note 23, at 121.

[41] 462 U.S. 919, 999 (1983).

[42] Van Alstyne, supra note 11, at 1709.

[43] For previous announcements of the death of federalism, *see* Tribe, supra note 24, at 17 n.9.

[44] A. Tocqueville, Democracy in America 160-66 (Knopf ed. 1963).

[45] J. Roche, "Constitutional Law: Distribution of Powers," in 3 Encyc. Soc. Sci. 304 (1968).

[46] J. Burns, The Vineyard of Liberty 598 (1982); Roche, supra note 4, at 302.

[47] Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495-503 (1977).

[48] S. Morison, H. Commager, and W. Leuchtenberg, The Growth of the American Republic 517 (7th ed. 1980).

[49] 349 U.S. 294 (1955).

[50] 369 U.S. 186 (1962).

[51] 285 U.S. 262, 311 (1932).

[52] 319 U.S. 624, 642 (1943).

[53] 5 U.S. (1 Cranch) 137 (1803).

[54] R. Jackson, The Struggle for Judicial Supremacy xi (1941).

[55] The detention of Japanese aliens during World War II does not contradict this point. This unfortunate event occurred in the 1940s, not the 1930s, and was a war-time measure. *See Korematsu* v. *United States*, 323 U.S. 214 (1944).

[56] 268 U.S. 652 (1925).

[57] 299 U.S. 353 (1937).

[58] 301 U.S. 242 (1937).

[59] 310 U.S. 88 (1939).
[60] 309 U.S. 227 (1940).
[61] 297 U.S. 233 (1936).
[62] R. Jackson, supra note 54, at 3.
[63] A. Schlesinger, supra note 25, at 29.
[64] Supra note 16, at 355.
[65] 369 U.S. 186 (1962).
[66] Brennan, supra note 47, at 493.
[67] *Smith* v. *Allwright*, 321 U.S. 649 (1944).
[68] *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).
[69] *Harper* v. *Va. Bd. Elec.*, 383 U.S. 663 (1966).

## EXECUTIVE CALENDAR

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 an 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*

Maj. Gen. Donald J. Kutyna, xxx-xx-xxxx xxx-..., FR, 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. Burpee, xxx-xx-xxxx xxx-..., FR, 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. Davis xxx-xx-xxxx, 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 1370:

Lt. Gen. James E. Light, Jr., xxx-xx-xxxx xxx-..., FR, 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 1370:

*To be lieutenant general*

Lt. Gen. Edward L. Tixier, xxx-xx-xxxx FR, U.S. Air Force.

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*

Lt. Gen. Johnny J. Johnston, xxx-xx-xxxx, 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, xxx-xx-xxxx xxx-..., U.S. Army.

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*

Brig. Gen. James F. Fretterd, xxx-xx-xxxx.

*To be brigadier general*

Col. John W. Schaeffer, Jr., xxx-xx-xxxx.
Col. Simon C. Krevitsky, xxx-xx-xxxx.

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, section 593(a), 3371 and 3384:

*To be major general*

Brig. Gen. Clyde R. Cherberg, xxx-xx-xxxx xxx-....
Brig. Gen. Robert C. Hope, xxx-xx-xxxx.
Brig. Gen. Alvin W. Jones, xxx-xx-xxxx.
Brig. Gen. Felix A. Santoni, xxx-xx-xxxx.
Brig. Gen. Richard E. Stearney, xxx-xx-xxxx xxx...
Brig. Gen. Mark W. Tenney, xxx-xx-xxxx.

*To be brigadier general, USAR*

Col. Woodrow A. Free, xxx-xx-xxxx.
Col. Barclay O. Wellman, xxx-xx-xxxx.
Col. Stephen H. Sewell, Jr., xxx-xx-xxxx.
Col. Claude J. Roberts, Jr., xxx-xx-xxxx.
Col. Paul R. Lister, xxx-xx-xxxx.
Col. Paul N. Revis, xxx-xx-xxxx.
Col. Gene P. Hale, xxx-xx-xxxx.
Col. Roger H. Butz, xxx-xx-xxxx.

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, xxx-xx-x... xxx-.../1110, U.S. Navy.

Mr. BYRD. Mr. President, I ask unanimous consent that all nominations placed on the Secretary's desk in the Marine Corps, Navy, be considered en bloc and agreed to en bloc.

Mr. DURENBERGER. They have been cleared on this side.

The PRESIDING OFFICER. Without objection, it is so ordered.

The nominations considered and agreed to en bloc are as follows:

NOMINATIONS PLACED ON THE SECRETARY'S DESK IN THE MARINE CORPS, NAVY

Marine Corps nominations beginning Pedro Gutierrez, and ending John A. Wilson, Jr., which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD on October 1, 1987.

Navy nominations beginning Rodolfo Llobet, and ending Robert L. Duell, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 30, 1987.

Navy nominations beginning Stephen A. Eilertson, and ending Earl H. Harley, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD on October 1, 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

Mr. DOLE. Mr. President, 92 years ago today, on October 23, 1895, 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 famine.

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 also a vigorous advocate of the 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," an excellent book by the Senate historian, Richard Allan Baker. To name just a few of the public laws Senator 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 instruction for all of us in the Senate today. It is a road map on how to be an effective U.S. Senator.

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 particular special 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 strove to be sure that New Mexico received 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 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 cared about. In command of the issues, he could persuade wavering colleagues. And as a committee chairman, he was always scrupulously fair. He strove to protect the rights and interests of every member of his committee, even when they did not fully understand what their interests were. But he also knew when committee discussion and debate should end, when it was time for his committee to act.

And on the Senate floor, he was, as always, fully prepared. He spent most of his floor time in quiet conversation with potential adversaries, using his mediation and negotiation skills. He gave very few speeches, and none was long-winded. But when Clinton Anderson did speak in floor debates, his colleagues listened, and they listened carefully.

Thanks to Dr. Baker's book, we have a model for Senate leadership we can study and emulate. Of course, it may not be a model appropriate for all Senators or for all times. But this Senate is now struggling to work with the executive branch to play its proper role in national policymaking on the truly critical issues which now face us. On this 92d anniversary of his birth, perhaps a few thoughtful minutes pondering the career of Senator Clinton P. Anderson, Democrat of New Mexico, might be a few minutes very well spent.

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 Environment and Public Works Committee and a ranking Democrat on the Labor and Human Resources Committee. West Virginia had a desperate need for improved infrastructure, and for 20 years, there wasn't a road, a bridge, a dam, or a sewer system that Phil McGance didn't work on, fight for, 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 1985, 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 management of the company; 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 Wheeling Pitt desk in our office. He worked the problem around the clock: trying to help management, workers, the Government, and the banks find solutions that would enable Wheeling Pitt to survive.

He practiced 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 the people of 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 in Washington, 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, I 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:

[From the New York Times, Oct. 19, 1987]

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 of China's position in Tibet. However, the concluding suggestion that Sikkim could be a model for China's relations with Tibet was misguided.

In 1974, Sikkim had 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 job. Since then, Sikkim has been considered 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, while independent Sikkim was wiped off the map.

We Himalayans watch with resignation as the United States supports the aggressors in Sikkim and in Tibet, all the while championing human rights elsewhere. 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.

YANGCHEN,
*Princess of Sikkim.*
New York, Oct. 12, 1987.

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To the Editor:

As a research scholar in Asian studies and his wife, both speakers of the Tibetan langauge, 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 foreign country whose inhabitants are mostly 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.

Despite 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 rebuild 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. Talking with the Tibetans, we noted a pervasive fear of being overheard by informants. They changed the subject abruptly when a Chinese walked by. We were told that disappearances, 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—destroyed; religious statues, 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 1980's. Chinese hold all positions of responsibility and authority, but we 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 langauge and culture.

Peking makes much of the economic aid it has given Tibet in recent years, but this aid coincides with the massive influx of Chinese and the recent increase of tourism. Modern Chinese housing and facilities stand apart from the squalid quarters of the Tibetans. Aid that is used for rebuilding monasteries goes to those that serve as museums for tourists, where an admission fee generates income for the Chinese Government. We found that the few monasteries that have reopened are entirely under the control of Communist officials, not the Buddhist monks.

Every Tibetan we spoke to in depth—farmers, teachers, monks, mothers—asked, "When will the Dalai Lama return to Tibet?" and told us, "We want the Chinese out of our country." They said they are intensely bitter that the Chinese hold them prisoner in their own country and are anguished over the loss of their spiritual teachers. Men and women openly wept as they said these things.

The evidence is in. Tibet is not an "autonomous region" of China. It is a colony of China, held by military force, against the will of the Tibetan people. The last time the Tibetan people resisted the Communist Chinese, one million of them died. It is a measure of their desperation at being erased from their own land, and of their great courage, that they stand up again now. The world community must throw a floodlight on Tibet at once, and hold China strictly accountable for every action. This may be the only thing that can stop China from beginning another massive wave of executions.

JOHN J. MAKRANSKY,
BARBARA R. MAKRANSKY,
Madison, Wis., Oct. 6, 1987.

## FRAUD OF THE DAY—PART 9

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 immune from this menace lurking on our docks and in our airports.

Not long ago, I received information from a constituent alleging that a Pennsylvania company was committing customs fraud. The information claimed that the company in question was importing refractory brick from Japan, removing the country of origin markings, and marketing the product as American produced brick.

I passed this information along to the relevant Customs Service officials and was pleased to see an investigation go forward. In September 1987, a visit by customs officers to the company plant confirmed the allegations made by my constituent. A customs summons was served on corporate headquarters, and later the same month 89 pallets of refractory brick were constructively seized under 19 U.S.C. 1595(a) and (c) for violation of 15 U.S.C. 1124. Penalties in this case have yet to be assessed, and court proceedings are still pending.

This fraud may seem insignificant next to a $72 million pipe fraud or a multimillion dollar coffee fraud. The value of the goods seized in this case was slightly more than $54,000. But that $54,000 is every bit as important to domestic manufacturers in this small industry as the millions are likewise important in other cases. In every case there are real domestic producers that suffer from this criminal activity—we are not talking about hypothetical or de minimis losses. In many respects, it is all the more devastating when it happens in a small case, like the photo album industry I discussed in an earlier fraud of the day, because the domestic industry's pockets are not as deep.

The Senate provision creating a private right of action for customs fraud would provide a means of redressing these outrages. U.S. laws provide for a private right of action in other situations where the crime involved harms U.S. parties, such as in antitrust, securities, or civil rights cases. In the same way, customs fraud represents far more than simple loss of revenue to the Federal Government—it has a direct and sharp impact on domestic manufacturers—and our law should similarly provide for a private right of action in these cases to provide some tangible assistance to abused U.S. industries.

## TECHNOLOGY TRANSFERS TO THE SOVIET UNION: A ROADMAP OF TREACHERY

Mr. HELMS. Mr. President, yesterday the police department of Drammen, Norway, made public its report on the Kongsberg Vapenfabrik's transfer of critical technology to the Soviet Union. Senators will recall that Kongsberg was the partner with Toshiba in the very damaging transfer of milling machines and the accompanying computer technology for the improvement of Soviet submarine propeller 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 existence of still other more serious 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 Norway. 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 exports, 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,
*Washington, DC, October 21, 1987.*

His Excellency EMMANUEL DE MARGERIE,
*The Ambassador of France, Reservoir Road NW., Washington, DC.*

DEAR MR. AMBASSADOR: Recent revelations of high technology machinery sales to the Soviet Union by the French company Ratier-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 occasion 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 our government responsible for technology transfer that the Government of France considers these violations to be "minor and isolated," and that the violations will not "provoke 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 an unfortunate misjudgment with regard to the resolve of the United States to make COCOM work.

First, the Japanese company Toshiba claims that its illegal sales to the Soviets, which precipitated strong legislation in the U.S. Congress earlier this year, would never have happened had not the French sale opened the door to the Soviets. Second, the report of French satisfaction with the status quo in authorization procedures leaves 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 strengthen our common goal of technology security, and to reject any counsel which invites an attitude of ease and nonchalance in the face of this most important issue.

In that sense of cooperation, I request that you provide your Government's position on the answers to the attached questions concerning the Ratier-Forest transaction. This information will no doubt play a central role in our deliberations in coming months.

Please be assured of my highest considerations.

Sincerely,

JESSE HELMS.

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QUESTIONS REGARDING FOREST COMPANY MACHINE TOOL EXPORTS

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. Where are these machines now?

b. Was a license issued for these machines? If so, why?

c. If these 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 on these machines?

2. 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 countries join in making our 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. We 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 VAPENFABRIKK 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 points:

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.

It was further decided that the undersigned was to be in charge of the case on behalf of the prosecuting authorities.

3. On Monday 3 March 1987, I met with Director General Barth and Head of Department Magnus from 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.

(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 that he has reported accordingly.

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 further remarks.

5. On Friday 6 March 1987, a meeting was held at the National Security Bureau where a plan for the investigation—including work progress—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 investigation group and the Foreign Ministry.

8. In conclusion, I refer to Police Adjutant Rustad's report of 6 March 1987.

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."

The order to investigate was aimed at inquiring into the above-mentioned sale of 4 numerical controllers, model NC 2000, from Kongsberg Vapenfabrikk to Toshiba Machine Company, with the U.S.S.R. as end-user, PC 150 S programming centres, the HAL program (a special program for Toshiba MBP 110 machine tools for generating executive tapes for propellers), and the NMG program (a Computer Aided Manufacturing program intended for double-curved tool pathes, which are typical of aircraft bodies, propellers and turbine blades). The programming centres and the programs themselves were sold to the Soviet Union directly from Kongsberg Vapenfabrikk, and the contract was co-ordinated with the Toshiba contract.

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 26, 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 on the case at hand.

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 in compliance with the directives and routines already established for the ongoing investigation of the delivery of 4 NC 2000s to Toshiba.

In the event that the investigation—and perhaps more particularly, the examination of documents—should give cause for suspi-

cion 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 took place and, of course, the goods delivered.

I emphasize the importance of giving this case top priority.

I am aware that the investigation is currently concentrating on a systematic examination of all deliveries made, for which purpose the police is availing itself of data processing facilities.

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—prepare to investigate the actual course of events within the COCOM itself. I await a further discussion of this final point."

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 Vapenfabrikk's 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 Friday 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 Prosecutions, Tor Aksel Busch, 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 in 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 Vapenfabrikk 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, NC 2000, and CNC 2000.

Mini-computer of the following model: KS 500 (which is also a part of NC 2000 and PC 150 S).

Programming centres of the following models: PC 150 S and PC 150 M.

Computer programs of the following models: HAL program and NMG program.

A Repair Shop for maintenance of NC 2000, including EPROM (Erasable programmable read-only-memory), electronic fixed wire storage of system programs, consisting of: KS 500 Test Station/Dynamic Test, Membrane—static test station, and PM 500—programming equipment.

Equipment which enables the Soviets to upgrade the NC 2000 system program, such as:

PM 500 EPROM programming equipment.

System program listing for NC 2000.

Training in the use of the system program listing and programming of KS 500.

The FORM contract with Czechoslovakia, which consists of the following main components:

NORD 505 computer from Norsk Data with peripheral equipment.

Kongsberg drafting system.

Kongsberg CAD/CAM program DMS.

Swedish finite element method program FEMPAC.

As for the numerical control systems, they have all been installed on third country manufactured machine tools.

There have been no cases involving the export of numerical control systems attached to Norwegian machine tools. The countries that have delivered such machine tools are West Germany, France, Italy, Japan and Great Britain.

In one particular case, Kongsberg Vapenfabrikk has purchased a Swedish machine tool, VBF 450, of SAJO make, fitted it with a CNC 203 numerical controller and exported it to the Soviet Union.

The investigation has shown that Kongsberg Vapenfabrikk, from May 1974 to October 1976, has delivered a total of 32 CNC 300 systems capable of operating 4-5 axes simultaneously, and one CNC 203 system capable of operating 3 axes simultaneously.

CNC numerical controllers are "freely programmable", and are therefore, according to COCOM Regulations, not allowed for export to countries of the "Eastern Bloc". An application 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 Vapenfabrikk cannot be held liable in this respect.

During the period starting in September 1976 and ending in July 1984, Kongberg Vapenfabrikk exported a total of 105 numerical control systems of NC 2000 model, where the Soviet Union was the end-user, and 2 such systems, where China was the end-user. Of this number, 29 are capable of operating 2 axes simultaneously, and are thereby in compliance with COCOM Regulations. Of the remaining number, 55 are capable of controlling 3 axes simultaneously (with no approval of the national authorities), 7 control 4 simultaneous axes, 10 control 5 simultaneous axes, and 4 control 9 simultaneous axes, and are therefore all in violation of COCOM Regulations. There are still two remaining control systems, where we have not been able to establish with certainty the number of simultaneous axes controlled, but information gathered so far seems to indicate that these systems are according to regulations.

The investigation has also revealed that Kongsberg Vapenfabrikk sold 3 CNC 2000 control systems to France in 1978 where the Soviet Union was the end-user. According to the French import certificate, the control systems were to operate 2 axes simultaneously, but the goods actually delivered to the Soviets consisted of machine tools capable of working 6 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 they control. The results of such investigations have led us to suspect that machine tool builders in France, West Germany, Italy and Japan have also largely violated COCOM Regulations. Data received 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 Vapenfabrikk 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 licence in this particular case, and the sale is therefore in compliance with regulations.

Where the Repair Shop sale is concerned, the investigation has shown that this delivery also included one unit of PM 500 programming equipment, that training had been given on the NC 2000 system program and that system program tapes had been provided. Since the Soviets have had access to the system program listing, this means that the NC 2000 controller is reprogrammable, and can no longer be said to be "fixed wired", as required by COCOM Regulations, and this would imply that the entire contract must be regarded as a breach of COCOM Regulations.

The investigation has disclosed that Kongsberg Vapenfabrikk has sold several pieces of PM 500 programming equipment to the Soviet Union, to Baltic Shipyard for one, in conjunction with the Toshiba delivery. Whether such sales constitute a breach of COCOM Regulations depends, however, on whether the Soviets possess the system program listing applying to the NC 2000 they wish to update, and the necessary training on the system itself. It has been established that training has been given, but there is no evidence of their having received the system program listing.

Where the FORM contract is concerned, the investigation has revealed that Kongsberg Trade delivered, on 15 or 16 March 1987, the Swedish software program FEMPAC to Czechoslovakia, without having applied to the Ministry of Trade for an export licence for this program. FEMPAC is a product for which a license is required before export can take place. This delivery took place in violation of the provisions of the Export Bans' Act.

II. COCOM REGULATIONS AND APPLICABLE STATUTORY PROVISIONS

Like many other western countries, Norway has seen fit to control the export to all Warsaw Pact countries, Albania, China, Mongolia, Vietnam and North Korea of products that may contribute to modifying the strategic balance.

This cooperation between western countries takes place within the COCOM (Co-ordinating Committee for Export Control). Countries participating on this committee include all NATO countries, except Iceland, plus Japan.

COCOM has not been established as the product of any formal agreement, and

therefore does not have the status of an international organization.

Hence a violation of 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 act which applies in cases of violation of COCOM Regulations. The penalty limits amount to fines or imprisonment for up to 6 months, which means 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 investigation of Kongsberg Vapenfabrikk's sale of the 4 numerical controllers to Toshiba, with the Soviet Union as end-user, he appointed, in consultation with the 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 Vapenfabrikk, 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 gave the investigators an introduction to the technology which was to be the subject of further investigations. Such instruction was an absolutely essential preparation for further document seizures, for enabling a valid assessment of such documents and for the interrogations that would have to be conducted.

When the group felt sufficiently prepared, the case was opened by searching through, and seizing relevant documents at Kongsberg Vapenfabrikk's offices. A court order to this effect had been obtained in advance from the Kongsberg Magistrate's Court.

During the entire period covering the sale of numerical control systems, i.e. from 1974 to 1985, the department responsible for the production and sale of these controllers was the Data Systems Division. When this division was closed down at the turn of year 1984/1985, its files were transferred to the Drafting Machine Department or to Kongsberg Trade, stored in a variety of different places and, to some extent, also destroyed. Hence the investigators had considerable difficulty in finding the documents they wished to seize, and subsequently, as a result also of the extended scope of the investigation, seizures had to be carried out on a number of different occasions in several different places. Although most of the information required by the investigators has finally been found, there are still some gaps in the documentation, most probably because such documents have been destroyed.

We have found no information or any other evidence indicating that documentary evidence has been deliberately removed/destroyed in order to cover up the illegal sales that have taken place.

Following the closing down of the Data Systems Division, Kongsberg Vapenfabrikk established Kongsberg Trade, which was purely a trade organization, responsible for the sale of products from Kongsberg Vapenfabrikk and other companies to Eastern Europe.

The police has so far seized more than 250,000 document pages, which form the basis of this 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 been as cooperative as could have been hoped for. The witnesses' identity will not be disclosed in this report, in order to protect their personal privacy.

Already during the initial stages of the investigation, the American authorities were contacted for the purpose of obtaining more information about the case. Investigators also visited USA during week 14. Collaboration during the progress of this case has functioned as initially agreed upon.

During the course of the investigation, the police has also collaborated with the Ministry of Trade and the Foreign Ministry, which has proven especially useful in comprehending the intentions and contents of the COCOM Regulations, and in ascertaining for which goods Kongsberg Vapenfabrikk has applied for export licenses.

Since Kongsberg Vapenfabrikk has delivered its numerical controllers to machine tool builders in third countries, it has been necessary to approach the police authorities in the various countries in question, in order to draw their attention to possible violations of COCOM Regulations by machine tool builders in their countries, and to obtain the necessary material for use in the Norwegian investigation.

Already on 20 May 1987, an inquiry was made through police channels to the Japanese police authorities, and their representatives also visited Norway during week 23 as part of their own investigation of Toshiba Machine Company. Data were exchanged and plans for further cooperation established. However, we take the liberty of pointing out that we have still not received the awaited information, nor have we been granted permission to question certain Japanese citizens central to this case, something which would be of some importance to shedding full light on this part of the case.

On 20 August 1987, information was sent through police channels concerning possible violations of COCOM Regulations committed by machine tool builders in France, West Germany and Italy, and the police authorities in these countries were invited to cooperate. To date, no reply has been received either from France or Italy. On 3 September 1987, a reply was received from West Germany, stating that our communication had been received and that the information contained in it would be conveyed to the Customs Authorities.

On 2 September 1987, a further notice concerning another possible violation of COCOM Regulations on the part of the Toshiba Machine Company was sent to the Japanese police authorities, but no reply to this has so far been received.

On 12 October 1987, a second inquiry was sent to the French, German and Italian police, the reason being that investigations in Norway had revealed information indicating that machine tool builders in these countries had been in breach of COCOM Regulations in connection with a far larger number of machine tool contracts than initially assumed. The questions contained in the initial inquiry were reiterated, and a few additional questions were raised.

The fact that Norwegian police has not received the awaited information, and not been able to question the desired witnesses in Japan, coupled with the fact that some of the other countries, at least so far, have seemed very little interested in cooperating, will at best slow down the Norwegian investigation and, at worst, make it impossible to reach a full elucidation of the case, especially as concerns the distribution of responsibility within Kongsberg Vapenfabrikk itself. This is especially important in respect of the sale of NC 2000 systems, in collaboration with Japanese and French machine tool builders, and where such offences are not subject to statute of limitation according to criminal law.

The investigation has also brought to light information appearing to indicate that American companies as well may have supplied technology in breach of COCOM Regulations. This information has been conveyed to the American authorities.

As a result of the American contention regarding reduced propeller noise, etc., we have approached the Ministry of Defence in order to obtain their view on certain questions in this respect.

The investigation has now progressed so far that we are certain of the technical specifications of the technology Kongsberg Vapenfabrikk has sold.

As for the machine tools, we have established what machines have been delivered, but are still missing some technical specifications on the individual types of machines.

The other part of the investigation, namely to establish the identity of the persons at Kongsberg Vapenfabrikk responsible for what was happening has given rise to major problems, partly because the necessary documentary evidence is not available (e.g. minutes of meetings), but, even more importantly, because the persons questioned

so far, and who, according to the organization chart should have been in positions of responsibility, have been somewhat uncooperative. To complicate matters even further, Kongsberg Vapenfabrikk is a company that was reorganized several times during the period in question, where the organization plan in effect at any given time is never strictly adhered to in practice, and where it has been impossible to establish who was responsible for what at any given time.

As mentioned earlier, a major problem in this case has been inadequate legislation in the field, especially with regard to the short statutes of limitation.

IV. INVESTIGATION RESULTS

*A. Introduction*

As mentioned at the beginning, the investigation of Kongsberg Vapenfabrikk's transfer of technology to the Soviet Union included machine tool controllers of the following models: CNC 300, NC 2000 and CNC 2000. CNC 300 controllers were sold in a number of 33 units to the Soviet Union during the period from May 1974 to October 1976.

The first of these controllers was sold directly to the Soviet Union, attached to a Swedish SAJO machine tool supplied by the company SANDEN. The remaining 32 controllers were exported to the French machine tool builders GSP and RATIER FORREST for re-export to the Soviet Union.

NC 2000 controllers were exported in a number of 107, of which 105 were re-exported to end-users in the Soviet Union and two end-users in the People's Republic of China.

These exports took place from September 1976 to July 1984. Apart from one single delivery, where we still have insufficient documentation to be able to draw a definite conclusion, and two reserve control systems, delivered directly from Kongsberg Vapenfabrikk to the Soviet Union, all these NC 2000 control systems were exported to machine tool builders in France, West Germany, Italy, Japan and Britain, for subsequent re-export to the Soviet Union and China. The machine tool builders in question are: FORREST LINE in France, SCHIESS, DORRIES and DONAUWERKE in West Germany, INNOCENTI in Italy, TOSHIBA MACHINE COMPANY in Japan and KTM in Britain.

The investigation has, moreover, been directed at the sale of PC 150 M, PC 150 S, the HAL and NMG programs, Repair Shop, PM 500 programming equipment, delivery/compromising of program system listings and the provision of relevant training. The above products have been sold directly to the Soviet Union, either as independent contracts, or as part of contracts for the sale of numerical control systems attached to machine tools from third countries.

A necessary step in the investigation of whether Kongsberg Vapenfabrikk's transfer of technology has been in violation of COCOM Regulations has also been to assess available documentary data relating to the machine tools themselves, and to question witnesses about their respective capabilities. A number of possible violations have also been ascertained in connection with the machine tools as well.

Attached to this report is an overall survey of the capabilities of the various machine tools and numerical controllers, cf. Appendix 1.

In addition, the FORM contract with Czechoslovakia has been subject to police investigation. This contract deals with the sale of DMS systems from Kongsberg Trade, also involving the delivery of a Swedish computer program, for which no export licence has been applied for.

*B. Kongsberg Vapenfabrikk's CNC 300/CNC 203*

As mentioned under item I,B, "Summary of investigation results" a CNC controller, like CNC 300 and CNC 203, is basically not allowed for export to "Eastern Bloc" countries, according to COCOM regulations, Item No. 1091(a)(i), in this case from 1976, which stipulates that the control system, in order to be allowed for export, must be "hardwired" (not softwired, i.e. not a Computerized Numerical Controller (CNC)). In this same Item No. 1091 Note 3 (d) of the COCOM Regulations, it is stipulated that permission may be sought to export CNC controllers to the "Eastern Bloc" (government may permit), but paragraph (i) of this Regulation clearly states that an absolute prerequisite for the granting of such a permit is that the controller does not operate more than 2 axes simultaneously.

It must therefore be concluded that all sales to the Soviet Union, in fact, constitute a violation of COCOM Regulations' Item No. 1091(a)(i), since the control systems in question are freely programmable (softwired) and capable of controlling more than 2 axes simultaneously.

When examining the individual CNC 300 delivery, it may be concluded that they, furthermore, all, in fact, violate the stipulations of COCOM Regulations' Item No. 1091(a)(ii), because:

Production no. 1080 (CNC 203), delivered to an "institute" in Moscow in May 1974 controlled 3 simultaneous axes. It is worth noting that "Government may permit" 2 simultaneous axes.

In this specific case, Kongsberg Vapenfabrikk applied for an export license, but it has been impossible to find any documents, either in the Military of Trade or a Kongsberg Vapenfabrikk, indicating whether such licence was granted or not. The documents have probably been destroyed.

Production no. 1134–1141, 1150, 1153–1170, 1174–1176, 1194 and 1203 (CNC 300) were delivered to the Soviet Union attached to machine tools from the French machine tool builders mentioned earlier, and they all controlled 4–5 axes simultaneously.

Attempts have been made to ascertain whether Kongsberg Vapenfabrikk applied for an export licence for these controllers, and, if so, what information these applications contained. This has, however, proven impossible, as all documentation of this type 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 Vapenfabrikk. 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 machine tools the CNC 300 control systems operated, in order to support the conclusions arrived at with respect to their number of simultaneous axes.

These investigators have not revealed any information indicating that the machine tools in question violate COCOM Regulations on any other points than their non-regulation number of simultaneous axes.

COCOM Regulations Item No. 1091(b)(i)(6) allows a maximum of 3 simultaneous axes, regardless of controller.

In view of the American information that Kongsberg Vapenfabrikk, even prior to the Toshiba contract, had allegedly delivered, in cooperation with a French machine tool builder, 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.

The documents seized showed that production no. 1165, 1166, 1167 and 1168 were delivered to Baltic Shipyard in April 1976 (3 units) and June 1976 (1 unit) respectively.

These CNC 300 controllers operated machine tools from Ratier Forrest, model OR-2-4000.

The investigation has revealed that this is a special machine used for milling marine 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 on a Ratier Forrest machine tool, model H 800, destined for Kiev. This machine tool manufactures propeller blades.

It may be added that, of the remaining deliveries, a further 4 were delivered to Leningrad, but to which company is unknown. This applies to production no. 1170, 1174, 1175 and 1176, all attached to Ratier Forrest machine tools.

Production no. 1170 was delivered on a Ratier Forrest machine tool, model OR 500, for propeller blade machining. The other production numbers were delivered on Ratier Forrest machine tools for machining large turbine blades.

The remaining deliveries were made to "Stankoimport", and one to Kiev, but there is no information as to the names of the receiving companies.

In so far as the deliveries of CNC 300 control systems are concerned, it may be concluded that they all, in fact, violate COCOM Regulations, and that the same must be said of the machine tools they control. The question of whether Kongsberg Vapenfabrikk may be held formally liable will be dealt with in Chapter V below.

*C. Kongsberg Vapenfabrikk's NC 2000*

In 1976 Kongsberg Vapenfabrikk produced a new type of numerical controller with the designation CNC 2000. However, this controller was "freely programmable" (softwired), and was subsequently not allowed for sale to the "Eastern Bloc", cf. COCOM Regulations' Item No. 1091(a)(i).

It was therefore decided to produce a so-called "Eastern version" under the designation NC 2000, which was "hardwired" and capable of controlling 2 axes simultaneously, and hence in compliance with COCOM Regulations. A 3-axis version was also produced, which would have been allowed for export, if Kongsberg Vapenfabrikk had applied for, and received the authorization of the Norwegian authorities, which the investigation has shown they did not do.

As mentioned earlier, a total of 107 of these NC 2000 controllers were exported, of which 105 were to the Soviet Union as end-user, and 2 to the People's Republic of China as end-user.

Of this total number, there are 2 deliveries 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 simultaneous axes; 55 deliveries are illegal, since NC 2000 operates 3 simultaneous axes; 7 deliveries are illegal, since NC 2000 operates ¾ simultaneous axes; 10 deliveries are illegal, 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 machine tools equipped with controllers operating more than 3 simultaneous axes are also, for this very reason, to be considered as illegal. In addition, a number of the machine tools operating 2 simultaneous axes are illegal because of their excessive slide travel.

Furthermore, 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 limited itself to merely referring to its embargo list, where NC 2000 was entered as non-strategic goods, something which referred to the original application dated 17 August 1977, whereby a NC 2000 controller, with specifications within the limits of the stipulations of the COCOM Regulations, was initially approved.

On the basis of information contained in seized documents, it would seem that Kongsberg Vapenfabrikk managed to have NC 2000 approved as a nonstrategic product, merely by entering it on the embargo list, and, in an appendix to the list, confirming that it was non-strategic. There is no information indicating that the Ministry of Trade conducted any further check prior to approving the product for export.

There is, however, no information that indicates that the specification of the NC 2000 control system originally approved were not in compliance with COCOM Regulations.

As will be accounted for in the below, the majority of NC 2000 controllers sold were not in compliance with the specifications of the application for export licence, and for which such licence was granted.

The documentation in support of each individual sale, i.e. contracts, orders, production orders, confirmations of orders, and on which each application for an export licence was founded, was often misleading in relation to the actual product delivered. We shall revert to this point when dealing with the various categories of NC 2000 control systems.

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, 4013–4019, 4035, 4036, 4041, 4068, 4071, 4072, 4075, 4077–4080, 4089, 4094, 4095, 4097 and 4098. These controllers were delivered attached to machine tools from Schiess and Dorries, and it may be concluded that;

11 of the machine tools from Schiess violate COCOM Regulations, since their slide travel exceeds the allowed limit (3000 mm), cf. Item No. 1091, (b) (i) (1).

5 of the machine tools from Dorries violate COCOM Regulations, since their slide travel also exceed the stipulated 3000 mm limit. It should be pointed out that three of these are equipped with two NC 2000 controllers, each with two simultaneous axes, which is legal in so far as the controllers are concerned.

Kongsberg Vapenfabrikk applied for, and received export licenses from the Ministry of Trade for these controllers. The application stated 2 simultaneous axes, which was, in fact, what was delivered, and documentation at Kongsberg Vapenfabrikk coincides with what was delivered.

*NC 2000 controlling 3 simultaneous axes—55 units.*

This applies to production no. 4001–4004, 4020–4034, 4037, 4040, 4042, 4060, 4063–4067, 4069, 4073, 4081, 4082, 4087, 4088 and 4096.

These controllers operate machine tools from 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 violates COCOM Regulations, because of excessive slide travel (max. allowed is 3000 mmm) 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 mmm) and/or excessive motor power (max. allowed is 20 kw) (Item No. 1091 (b) (1) (1) and (3).

1 machine tool from Toshiba violate COCOM Regulations, because of excessive slide travel (44000 as opposed to max. allowed 3000 mmm) and/or excessive motor power (55 kw as opposed to max. allowed 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, since they have 3 simultaneous axes. This sale from Kongsberg Vapenfabrikk is somewhat special, as the 2 NC 2000 controllers were programmed in Britain by the British themselves. Hence, there is no information available concerning the controllers' capabilities nor the number of simultaneous axes operated. The machine tools themselves though do not appear to violate COCOM Regulations. However, there is reason to believe that the controllers also operate 3 axes simultaneously, which would, on the contrary, constitute a breach of COCOM Regulations, unless an application for their approval has been filed with the Norwegian authorities.

Kongsberg Vapenfabrikk has applied for export licenses for all of these controllers by referring to the fact that the products were non strategic according to the embargo list, i.e. they should have been restricted to 2 simultaneous axes.

From Kongsberg Vapenfabrikk's own documentation, it appears that 5 production numbers (4025, 4028, 4029, 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 3 axes simultaneously; in other words, the products were in keeping with the documents, but not in keeping with what Kongsberg Vapenfabrikk was licensed to export, i.e. 2 simultaneous axes according to the embargo list.

*NC 2000 controlling 4 simultaneous axes—7 units*

This refers to production no. 4061, 4062, 4074, 4076, 4083, 4084 and 4093 which control machine tools from Schiess and Donauwerke.

It must be concluded these NC 2000 controllers violate COCOM Regulations, because they operate 4 simultaneous axes, as opposed to 2 simutaneous axes authorized by COCOM Regulations' Item No. 1091(a)(ii). As for the machine tools, they all violate COCOM Regulations for this very reason, but, in addition, it may be ascertained that; all 5 machine tools from Schiess also violate COCOM Regulations because of their excessive slide travel, in relation to the allowed 3000mm, cf. COCOM Regulations' Item No. 1091(b)(i)(1).

As concerns the machine tools delivered from Donauwerke, these appear to be legal, apart from the fact that they operate 4 axes simutaneously.

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; in other words, the product was 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 2 controllers were delivered directly to the Soviet Union as "reserve controllers", and 8 controllers to the machine tool builder Forrest Line.

All of these NC 2000 controllers are in breach of COCOM Regulations, since they all control 5 simultaneous axes, as opposed to the 2 simultaneous axes allowed, cf. Item No. 1091(a)(ii).

On the basis of available documentation, the macine tools are illegal, since they have 5 simultaneous axes, cf. COCOM Regulations' Item 1091 (b)(2)(6).

From Kongsberg Vapenfabrikk's documentation, it appears that all the systems were to control 3 simultaneous axes, with 2 non-simultaneous additional axes; i.e. the product coincides neither with the documentation, nor with the relevant export licence, 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 Toshiba Machine Company.

It may be concluded that these NC 2000 controllers all violate COCOM Regulations, since they operate 9 simultaneous axes, as opposed to the 2 simultaneous axes allowed.

The same conclusion may be drawn with regard to the machine tools themselves, but, in addition to this, they also violate COCOM Regulations as a result of their excessive slide travel, motor power, accuracy and two independent spindlers. It must be concluded that the milling machines are in-breach of COCOM Regulations Item No. 1091(b)(i) (1), (2) (3) (4) and (6). The machine tool designation is moreover false.

From Kongsberg Vapenfabrikk's documentation, it appears that these systems were to control 2+2 axes simultaneously, with 5 non-simultaneous additional axes, i.e. the product coincides neither with the documents nor the relevant export license, i.e. 2 simultaneous axes, according to the embargo list.

On the basis of the information received from the American authorities, referred to in the introduction, we would like to draw attention to the following points:

The export of these 4 machine tools equipped with Kongsberg Vapenfabrikk's NC 2000 contollers have enabled the Soviets to manufacture propellors with a diameter

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, not correct to maintain that Kongsberg Vapenfabrikk has provided the Soviet Union with software enabling them to design the new, and extremely sophisticated propellors that have been observed on their submarines. It must therefore be concluded that where propellor manufacturing is concerned, Kongsberg Vapenfabrikk has contributed to facilitating the machining of such equipment and increased overall production capacity. Kongsberg Vapenfabrikk has not, on the other hand, contributed to simplifying the designing process nor provided designing data for such propellors.

The American questions/contentions on this point have also been linked to the sale of HAL and NMG programs. We refer to the account of said programs in the below.

*D. Kongsberg Vapenfabrikk's CNC 2000—3 units*

The investigation has revealed information that Kongsberg Vapenfabrikk has sold 3 CNC 2000 controllers to the French machine tool builder Ratier Forrest.

These sales refer to production no. 7006, 7032 and 7087, which were delivered to France in February, May and September 1978 respectively. The controllers were attached to French milling machines, and reexported to the Soviet Union, where two of them were installed in Volgodonsk and one in Leningrad.

CNC 2000 is entered on Kongsberg Vapenfabrikk's list of embargoed goods (strategic goods). Hence the export of this controller to an "Eastern Bloc" country constitutes a clear violation of COCOM Regulations item No. 1091(a)(1), since the control system is freely programmable (softwired, not hardwired).

Kongsberg Vapenfabrikk did, however, apply to the Ministry of Trade for an export license, enclosing the relevant import certificate from the French authorities. The import certificate stipulated that the CNC controllers were to operate 2 simultaneous axes. What was delivered to the Soviet Union, however, were machine tools equipped with controllers operating 6 simultaneous axes. Kongsberg Vapenfabrikk did not inform the Ministry of Trade that the end-user of these systems was the Soviet Union, despite the fact that this was common knowledge among the people involved at Kongsberg Vapenfabrikk.

*E. Kongsberg Vapenfabrikk's PC 150 S*

The principal task of a PC 150 S is to generate executive tapes for the NC 2000 system. These tapes maintain control instructions that are essential to a numerically controlled machine tool's ability to machine a workpiece according to a set of rules that are specific to each machine model.

In order to generate these executive tapes, each programming centre has a KS 500 mini-computer, with ancillary standard in/out equipment and a simple terminal (display).

The executive tapes themselves are made of a "paper tape punch" (PTP). PC 150 S has no data link with the NC 2000 system, which is something modern computer-operated control systems have, and which would have instituted a breach of COCOM Regulations.

It must therefore be concluded that PC 150 S is in compliance with COCOM Regulations (cf. Item No. 1565 Note 9 (Government may permit)). PC 150 S is included in Kongsberg Vapenfabrikk's embargo list of non-strategic goods, and is therefore authorized by the Ministry of Trade for export to the "Eastern Bloc". This equipment has been exported in large numbers and, in the cases checked, Kongsberg Vapenfabrikk has had the necessary export license.

The product was delivered in compliance with the specifications of Kongsberg Vapenfabrikk's relevant documentation.

It may therefore be concluded that PC 150 does not violate COCOM Regulations.

*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. Further reference 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 above-mentioned milling machines with 9 simultaneous axes. The program was originally designed for machine tools equipped with 2 controllers per machine (Japanese FANUC controllers), and what Kongsberg Vapenfabrikk did was to implement the HAL program on KS 500, as a part of the programming station.

The HAL program is a CAM program (Computer Aided Manufacturing program) and is stored in the KS 500 computer, which is part of the PC 150 programming station.

When the following propellor data are known:

a. Diameter of propellor.
b. Number of blades.
c. Propellor's direction of rotation.
d. Propellor blade's shape in different cylindrical sections.
e. Angle of climb, etc.
f. Sectional speed, milling diameter, etc.

the program will be subsequently compute the necessary tool paths. The program will simultaneously activate the PC 150's tape punch and produce the necessary executive tape for the machine tool.

The knowledge and technical aids available to the Soviets for determining parameters a. to f. is something we know nothing about. The HAL program is, however, useless, unless these parameters are known, and the program gives no help in determining them.

It must therefore be concluded that the HAL program is purely a CAM tool, and has nothing to do with propellor design as such.

Such sales are legal, as the 1980 COCOM Regulations placed no embargo on the sale of software.

*H. Kongsberg Våpenfabrikk's NMG program*

The NMG program (Numerical Master Geometry) is of British origin, and is loaded into PC 150 S in the same manner as the HAL program.

The program was sold to the Soviet Union in connection with the above-mentioned sale to Baltic Shipyard of machine tools with 9 simultaneous axes.

This program is also purely a CAM tool, which produces the executive tape for the machine tool. It requires a post-processor between NMG and the machine tool in question, which Kongsberg Våpenfabrikk has not been requested to deliver. One could therefore ask whether the NMG program has been put to use at all. NMG is 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 Våpenfabrikk installed a KS 500 Repair Shop in Volgodonsk.

This Repair Shop consists of Test Station/Dynamic Test, a KS 500 computer, a Membrane station MB 2460 and PM 500 programming equipment.

Where KS 500 and the Membrane station are concerned, Kongsberg Våpenfabrikk has applied for, and received the necessary export licence. Hence, this equipment is in compliance with COCOM Regulations. Where PM 500 is concerned, however, no mention is made of this equipment in the application, and this part of the delivery has been found to constitute a breach of COCOM Regulations.

The purpose of this delivery was to enable the Soviets to do their own error detection and repair of NC 200's circuit cards, the EPROM cards. To be able to do this, all they needed were the functional diagrams for the cards and the system program tapes for EPROM programming.

To enable the Soviets to modify the individual NC 2000 controller, however, they would need to have the system program listings as well. It has been ascertained that the Soviets 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 in order to be able to modify the individuals NC 2000 controller, the Soviets would need to have the system program listing of the controller in question. If they are identical, only one listing is required. It may be ascertained that in Volgodonsk, at any rate, the Soviets had sufficient listings to be able to modify all their NC 2000 controllers to function in practice as CNC controllers.

It has furthermore been revealed that the system program listings for the NC 2000 controllers delivered to Volgodonsk were, during the entire installation period, stored in a mobile workmen's shed, which was locked, but to which the Russian interpreters had a key. For this reason alone, the listings stored in such a manner must be regarded as having been compromised.

It must therefore be concluded that the Soviets, by using their Repair Shop, were capable, not only of detecting errors on the circuit cards and repairing them, but also of modifying NC 2000 in the same way in which this is feasible with CNC controllers, and is therefore a clear breach of COCOM Regulations.

NC 2000 is, however, configurated in such a way that the Soviets, with the help of the additional programming equipment they have been provided with, may more appropriately modify the system program in the EPROMs, in the same way as service technicians do, when carrying out program modifications during installation.

*J. PM 500 EPROM programming equipment*

Item H dealt with PM 500 particularly in relation to the sale of the Repair Shop to Volgodonsk. However, we have seen fit to deal with this equipment also in relation to the Toshiba/Kongsberg Vapenfabrikk delivery of milling machines to Baltic Shipyard in Leningrad, as these sales have been investigated as two separate matters.

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 earlier model, CNC 300, but is based on the KS 500 mini-computer. "Hardwired" means that the system program is burnt into a Read Only Memory (ROM). Kongsberg Vapenfabrikk has used a special ROM for NC 2000, called EPROM.

Kongsberg Vapenfabrikk has chosen EPROM for reasons of production and installation, and the system is in compliance with COCOM regulations, provided that certain precautionary measures are taken.

The program 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 listing.

The investigation has been directed at establishing whether Kongsberg Vapenfabrikk has delivered these facilities, and thereby enabled the Soviets to reprogram the NC 2000 controllers delivered.

It has also been established that Kongsberg Vapenfabrikk has sold 2 pieces of EPROM programming equipment, model PM 500, together with the 2 PC 150 S systems sold to Baltic Shipyard in connection with the Toshiba delivery.

PM 500 reprogramming equipment cannot be used on PC 150 S, whereas NC 2000 is, on the other hand, prepared for such equipment.

The equipment was sold as "spare parts" for 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 listing for NC 2000, and the necessary training in how to use it, then Item No. 1091(a)(i) has been violated.

It has been established that Kongsberg Vapenfabrikk has provided training in assembly programming on KS 500, and this could be enough to be able to read the listing, albeit with some difficulty. If they, moreover, have been given training in the structure of the program, they should have no difficulty whatsoever.

Apart from the Repair Shop sale to Volgodonsk, there is no other information that other system program listings have been deliberately supplied in conjunction with individual contracts.

There is, however, a fair chance that these listings may have been compromised; Kongsberg Vapenfabrikk 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 simultaneous axes. Any limitations in this respect lie in the capacity of the machine tools themselves.

One may, however, ask whether the Soviets really need to upgrade any of the NC 2000 controllers they have purchased, with regard to their number of axes, since the results of our investigation indicate that the Soviets have received control systems with the number of simultaneous axes required, and therefore do not need to upgrade them. The most likely assumption 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 Toshiba/KV personnel have only installed two of the machine tools at Baltic Shipyard. The remaining two machine tools were installed 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 Vapenfabrikk 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 any such application. 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 1986.

On 10 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 Vapenfabrikk.

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 Vapenfabrikk board decision of 29 April 1987 to terminate all relations with the "Eastern Bloc", the implementation of this contract was put on hold.

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 would 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 the FFI (Norwegian Defense Research Institute) in respect of the export license.

In a report dated 1 September 1987, the FFI concludes that the application does not cover FEMPAC. The report goes on to say 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 the delivery of the program would imply a strengthening of the software which could lead to an increase of the DMS equipment's performance, and thereby go beyond the level of what had been approved by the COCOM. At the same time, ICAN was informed that the Ministry had decided not to authorize 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 in the preceding. Furthermore, said violations will be considered in relation to the statutory provisions that may be applied.

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 1946 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 Vapenfabrikk, and statements given by Kongsberg Vapenfabrikk employees have revealed a number of data concerning the different machine tools to which Kongsberg Vapenfabrikk's numerical control 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 that most of the machine tools were in violation 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 in question 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, Schiess, Donauwerke, Dorries, KTM and Forrest Line have, in fact, violated the COCOM regulations.

The same may not be said of Toshiba Machine Company in Japan. Their sale to Baltic Shipyard in Leningrad of 4 machine tools has been investigated by Japanese police, the conclusion of which is that this 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 their disposal. But, as also mentioned, no response has yet come from the police authorities in France and Italy. There has been some degree of collaboration with the Japanese police, but not to the extent in which one would have hoped for. German police has sent a reply, but no formal collaboration has yet been established.

*B. Kongsberg Vapenfabrikk's CNC 300/CNC 203*

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)(i). Kongsberg Vapenfabrikk has, moreover, failed to apply for an export license, 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)(i).

The question to be raised is therefore whether Kongsberg Vapenfabrikk 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 reexport 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 lawfulness of this delivery 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 represented). The rules applying to trade, between COCOM countries, of goods under embargo were brought into the discussion and it was agreed that part contractors are also separately responsible for safeguarding themselves against exports contrary to COCOM Regulations. The part contractor, or subcontractor (in this case, Norway) is, however, not responsible for the actual reporting of such matters to the COCOM, but an import certificate from the purchasing country's authorities (in this case, France) must be demanded.

The Norwegian delegate at the working group meeting stated that the Norwegian understanding of this matter had been different, and, consequently, that no import certificate had been demanded when exporting these 23 control units to France. He maintained that it had been a matter of misinterpretation on the part of the Norwegians, and that Norwegian authorities would modify their licencing routines so as to fall in line with the agreed conclusion expressed at the meeting.

He further stated that all 23 control units had already been delivered. The working group meeting appears to have made a note of this information.

As a result, the Ministry of Trade changed its licencing practice, so as to demand an import certificate from Western countries importing equipment under the COCOM embargo. This does not, however, change the fact that it is the country licencing the final sale of goods to the "Eastern Bloc"—in this case, France—that is responsible that COCOM regulations for export to proscribed countries are complied with.

The import certificate serves the following main purposes: to confirm to the exporting country that the goods are to be imported to the importing country; to confirm that re-export will not take place without the permission of the competent authorities in the importing country.

In practice, this means that an exporter of strategic goods from Norway to another COCOM country must first obtain an import certificate from the importing country's authorities. In this manner, the importing country's authorities take over responsibility for the goods in question."

The Foreign Ministry's conclusion was that the delivery of the above 23 controllers did not constitute a breach of COCOM Regulations, nor did it represent a distorted interpretation of COCOM commitments.

Following the subsequent change in licencing practices, it appeared that 2 of the above 23 controllers had, in actual fact, not been delivered. The matter was then submitted to the Norwegian authorities, who granted an export licence without, in this case, demanding a French import certificate.

In its note dated 6 July 1987, the Foreign Ministry stated as follows:

"The competent authorities' permission for an export licence for the two remaining units was, however, no longer in compliance with Norwegian licencing practice, following its modification in keeping with our new interpretation of the guidelines referring to internal COCOM trade. For a variety of reasons, the licencing authorities decided, however, to deviate from this new practice, although this did not in itself involve a breach of any formal provisions or COCOM commitments.

The decision was not, however, in keeping with the point of view expressed by the Norwegian COCOM delegate at the working group meeting of 21-23 June 1976, nor the information he had given the meeting concerning the implementation of said transactions and the changing of Norwegian licencing practices."

All the same, it seems clear that Kongsberg Vapenfabrikk cannot be reproached in this matter. The fact that France chose not to report to the COCOM this export to an end-user in the Soviet Union is quite another matter, which neither directly involves Kongsberg Vapenfabrikk, nor the Norwegian authorities. Why France failed to submit the case to the COCOM was, as already pointed to, because the French authorities did not share the American and British view that the total package came under COCOM embargo."

Since these represented the last deliveries of CNC 300 made with the Soviet Union as end-user, and, in other words, since all systems had been sold in compliance with the understanding of COCOM regulations also held by the Ministry of Trade until said COCOM meeting, it must be concluded that Kongsberg Vapenfabrikk has not violated COCOM regulations in these instances.

Hence, these sales do not constitute an offense against the Export Bans' Act or Section 166 of the Penal Code.

As for Kongsberg Vapenfabrikk's sale of a SAJO machine tool equipped with a CNC 203 controller, Norway is, in this instance, the exporting country. There is no trace of an application for an export licence for the controller, a license which should, moreover, have been refused, since this was a CNC control system with more than 2 simultaneous axes. It must therefore be concluded that this sale constitutes a breach of COCOM regulations. However, from the point of view of criminal liability, this offence is subject to statute of limitations.

*C. Kongsberg Vapenfabrikk's NC 2000*

As far as the deliveries of NC 2000 controllers are concerned, they will be dealt with according to the number of simultaneous axes they operate.

*a. NC 2000 controlling 3 simultaneous axes*

The delivery of NC 2000 capable of controlling 3 axes simultaneously may be allowed, according to COCOM Item No. 1091 Note 1(b), on the condition, however, that the relevent export licence has been granted by the Ministry of Trade, and that the machine tool operated by the controller is in compliance with COCOM Regulations.

Certain witnesses in this case seem to be of the opinion that Kongsberg Vapenfabrikk either had a general licence for exporting NC 2000 control systems capable of controlling 3 simultaneous axes, or that this number of simultaneous axes was, in fact, in compliance with COCOM Regulations. However, none of these witnesses have claimed to have certain knowledge of any such general authorization.

Nor has the police found any document where such authorization is granted, whether in general terms, or relevant to the export licences for the individual control systems.

With regard to applications for export licenses for NC 2000 control systems Kongsberg Vapenfabrikk has, during this entire period, followed the practice whereby the item "Other details" was completed with the statement "The product is non-strategic, according to list from A/S Kongsberg Vapenfabrikk dated. . . . . .".

This list refers to Kongsberg Vapenfabrikk's "Nato Embargo" list where its export products are listed—both goods freely exportable to "embargo countries", and goods subject to embargo (strategic goods).

The very first time NC 2000 was put on this list of non-strategic goods was on 17 August 1977. An appendix to the list contains comments to its contents, and the comment to NC 2000 controllers states that this is a newly developed product to which embargo regulations do not apply.

On the basis of the above information, it must be ascertained that what Kongsberg Vapenfabrikk entered on its list was an NC 2000 controller capable of operating 2 simultaneous axes only, and thereby in compliance with Item 1091(a)(ii).

The Ministry of Trade has been asked whether Kongsberg Vapenfabrikk was authorized to export NC 2000 controllers capable or operating 3 simultaneous axes, and their conclusion, in a reply dated 27 August 1987, reads as follows:

"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 consideration from case to case;

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;

Kongsberg Vapenfabrikk'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 may be granted, 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 the 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 violation 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 capable of operating 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 conjunction with Forrest Line machine tools, 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 this specific case, Kongsberg Vapenfabrikk did apply for an export license 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 Section 166 of the Penal Code. This offence is not subject to statute of limitations.

In January 1982, Forrest Line contacted Kongsberg Vapenfabrikk's office in France (KV-France), asking for a quotation for 8 NC 2000 controllers. The offer was drawn up on 6 March 1982, and in May 1982. Forrest Line inquired as to whether the same software as provided in CNC 300 controllers could be supplied.

It has 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 result, i.e. 5 simultaneous axes.

On 7 March 1983, Forrest Line placed an order, where the axes were described as 3 simultaneous axes, with 2 non-simultaneous additional 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 license containing the "usual information" was sent to the Ministry of Trade on 7 September 1983, on the basis which the relevant export license 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 offense against Section 166, sub-sections 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 Vapenfabrikk, represented by B. Green, on the one hand, and Stankoimport, on the other. The contract stipulates three—and not two—simultaneous axes.

The relevant export license application 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 offense against Sections 166, subsections 1 and 2, of the Penal Code, as the export license 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 Baltic Shipyard, 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, sub-sections 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 Systems Division were aware of the existence of such unlawful practices. To this, it must be said that Green maintains that the heads of division of the Data Systems Division were acquainted with the matter. Both heads of division, however, deny having had such knowledge. The prosecuting authorities are not, however, required to consider this aspect of the matter, as both persons had left the division at the time the application for an export license was filed. Nor are there any indications that they had anything to do with the 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 license application. Nor has any such allegation been made by any of the persons involved.

The technical personnel involved in manufacturing the equipment was aware of its capability of controlling 9 axes simultaneously. They maintain, however, that they were not familiar with the restrictions contained in the COCOM regulations, nor did they have anything to do with the export license application.

*D. Kongsberg Vapenfabrikk's CNMC 200 control systems*

As mentioned in chapter IV, Kongsberg Vapenfabrikk has sold 3 such CNC 2000 controllers to the machine tool builder Ratier Forrest, which reexported the controllers on their only machine tools to the Soviet Union.

As also mentioned in the above, a CNC controller is per se banned for export to the "Eastern Bloc", (cf. Item No. 1091(a)(i)). However, permission to export such controllers may be granted, provided they are restricted in such a way as to not 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 Vapenfabrikk'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 granted.

The investigation has shown that there is no doubt that the persons at Kongsberg Vapenfabrikk 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 are facts that 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 Vapenfabrikk's PC 150 M, PC 150 S, Hal and NMG program*

As regards the above equipment, it must be concluded that their export did not constitute a breach of COCOM Regulations, nor has it been possible to establish that their sale represented an offence against any Norwegian legislation in force.

*F. Repair Shop*

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 been 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 under Section 166 of the Penal Code.

*G. PM 500 EPROM programming equipment*

As for this delivery, 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 505 computer with ancillary peripheral equipment, Kongsberg drafting equipment and CAD/CAM computer programs (DMS).

However, no application has been filed 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 the one who "sounded the alarm" after delivery had taken place.

*I. 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 JOHNSEN,
*Chief of Police.*

*Abbreviations*

| Norwegian | English |
|---|---|
| Maskinregister | Register. |
| Anleggsnr. | Production number. |
| Side | Page. |
| Kontraktsdato | Date of contract. |
| Kontr.nr. | Contract number. |
| Styretyp | Numerical controller model. |
| Akser | Axes. |
| Sim. aks. | No. of simultaneous axes. |
| KV aks. | No. of axes specified in KV's documentation. |
| Mask.fabrikat | Machine tool builder. |
| Mask. type | Machine tool model. |
| Mask. bet | Machine tool designation. |
| Aks. bev | Machine tool's slide travel. |
| Pos. noy | Machine tool's positioning precision. |
| Motoreffekt | Machine tool's motor power. |
| Ant. spind. | No. of spindles on machine tool. |
| Best. sted. | Place of order. |
| Best. dato | Date of order. |
| Prod. ord | Date of production order. |
| Ex. soknad | Application for export licence for the machine tool. |
| Lev. dato | Delivery date. |
| OEM inst. | Date of installation of numerical controller on machine tool. |
| FAT | Factory acceptance tests. |
| Endu | End-user. |
| Sluttinst | Date of final installation. |
| IAT | Installation acceptance tests. |
| Res. lev | Date of delivery of spare parts. |
| Res. del | Spare part. |
| Service | Date of service. |
| Dok. henv | Documentary reference. |
| Merknader | Remarks. |

## THE DEATH OF JOE FLAVIN

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 was already beginning his climb up the corporate ladder, with IBM World Trade Corp. There he rose to become controller, before moving on to Xerox in 1968, first as a group vice president, and later 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 go, and he emphasized electronics and high technology. When Joe took over in 1975, defense electronics contributed less that 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 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.

## APPOINTMENT BY MAJORITY LEADER

The PRESIDING OFFICER (Mr. WIRTH). the Chair announces, on behalf of the majority leader, pursuant to Public Law 96-114, as amended by Public Laws 98-33 and 99-161, his appointment of Mr. Kevin B. Campbell to be a member of the Congressional Award Board.

## MESSAGES FROM THE HOUSE

At 11:14 a.m., a message from the House of Representatives, delivered by Mr. Berry, one of its reading clerks, announced that the House agrees to the amendments of the Senate to the bill (H.R. 2937) to make miscellaneous technical and minor amendments to laws relating to Indians, and for other purposes.

The message also announced that the House agrees to the following concurrent resolution, without amendment:

S. Con. Res. 64. A concurrent resolution to authorize the printing of "Guide to Records of the United States Senate at the National Archives, 1789-1989: Bicentennial Edition".

The message also announced that the House has passed the following bill, in which it requests the concurrence of the Senate:

H.R. 2939. An act to amend title 28, United States Code, with respect to the appointment of independent counsel.

## MEASURES PLACED ON THE CALENDAR

The following bill was read the first and second times 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 1988; to the Committee on Agriculture, Nutrition, and Forestry.

EC-2030. A communication from the Acting Under Secretary International Affairs and Commodity Program, 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 (Logistics), Department of the Air Force, transmitting, pursuant to law, a report relative to converting the grounds maintenance function at Carswell Air Force Base, Texas, 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 Public Work Facilities at the Naval Air Station, Cecil Field, Florida, 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-ss-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 1987, 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 on experimental, 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. 38301S, *Coal Trading Corporation, et 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 merchant 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 assets of the Transportation Systems Center to non-Federal control;" to the Committee on Commerce, Science, and Transportation.

EC-2041. A communication from the Secretary of Energy, transmitting, pursuant to law, a report entitled "Ninth 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, notification that the legal descriptions and maps of the Chugach National Forest boundary changes, as provided by ANILCA; 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 to authorize 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 to 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. 614. A bill to designate the new U.S. courthouse in Birmingham, Alabama, as the "Hugo L. Black United States Courthouse" (Rept. No. 100-207).

H.R. 307. A bill to designate the Federal Building and U.S. Post Office located at 315 West Allegan Street in Lansing, MI, as the "Charles E. Chamberlain Federal Building and United States Post Office."

## INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. BOREN (for himself and Mr. NICKLES):

S. 1812. A bill to provide for the extension of the Federal Employees Health Benefits Program to certain employees and annuitants; to the Committee on Governmental Affairs.

By Mr. LEAHY:

S. 1813. A bill to reduce foodborne disease, to improve the inspection of meat, poultry, and fish, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

By Mr. MELCHER (for himself and Mr. NICKLES):

S. 1814. A bill to provide clarification regarding the royalty payments owed under certain Federal onshore and Indian oil and gas leases, and for other purposes; to the Committee on Energy and Natural Resources.

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.

By Mr. HELMS (by request):

S. 1816. A bill to authorize the Secretary of Agriculture to recover costs of carrying out certain animal and plant health inspection programs, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

By Mr. KENNEDY (for himself and Mr. PELL):

S. 1817. A bill to amend the Internal Revenue Code of 1986 to provide that gross income of an individual shall not include income from United States savings bonds which are transferred to an educational institution as payment for tuition and fees; to the Committee on Finance.

By Mr. REID:

S.J. Res. 208. A joint resolution designating June 12 to June 19, 1988, as "Old Cars Week"; to the Committee on the Judiciary.

## SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Mr. ARMSTRONG (for himself and Mr. HELMS):

S. Res. 301. A resolution to acknowledge the public service of Judge Robert H. Bork and to affirm the Senate's commitment to the integrity of the confirmation process; ordered to lie over under the rule.

By Mr. PRESSLER:

S. Res. 302. A resolution expressing the concern of the Senate regarding the situation in Fiji; to the Committee on Foreign Relations.

## STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. LEAHY:

S. 1813. A bill to reduce foodborne disease, to improve the inspection of

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 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 conclusion 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 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 decades ago.

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 bill establishes a voluntary program to test animal feed for contamination as well as a program to improve animal feeds.

Second, 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.

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 Secretaries of Agriculture and Commerce, and especially the inspector on the line, will have the tools they need to do the job. These new procedures will supplement, not replace, the existing inspection system.

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 funds 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 have sifted through their ideas and advice. As I stated earlier, I think the bill I'm introducing is fair and balanced, and 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 will be established by the Secretary of Agriculture. Programs for fish and fish products will be established by the Secretary of Commerce.

In establishing these standards, the Secretaries 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 identifica-

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 or failing to pay 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 superceded.

*Participation:* A person or company manufacturing animal feed for poultry, sheep, cattle or swine may participate in the testing program if they meet requirements established by the Secretary. Participants can display an emblem of participation on their feed products.

If contaminants are found in excess of any standard or tolerance level, the Secretary will issue a warning and prohibit use of the emblem.

ANIMAL FEED IMPROVEMENT PROGRAM

The Secretary of Agriculture will establish a program designed to provide information, advice, and instruction regarding the processing or manufacture of animal feed. $2.5 million for animal feed programs ($500,000 a year, 1988–1992) will be provided.

CONSUMER EDUCATION

Will be improved through food safety programs that include:

(1) $2.5 million ($500,000 a year, 1988–1992) for programs to disseminate information to consumers, restaurants, schools, etc.

(2) $750,000 for the USDA to establish demonstration project grants to go to states for programs on food safety.

(3) A toll-free hotline to provide the public with food safety information and advice.

(4) For each year 1988 and 1989, $500,000 is provided to study the effect of labeling fresh meats and poultry with cooking and handling instructions.

$10 MILLION FOR RESEARCH PROGRAMS

$2,500,000 is appropriated for each of the years 1988–1992 to establish a research program to develop methods for reducing foodborne illnesses.

CIVIL ACTIONS

Any person adversly affected by the failure of the Secretary to carry out the provisions of this act may file a civil action (under certain time restrictions).

EMPLOYEE PROTECTION

No employer may take action against an employee because of the employees involvement in a civil action involving the provisions of this Act, or for testimony regarding its enforcement.

This provision follows procedures currently in place pertaining to public employees in various health and safety positions.

A complaint by an employee alleging such action against him may be filed with the Secretary of Labor within 30 days after the alleged violation occurs. The Secretary must then notify the employer of the complaint and has 60 days to determine if the complaint has merit. If a violation has occurred, relief will be provided.

Once a decision has been made, either party has 30 days to request a review of the decision. The review must be completed within 120 days of filing.

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SAFE FOOD STANDARDS ACT OF 1987—SECTION-BY-SECTION ANALYSIS

(Offered 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 biological contaminants on meat and poultry, requiring Federal inspection of fish by the Department of Commerce, protecting employees of slaughtering plants that complain about violations of Federal meat and poultry inspection laws and improving the quality of animal feed.

I. 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 must design 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 at each slaughtering plant, or similar establishment, to determine the levels of contamination by pathogenic microorganisms, such as *Salmonella* and *Campylobacter,* harmful to humans. These "baseline" levels of contamination shall be established at each such plant within fifteen months after enactment and shall be used in developing 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, the Secretary shall notify the slaughtering plant or similar establishment and target them for additional sampling or other monitoring, beginning no earlier than 30 days after issuing the notification. 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 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 slaughthering plant issued a warning.

*Fines:* 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 samples are in excess of the standards set forth in the Federal Register notice the establishment shall be fined $3,000 and after the fifth such day the fine will be $10,000 per day.

*Closing Slaughtering Plants:* The Secretary shall not provide inspection services to any slaughtering plant or similar establishment that fails to pay any fine assessed 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 administrative review of a decision not to provide inspection services.

*Reinstatement:* The Secretary shall establish procedures for the reinstatement of inspection services on approval by the Secretary under such conditions as are determined appropriate by the Secretary.

II. TRACING OF 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 slaughterer back to the producer. These procedures can involve recordkeeping, tagging, marking, implanting, branding, lot processing, or any other procedure approved by the Secretary 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.

III. FISH INSPECTION BY THE DEPARTMENT OF COMMERCE

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 or fish products intended for human consumption, the Secretary shall consult with the National Research Council, the Secretary of Health and Human Services, the National Fish and Seafood Promotional Council, industry representatives and public interest groups.

*Reduction in Severe Foodborne Illnesses:* The standards must be designed to substantially reduce the incidence of severe foodborne illnesses in the United States. The Secretary must consider the appropriateness of alternative methods of reducing such illnesses and the adverse impacts on the affected industry.

Each standard shall be based on a percentage of sampled fish products intended for human consumption that contain such pathogenic microorganisms at levels determined by the Secretary that are likely to result in severe foodborne illness.

*Exception*: Standards can not be set regarding the adulteration or contamination by pathogenic microorganisms of fish products already being regulated, with respect to those microorganisms, by the Secretary of Health and Human Services or the Administrator of the Environmental Protection Agency.

*Baselines and Initial Set of Standards*: Within three months after enactment the Secretary shall develop sampling procedures to be used to determine "baseline" levels of contamination which must be determined within twelve months after enactment of this Act. These baselines shall be used in establishing the initial set of standards.

*Public Input*: The Secretary of Commerce shall seek public input on each standard for a pathogenic microorganism at least 90 days prior to testing samples under these requirements.

*Monitoring of Water Quality*: The Secretary may establish a program to monitor the quality of bodies of water in which fish are harvested on a regular basis by commercial harvesters as a substitute for testing fish or shellfish taken from those waters. In carrying out this alternative approach, the Secretary shall consult with the National Fish and Seafood Promotional Council, States, the National Research Council, the Administrator of the Environmental Protection Agency, the Secretary of Health and Human Services, the Secretary of Agriculture, public interest groups, and affected industries.

*Warnings and Fines*: The Secretary of Commerce must establish procedures for warning fish processors and handlers when standards are violated and for monitoring them when violations are found. These procedures are the same as for meat and poultry except that inspection services shall not be withheld for persistent violators since currently there is no mandatory Department of Commerce inspection. Persistent violators of standards can not participate in the Department's voluntary seafood inspection program. These firms are also subject to additional fines of $10,000 per day for each day that a standard is violated after the firm receives a warning and after its identity was published in the Federal Register.

*Exemptions:* The fish and shellfish inspection program shall exempt from inspection those processors and other fish suppliers that handle, process or sell small quantities of fish or shellfish annually and establishments that the Secretary determines, on application of such person or company, that an exemption will not impair effectuating the purposes of this Act.

IV. VOLUNTARY ANIMAL FEED INSPECTION PROGRAM

The Secretary of Agriculture shall establish and administer a program to test statistically selected samples of animal feed intended for use as feed for poultry, sheep, cattle, or swine, to detect contamination by pathogenic microorganisms or toxic chemicals which may ultimately be harmful to humans.

*Public Input:* The Secretary shall publish lists of standards for the pathogenic microorganisms and tolerance levels for toxic chemicals, in the Federal Register, after providing an opportunity for public comment. The Secretary shall not adopt animal feed standards or tolerances regarding pathogenic microorganisms or toxic chemicals that are regulated by other Federal agencies, although the Secretary may use those standards in this voluntary inspection program.

*Consultation:* In developing any standards or tolerances, the Secretary shall consult with the National Research Council, the Secretary of Health and Human Services, industry representatives and public interest groups.

*Reduction of Severe Foodborne Illnesses:* The Secretary shall design standards likely to reduce severe foodborne illnesses in the United States and shall consider the appropriateness of alternative methods of reducing such illnesses as well as the adverse impacts on the affected industry.

*Application for Participation:* A person or company that manufactures animal feed intended for use as feed for poultry, sheep, cattle or swine may apply for participation in the testing program and be accepted if they meet requirements established by the Secretary. Participants shall be allowed to display an emblem of participation on their feed products.

*Warnings:* If contaminants are found in excess of any standard or tolerance level, the Secretary shall notify the manufacturer, and may target the firm for additional sampling. The Secretary shall issue a warning to a participant whose animal feed continues to test in excess of the prescribed standard or tolerance level during a specified period of time established by the Secretary. The Secretary shall prohibit persons from using the emblem if samples taken continue to test in excess of the standard or tolerance level described in the notice at anytime during the review period.

V. CONSUMER EDUCATION

*$2.5 Million for Additional Food Safety Programs:* There is authorized to be appropriated for each of the fiscal years 1988 through 1992, $500,000 for additional programs administered by the Secretary of Agriculture to disseminate food safety information, publications, and instruction to consumers, restaurant food handlers, schools and other persons.

*Toll-free Hotlines for Food Safety Information:* The Secretary of Agriculture, in consultation with the Secretary of Health and Human Resources, shall establish and administer a public awareness program involving the operation of a toll-free hotline to provide food safety information and advice regarding all types of foods.

*Grants to States for Food Safety Programs.* There is authorized to be appropriated to the Department of Agriculture $750,000 to provide demonstration project grants to States, under terms and conditions determined by the Secretary, to assist States in providing food safety information and instructions regarding the handling and preparation of foods for human consumption.

VI. ANIMAL FEED IMPROVEMENTS PROGRAM

The Secretary of Agriculture shall establish a program designed to provide information, advice, and instructions regarding the processing or manufacture of animal feed.

*Toll-free Animal Feed Hotline:* The Secretary shall maintain a toll-free hotline to provide information regarding the safe processing, handling and manufacture of animal feed.

*$2.5 Million Authorized:* There is authorized to be appropriated to carry out an animal feed improvements program $500,000 for each of the fiscal years 1988 through 1992.

VII. $10 MILLION FOR RESEARCH PROGRAMS

The Secretary of Agriculture shall establish a research program to develop methods to reduce foodborne illnesses in the United States. The technological research funded shall include research on the development of procedures for the control and rapid detection of pathogenic microorganisms. Grants may be provided to public or private colleges or universities. To carry out this section, there is authorized to be appropriated $2,500,000 for each of the fiscal years 1988 through 1991.

VIII. REPORT ON EDUCATIONAL LABELING OF FRESH MEATS AND POULTRY

The Secretary of Agriculture shall conduct one or more pilot studies to evaluate the usefulness and effectiveness of labeling fresh meats and poultry with brief instructions on proper handling and cooking. There is authorized to be appropriated $500,000 for each of the fiscal years 1988 and 1989 for this purpose. Not later than March 1, 1989, the Secretary of Agriculture shall submit a report to the Congress on the results of these studies.

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 1 year after person is so aggrieved.

*Legal Fees:* A court may award costs of litigation (including reasonable attorney 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 for injunctive relief under this bill or any other proceeding for the enforcement of the Federal Meat Inspection Act or the Poultry Products Inspection Act. Also, no employer may discharge or otherwise discriminate against any employee that testified or is about to testify in any such proceeding, or assisted or participated in such a proceeding to enforce the Federal Meat Inspection Act or the Poultry Products Inspection Act.

*Complaint Filed with the Labor Department:* A complaint may be filed, within 30 days after such violation occurs, with the Secretary of Labor alleging such 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 that 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 complainant 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 to carry out 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 laws in accordance with section 553 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.●

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By Mr. MELCHER (for himself and Mr. NICKLES):

S. 1814. A bill to provide clarification regarding the royalty payments owed under certain Federal onshore 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 royalty payments owed under notice to lessees-5 [NTL-5] on these leases during the period from January 1, 1982 to July 31, 1986.

NTL-5 was originally issued by the Department of the Interior in 1977. Its provisions stated that a substantial amount of gas was to be valued for royalty purposes at the highest applicable rate established by the Federal Power Commission, interpreted to mean the FERC ceiling price. However, as the gas industry knows too well, beginning in the early 1980's, gas prices began to decline. In many instances, market price fell far below the FERC ceiling price.

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 handling of this matter by the Department of the Interior.

I, for one, simply do not believe that it is reasonable to require producers to pay royalties on the basis of the unrealistically high FERC ceiling price which was out of step with the market. This cannot be what is intended by the law. The Department of the Interior should have made this clear to all involved. However, by the same token, I believe care must be taken not to work unnecessary hardship on the States and the tribes and allottees.

That is why today I am introducing legislation which would clarify the royalty amounts owed by lessees under NTL-5. Rather than basing royalty valuation on the artificially high FERC ceiling price, my bill provides that royalties be based on the reasonable value of the production under regulations published in the Code of Federal Regulations.

My bill also provides that lessees who have already paid based on the FERC ceiling price will receive refunds. These refunds, estimated by the Department of the Interior to total $500,000, would be paid out of the Federal share of future mineral receipts. While I am advised by the Department of the Interior that refunds are unlikely to reach this amount, my bill places a cap on total refunds of $2 million. Thus, the States and tribes would not be penalized by having to pay these refunds out of their treasuries.

I urge my colleagues to join me in supporting this bill. In my view, it provides for a fair resolution to a difficult problem.

Mr. President, I ask unanimous consent that the text of the bill and 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:

S. 1814

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be referred to as the "NTL-5 Gas Royalty Act of 1987".

SEC. 2. DEFINITIONS.

For purposes of this Act:

(1) SECRETARY.—The term "Secretary" means the Secretary of the Interior or his designee.

(2) NTL-5.—The term "NTL-5" means the Notice to Lessees and Operators of Federal and Indian Onshore Oil and Gas Leases published May 4, 1977 (42 Fed. Reg. 22610).

(3) OTHER TERMS.—All other terms carry the same meanings as provided in section 3 of the Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. Sec. 1702).

SEC. 3. VALUATION FOR ROYALTY PURPOSES OF CERTAIN GAS PRODUCTION FROM FEDERAL AND INDIAN LANDS.

(a) APPLICABILITY.—The provisions of this section shall be used in determining the value for royalty purposes of any gas production from Federal onshore or Indian oil and gas leases during the period from January 1, 1982, through July 31, 1986, which is with of section I.A.2 or section II.A.2 of NTL-5, and for which the lessee or royalty payor provides written documentation, determined to be adequate by the Secretary and existing at or near the time the gas was sold, of receipt of less than the highest applicable price under the Natural Gas Policy Act.

(b) ROYALTY CALCULATION FOR CERTAIN FEDERAL ONSHORE OIL AND GAS LEASES.—If the gas referred to in subsection (a) of this section was produced from a Federal onshore lease, the value shall be determined in accordance with the lease terms and the regulations codified at Part 206 of Title 30 of the Code of Federal Regulations as in effect at the time of production.

(c) ROYALTY CALCULATION FOR CERTAIN INDIAN LEASES.—If the gas referred to in subsection (a) of this section was produced from an Indian lease, the value shall be determined in accordance with the lease terms and the regulations codified at Part 206 of Title 30 of the Code of Federal Regulations and sections 211.13 and 212.16 of Title 25 of the Code of Federal Regulations, as applicable and as in effect at the time of production.

(d) WRITTEN DOCUMENTATION.—The written documentation required under subsection (a) of this section may include, but is not limited to, a gas sales contract, purchase

statement, receipt, or other written documentation deemed appropriate by the Secretary existing at or near the time 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 received less than the highest applicable price under the Natural Gas Policy Act due to a failure by the lessee or payor to collect amounts which the purchaser would have been required to pay under a gas sales contract providing for that price and not as a result of market conditions or considerations.

SEC. 4. REFUND OF ROYALTIES PREVIOUSLY PAID.

(a) REFUND FOR FEDERAL ONSHORE OIL AND GAS LEASES.—If the Secretary or a court of competent jurisdiction determines that a lessee or royalty payor on a Federal onshore oil and gas lease has paid, prior to October 1, 1987, more than the value determined under subsection 3(b) of this Act for any natural gas within the coverage of subsection 3(a) of this Act, the Secretary shall refund the amount paid in excess of the value determined under subsection 3(b) from monies received under section 35 of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. Sec. 191), which would otherwise be deposited to miscellaneous receipts in the Treasury. The Secretary shall not recoup any portion of such refund from any State.

(b) REFUND FOR INDIAN LEASES.—If the Secretary or a court of competent jurisdiction determines that a lessee or royalty payor has paid, prior to October 1, 1987, more than the value determined under subsection 3(c) of this Act for any gas within the coverage of subsection 3(a) of this Act and produced from an Indian lease, the Secretary shall refund the amount paid in excess of the value determined under subsection 3(c) from monies received under section 35 of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. Sec. 191) which would otherwise be deposited to miscellaneous receipts in the Treasury. The Secretary shall not recoup any portion of any such refund from the Indian lessor.

(c) The total amount of refunds made under this section shall not exceed two million dollars ($2,000,000).

SEC. 5. PROCEDURES.

(a) CASE-BY-CASE AUDIT FOR CERTAIN FEDERAL ONSHORE OIL AND GAS LEASES.—The Secretary shall publish in the Federal Register and send to each lessee or royalty payor of record as of July 31, 1986, for any Federal onshore oil and gas lease a notice of enactment of this Act informing such lessees and royalty payors of the provisions of this Act and the terms and conditions for receiving refunds or royalty calculations under this Act. Any lessee that has reason to believe that it is entitled to a refund under this Act shall provide written notice to the Secretary in a form prescribed by the Secretary specifying the Federal onshore oil and gas lease or leases involved. The Secretary, and any State in accordance with delegations of authority under section 205 or cooperative agreements under section 202 of the Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. 1732, 1735), shall conduct a case-by-case audit of royalties for such leases and any other Federal onshore lease which the Secretary may select for examination under existing law to determine the amount of royalties due and payable under this act and other applicable law and the amount of any refund due the lessee.

(b) CASE-BY-CASE AUDIT ON INDIAN LEASES.—The Secretary, and any Tribe in accordance with cooperative agreements under section 202 of the Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. 1732), shall conduct a case-by-case audit of royalties for Indian oil and gas leases on which gas was produced at any time during the period from January 1, 1982, through July 31, 1986, which is within the coverage of section I.A.2 or section II.A.2 of NTL-5 to determine the amount of royalties due and payable under this Act and other applicable law and the amount of any refund due the lessee.

(c) MMS NOTICE.—The Secretary shall provide a notice under this section to each lessee under a Federal onshore or Indian oil and gas lease on which an audit was performed in accordance with this section. The notice shall contain each of the following:

(1) A statement of the amount of the royalty payments made in accordance with the provisions of NTL-5.

(2) A statement of the amount of refund, if any, to which the lessee is entitled under this Act and a description of the means by which such refund will be provided.

(c) REPORT TO INDIAN TRIBES.—The Secretary shall provide a report to each Indian Tribe holding an Indian oil and gas lease on which gas was produced at any time during the period from January 1, 1982, through July 31, 1986, which is within the coverage of section I.A.2 or section II.A.2 of NTL-5. The report to each Tribe shall contain information for each such lease held by the Tribe stating the difference between royalties computed in accordance with NTL-5 and royalties computed in accordance with subsection 3(c) of this Act.

SEC. 6. RECORD KEEPING REQUIREMENTS.—Notwithstanding the requirements of section 103 of the Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. Sec. 1713), and any regulations promulgated pursuant thereto, lessees and other payors are required to maintain records related to the value of gas production to which this Act applies for the period January 1, 1982 through July 31, 1986, until the Secretary gives notice that maintenance of such records no longer is required.

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SECTION-BY-SECTION ANALYSIS

Section 1 states the short title.

Section 2 sets forth definitions.

Subsection 3(a) provides that the provisions of the section 3 are to be used in determining value for royalty purposes of gas production from Federal onshore or Indian oil and gas leases during the period from January 1, 1982 through July 31, 1986, which is within the coverage of specified sections of NTL-5 and for which the lessee or royalty payor provides certain written documentation of receipt of less than the highest applicable price under the Natural Gas Policy Act.

Subsection 3(b) provides that the value for gas covered by the Act produced from Federal onshore oil and gas leases is to be determined in accordance with the lease terms and regulations at 30 CFR Part 206.

Subsection 3(c) provides that the value for gas covered by the Act produced from Indian oil and gas leases is to be determined in accordance with the lease terms and regulations at 30 CFR Part 206 and 25 CFR Sections 211.13 and 212.16, as applicable.

Subsection 3(d) describes the written documentation required by subsection 3(a).

Subsection 3(e) states that the section does not apply to gas for which the Secretary determines that the lessee or royalty payor 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(a) provides that if the Secretarty 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 Indian lessor.

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.

Section 6 sets forth recordkeeping requirements.●

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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.

Dr. 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. In each school building, a leadership team is convened for shared decisionmaking. The team includes teachers, department heads and the principal. The principal and teachers receive intensive training in how to guide the process, which begins with the collection of hard data on student achievement and behavior, along with information on community perceptions of the school, and a review of district policies that impact on the school.

Dr. Miles went on to explain that effective schools research shows that there are many things teachers, principals, and schools do control which can serve as the means to improve student achievement, student behavior, and teaching and learning practices. The underlying assumption in effective schools programs is that all children are educable; that their education derives primarily from the nature of the school to which they are sent, as contrasted with the nature of the family or neighborhood from which they come; and that children who start out not doing well in school get further behind the longer they go to school.

Therefore, our objective must be to stop 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 a single 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 on Excellence in Education'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 nationwide at a 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, and that this promise suggests that effective schools 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 has been 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 even those schools in poor areas have been successful in improving student achievement through the effective schools model. This bill will focus on school districts with 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 colleague, 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 like to 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

[Charts not printed in RECORD.]

In 1979 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 lowest achieving 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

*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. Key instructional behaviors (review and homework check; development lesson, process/product check, actively monitored seatwork, related homework assignment)
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 beginning at the kindergarten level

*Coordination of Supportive Services*

1. Instructional approach, curriculum content, and materials of supplementary instructional services coordinated with the classroom 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 behavioral standards
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 student achievements by systematically implementing the essential elements of effective schooling. These elements (see Figure 1) were derived primarily from the research and literature on school and teacher effectiveness and from the reported practices of other effective schools.

By the close 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 scored average and above average on standardized tests. The most significant gains occurred between 1979 and 1983 and brought the 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 policies, and changes in classroom 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 re-educate misinformed personnel by refuting the individual deficit and cultural deficit theories that are commonly used to explain the under-achievement of low-income and minority students. The school deficit theory was explained and the potency of school expectations emphasized.

Staff members were encouraged to meet and establish networks with practitioners from effective schools throughout the country. RISE principals and teachers visited effective schools, and practitioners from these schools came to Milwaukee to share how they had changed their schools.

Literature and reports related to the successes of schools that served low-income and minority students were disseminated among staff and reviewed on a regular basis, reinforcing the belief that low-income students can perform at high levels of achievements.

Grouping practices and programs that identified some students as low achievers were abandoned.

Staff members indicated an improvement in their sense of self-esteem and efficacy as professional educators.

Inservice activities included exchange forums wherein teachers would act as the consultants in presenting successful methods and practices to other teachers, and principals would share their successes in various domains. This contributed to a shift from depending on outside educational experts to recognizing the expertise within their own ranks. Staff members from the fast-improving schools frequently volunteered or were asked to lead these sessions.

Staff members (rather than the superintendent or central office personnel) acted as spokespersons for the school effectiveness program at local professional meetings, press conferences, university classes, and community forums. Thus, the practitioners who were responsible for the implementation and successes of the program were the ones to discuss the program and receive the recognition due.

When visitors came to the schools, the principals shared with the staff the responsibilities involved in guiding tours, explaining the program, and recognizing the accomplishments of individual staff members and students.

Staff members orchestrated their own professional development activities. Schools used their allocated funds to design their inservice, selecting the topics and presenters. A number of RISE principals and teachers led a professional education group called the League of Urban Educators. The League, which received no funding and met after school, was a voluntary group of teachers, principals, central office staff, university professors, and business and community leaders, who met monthly in a prestigious university conference center to share a potluck dinner, listen to a presentation on an issue related to urban education, and discuss the issues raised in the presentation. For the most part, the presentations focused on the essential elements of RISE. Participating members report that the League elevated their stature as professionals, united people across role and status lines, and served as a professional support group.

CHANGES IN SCHOOL MANAGEMENT AND ORGANIZATION

Principals reported a change in their role as building manager to include being an instructional leader.

Principals had the opportunity to meet with other principals from effective schools who emphasized the importance of being knowledgeable of the curriculum and of instructional practices, visiting each classroom on a daily basis and concentrating the agenda of the staff meetings on instructional issues.

Principals involved teachers in important planning and decision-making processes, thereby generating a strong sense of ownership of their school.

Principals in these schools loosened the linkages between central office and the school and strengthened the sense of school ownership, thus engendering the responsibility among staff for the school's successes or failures. One way they did this was by empowering the teachers in acting as advocates for the changes proposed by the teachers. For example, when teachers denounced the pullout approach used by supplementary programs as being disruptive and counterproductive, and recommended that all programs be conducted in their classrooms coordinated with the classroom instructional program, the principals supported the teachers in implementing this approach.

Although all of the annual improvement plans were required to include the RISE essential elements, each school decided for itself how to best reach the project goals based on the unique characteristics of the school.

School effectiveness committees assumed responsibility for making plans to improve school climate, reading and math achievement, and the school's evaluation program. Their plans were presented as recommendations at staff meetings for discussion, modification, and adoption.

Principals established grade-level teams and arranged for them to meet on a weekly

basis during the school day for planning, sharing, and coordinating their efforts.

Staff members expressed their recognition of the interrelatedness of their responsibilities and the need to work together as a unified system.

During the program's five year-period, the schools operated less as a set of separate classrooms and programs and more as a unified body with interrelated and interdependent responsibilities. The principals heightened this awareness in a number of ways, for example, by emphasizing the responsibility each teacher had in seeing that students were performing at or above grade level. A 3rd grade teacher soon came to realize that all of the effort exerted to prepare her students for the 4th grade could be rendered meaningless if the following year the 4th grade teacher did not also work toward grade-level proficiency. The teacher also realized that the 2nd grade teacher's failure to prepare his students for the 3rd grade would create a burden for this 3rd grade teacher.

Behavioral expectations were developed and consistently reinforced by all staff.

Supplementary programs discontinued the pullout approach and worked with the classroom teacher within the classroom setting.

CHANGES IN SCHOOL PRACTICES AND POLICIES

A strong academic emphasis was clearly evident in the fast-improving schools, with a focus on acquiring basic skills.

Because the majority of the students were performing far below grade level in 1979, staff members expressed the need to concentrate on 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 are now 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 clubs, and critical thinking projects.

Extracurricular activities and assembly programs emphasized academic achievement by including competitive meets with the reading and math olympic teams, academic pep rallies, student recognition 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 when students could 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.

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" sheets, reviewed 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 the policy by monitoring the doors at dismissal and sending empty-handed students back to their rooms to get their homework.

Parents were informed if students were not completing their homework assignments and told that the students would be retained after lunch, during recess, or after school in the "homework center" to complete missing assignments.

The schools had schoolwide policies designed to protect instructional time from unnecessary disruptions and distractions.

Some of the schools identified blocks of time in the daily schedule when the entire school would be teaching reading, math, and language arts. Interruptions such as public address announcements, requests from the office, pullout programs, and the like would not be allowed during these instructional periods.

CHANGES IN CLASSROOM PRACTICES

Teachers planned to teach the entire grade-level curriculum content to every student.

The grade-level objectives were organized into units of instruction, and teachers used content coverage schedules to plan on a yearly, weekly, and daily basis.

Adjustments in the content coverage schedules were made throughout the year as some lessons required more or less time than expected.

Lessons were usually taught to the whole class and were supplemented with small-group corrective or enrichment instruction.

Whole-class instruction was taught at the student's *grade* level, and small-group instruction was taught at the student's *performance* level.

The pullout approach for compensatory education was replaced by an in-class delivery of service. Support teachers were in classrooms during the instructional lesson, which prepared them to supplement the instruction.

Precautions were taken to avoid ostensibly identifying or labeling students as Title I students or as the "slow group."

Grouping was flexible, and outside observers commented that they were unable to identify the slow learners.

Instructional lessons were highly structured and generally included the key instructional behaviors.

These behaviors were identified as a review of the previous lesson and homework check, a developmental lesson using direct instruction, a process-product check for understanding, actively monitored seatwork, and the assignment of a related daily homework assignment.

Staff members reported that the systematic and structured instructional format helped maintain orders by minimizing the opportunity for disruptive behavior and increased the academic engagement of the students.

Teachers expected their students to perform at or above grade level, and used remedial measures to help underachieving students advance to grade-level proficiency.

Teachers used some form of accelerated learning. This was described as an intervention strategy intended to help underachieving students make more than a year's gain in a given school year. This curriculum design and instructional approach included concentrated instruction that focused on the essential content included within each of the preceding levels.

When many older students complained that they were embarrassed to carry home books that were years below their grade level and that younger students were using, the schools prepared and distributed book covers with the school's name and logo to all the students. Soon the underachieving students began bringing home the books and assignments needed to help them advance to grade-level proficiency.

CONCLUDING REMARKS

Project RISE appears to be a promising example of the successful implementation of the school effectiveness and teacher effectiveness findings. The project schools began with a clear vision of what an effective school is (one performing at or above national norms in reading, math, and language arts, with no disparity based on race or class), they used the school effectiveness correlates as a framework for developing their own plans, and they implemented these plans in a systematic and self-conscious manner.

The RISE practitioners are modest when discussing their accomplishments. They are obviously proud of the gains their students have made, but are quick to point out that becoming an effective school is only a first step. Narrowing the educational agenda was a necessary prerequisite in turning their schools around, but now they are eager to accept the challenge of converting their effective schools into excellent schools.

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By Mr. HELMS (by request):

S. 1816. A bill to authorize the Secretary of Agriculture to recover costs of carrying out certain animal and plant health inspection programs, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

AGRICULTURAL PROTECTION COST RECOVERY ACT

Mr. HELMS. Mr. President, today I am introducing by request the Administration's Agricultural Protection Cost Recovery Act of 1987. In addition, I ask unanimous consent that a letter from Deputy Secretary of Agriculture Peter Myers, along with a section-by-section analysis of the bill, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 1816

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Agricultural Protection Cost Recovery Act of 1987."

TITLE I

SEC. 101. The Secretary of Agriculture may charge and collect fees for the provision of agricultural quarantine inspection services in connection with the arrival at a port in the customs territory of the United States or the preclearance or preinspection

at a site outside the customs territory of the United States of a commercial vessel, commercial aircraft, commercial truck, railroad car, and each passenger aboard a commercial vessel or commercial aircraft.

SEC. 102. (a) Each person that provides transportation to a passenger for transportation by a commercial aircraft or commercial vessel into the customs territory of the United States shall—

(1) collect from that passenger the fee charged under section 101 at the time the document or ticket is issued, and

(2) identify on that document or ticket the fee charged under section 101 as an agriculture fee.

(b) If a document or ticket for transportation of a passenger into the customs territory of the United States is issued and the fee charged under section 101 is not collected at the time such document or ticket is issued, the person providing the transportation to such passenger shall collect the fee before the passenger departs from the commercial aircraft or commercial vessel and shall provide such passengers a receipt for payment of the fee.

(c) Any person who collects a fee under this section shall remit that fee to the Treasury of the United States at any time before the date that is thirty-one days after the close of the calender quarter in which the fee is collected.

SEC. 103. (a) All of the fees collected under section 101 shall be deposited in a separate no-year account within the general fund of the Treasury of the United States. Such account shall be known as the "Agricultural Quarantine Inspection User Fee Account."

(b) Upon failure to remit any fee under this Title to the Treasury of the United States, the Secretary of Agriculture shall assess a late payment penalty, and such overdue fees shall accrue interest, as required by 31 U.S.C. 3737. Any late payment penalty and any accrued interest shall be deposited to the Agricultural Quarantine Inspection User Fee Account.

(c) The Secretary of Treasury shall refund out of the Agricultural Quarantine Inspection User Fee Account to any appropriation the amount paid out of such appropriation for expenses incurred by the Secretary of Agriculture for:

(1) the administration of this Act; and

(2) all activities carried out by the Secretary of Agriculture at ports in the United States and at foreign preclearance and preinspection locations in connection with the enforcement of the plant and animal quarantine laws.

(d) The amounts which are required to be refunded under subsection (c) of this section shall be refunded quarterly on the basis of estimates made by the Secretary of Agriculture of the expenses referred to in subsection (c) of this section. Proper adjustment shall be made in the amounts subsequently refunded under subsection (c) of this section to the extent prior estimates were in excess of, or less than, the amount required to be refunded under subsection (c) of this section.

(e) The Secretary of Agriculture shall adjust the fees provided in section 101 to reflect the actual costs for the administration of this Act, the activities carried out at ports in the United States and at foreign preclearance and preinspection locations in connection with the enforcement of the plant and animal quarantine laws, and the maintenance of a reasonable balance in the Agriculture Quarantine Inspection User Fee Account.

TITLE II

SEC. 201. Section 102(b) of 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.".

SEC. 202. Section 306 of the Tariff Act of 1930 (19 U.S.C. 1306) is amended by redesignating 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.".

SEC. 203. Section 7 of the Act of August 30, 1890, (21 U.S.C. 102) is amended by deleting the first sentence and inserting in lieu thereof:

"The Secretary of Agriculture is authorized to place and retain in quarantine all animals imported into the United States, at such ports as he or she may designate for such purpose, and under such conditions as he or she may by regulation prescribe."

and by adding at the end of such section

"The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of carrying out this section.".

SEC. 204. Section 10 of the Act of August 30, 1890, (21 U.S.C. 105) is amended by deleting the last semicolon and all that follows 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. 205. Section 2 of the Act of February 2, 1903, (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 the provisions of this section which relate to the importation of animals, live poultry, hay, straw, forage, or similar material or any meats, hides, or other animal products.".

SEC. 206. Section 4 of the Act of May 29, 1884, (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 exportation of livestock and/or live poultry.".

SEC. 207. Section 5 of the Act of May 29, 1884, (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 exportation of livestock and/or live poultry.".

SEC. 208. Section 11 of the Act of May 29, 1884, (58 Stat. 734, 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. 209. Section 1 of the Act of February 2, 1903, (32 Stat. 791, 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. 210. 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. 134a(c)) which reads: "Such costs shall not constitute a lien against the animals, carcasses, products, or articles involved."; by amending the fourth sentence of section 2(c) (21 U.S.C. 134a(c)) 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 by adding 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 the provisions of this Act which relate to the importation and exportation of animals.".

SEC. 211. Section 12 of the Federal Meat Inspection Act (21 U.S.C. 612) is amended by adding at the end thereof: "The Secretary is authorized to prescribe and collect fees to recover the costs of carrying out this section and section 13 of this Act.".

SEC. 212. Section 3901 of the Act of August 26, 1983, (46 U.S.C. 3901) 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. 213. The eighth paragraph under the heading "Bureau of Animal Industry" of the Act of March 4, 1913, (37 Stat. 832, 21 U.S.C. 151–159) is amended by striking the semicolon following the last sentence of the paragraph, inserting a period following the last sentence of the paragraph, and inserting thereafter the following:

"The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of carrying out this Act;".

SEC. 214. Any person for whom an activity is performed pursuant to section 102(b) of the Act of September 21, 1944, (7 U.S.C. 147a(e)), sections 4, 5 and 11 of the Act of May 29, 1884, (21 U.S.C. 112, 113 and 114a), sections 7 and 10 of the Act of August 30, 1890, (21 U.S.C. 102 and 105), section 3901 of the Act of August 26, 1983, (46 U.S.C. 3901), sections 1 and 2 of the Act of February 2, 1903, (21 U.S.C. 111 and 120–121), section 306 of the Tariff Act of 1930, (19 U.S.C. 1306), section 14 of the Act of July 2, 1962, sections 12 and 13 of the Federal Meat Inspection Act (21 U.S.C. 612 and 613), and the Act of March 4, 1913, (21 U.S.C. 151–159) shall be liable for payment of fees assessed. Upon failure to pay such fees, the Secretary of Agriculture shall assess a late payment penalty, and such overdue fees shall accrue interest, as required by 31 U.S.C. 3717. The Secretary shall have a lien for the fees, any late payment penalty, and any accrued interest assessed against the plant, animal, product, material, means of conveyance or establishment for which services have been provided. In the case of any person who fails to make payment when due, the Secretary shall also have a lien against any plant, animal, product or material thereafter imported, moved in interstate commerce or attempted to be exported by such person. The Secretary may, in case of nonpayment of the fees, late payment penalty or accrued interest, after giving reasonable notice of default to the person liable for payment of such assessments, sell at public sale after reasonable public notice, or otherwise dispose of, any such plant, animal, product, material, means of conveyance, or establishment upon which the Secretary of Agriculture has a lien pursuant to this section. If the sale proceeds exceed the fees due, any late payment penalty assessed, any accrued interest and the expenses of the sale, the excess shall be paid, in accordance with regulations of the Secretary, to

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 credited to accounts that incur the costs and shall remain available until expended without fiscal year limitation. The Secretary shall, pursuant to regulations as prescribed by the Secretary, suspend performance of services to persons who have failed to pay such fees, late payment penalty and accrued interest.

SEC. 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

SEC. 301. The Secretary of Agriculture may prescribe such regulations as the Secretary deems necessary to carry out this Act.

SEC. 302. The Attorney General may bring an action for the recovery of fees, late payment penalties, and accrued interest which have not been paid in accordance with 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 for any territory or possession in any jurisdiction in which such person is found or resides or transacts business, and such court shall have jurisdiction to hear and decide such action.

SEC. 303. (a) For purposes of this Act the term "person" means an individual, corportion, 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.

(d) For purposes of Title I of this Act, the term "plant and animal quarantine laws" means one or more of the following: the Plant Quarantine Act of 1912, 7 U.S.C. 151 *et seq.;* the Federal Plant Pest Act, 7 U.S.C. 150aa *et seq.;* the Federal Noxious Weed Act of 1974, 7 U.S.C. 2801 *et seq.;* the Animal Quarantine Laws, 21 U.S.C. 101–105, 111–131, and 134–134h; the Honeybee Act, 7 U.S.C. 281 *et seq.;* section 306 of the Tariff Act of 1930, 19 U.S.C. 1306; and any other Act administered by the Secretary relating to plant or animal diseases or pests or noxious weeds.

(e) For purposes of Title II of this Act, the term "United States" means the several 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 arrival, or preclearance 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 collected. If the fee is not collected when the ticket is issued, the person providing transportation to the passenger must collect the fee before the passenger departs from the commercial aircraft or commercial vessel and give the passenger a receipt for the fee.

Section 103 authorizes the fees collected under section 101 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 or preclearance or 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 101 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 locations in connection with 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 II authorizes the assessment of fees for various activities relating to veterinary diagnostics, the importation and exportation of animals, animal products, and articles, the exportation of plants and plant products, and for carrying out the provisions of the Virus-Serum-Toxin Act.

Section 203, in addition to authorizing the assessment of fees to recover the costs of carrying out 21 U.S.C. 102, amends the first sentence of 21 U.S.C. 102 to authorize the Secretary of Agriculture to quarantine any animal imported into the United States at any port he or she may designate. Currently, the Secretary's authority to quarantine is limited to 21 U.S.C. 102 to ruminants and swine and in 21 U.S.C. 134c to animals which are or have been affected with or exposed to any communicable animal disease, or which have been vaccinated or otherwise treated for any communicable animal disease, or which the Secretary finds would be likely to introduce or disseminate any communicable animal disease, when the Secretary determines that the quarantine is necessary to protect the livestock or poultry of the United States.

Section 214 provides that payment of fees assessed pursuant to Title II shall be made by the person for whom an activity has been performed. The word "activity" as used in this section is intended to encompass any function performed by the Secretary for a person to enable such person to comply with requirements of the animal and plant quarantine and related laws which are amended by this title or the regulations of the Secretary promulgated pursuant to such laws. This section also authorizes the Secretary of Agriculture to assess a late payment penalty, imposes liens upon certain specified items, and authorizes the Secretary to sell items upon which the Secretary has imposed a lien, and to refuse services to persons who have not paid in full for previous services rendered. Further, any fees not paid when due shall accrue interest.

Section 215 requires the Secretary to credit all fees, any late payment penalty, or accrued interest collected pursuant to Title II to the accounts that incur the cost. The availability of such funds is to be without fiscal year limitation.

Title III authorizes the Secretary to prescribe regulations to carry out the Act.

Section 302 provides the Attorney General with authority to bring an action for recovery 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)–(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 Puerto Rico. The term "plant and animal quarantine laws" means one or more of the following: the Plant Quarantine Act of 1912, 7 U.S.C. 151 et seq.; the Federal Plant Pest Act, 7 U.S.C. 150aa et seq.; the Federal Noxious Weed Act of 1974, 7 U.S.C. 2801 et seq.; the Animal Quarantine Laws, 21 U.S.C. 101–105, 111–131, and 134–134h; the Honeybee Act, 7 U.S.C. 281 et seq.; section 306 of the Tariff Act of 1930, 19 U.S.C. 1306; and any other Act administered by the Secretary relating to plant or animal diseases or pests or noxious weeds. Section 303(e) defines the term "United States," for purposes of Title II, to mean the several 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.

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DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
*Washington, DC, July 7, 1987.*

HON. GEORGE BUSH,
*President of the Senate, Washington, DC.*

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; activities under the Virus-Serum-Toxin Act; port of entry, preclearance and preinspection activities; and the issuance of phytosanitary certificates for the exportation of plants and plant products. These activities, which include but are not limited to testing, inspection, certification, quarantine, examination of records, and cleaning and disinfection, benefit those persons who cause the Department to perform the activity. A 1981 report of the General Accounting Office (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.

An identical letter has been sent to the Speaker of the House.

The Office of Management and Budget advises that enactment of this proposed legislation would be in accord with the President's program.

Sincerely,

PETER C. MYERS,
*Acting Secretary.*

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By Mr. KENNEDY (for himself and Mr. PELL):

S. 1817. An act to amend the Internal Revenue Code of 1986 to provide that gross income of an individual shall not include income from U.S. savings bonds which are transferred to an educational institution as payment for tuition and fees; to the Committee on Finance.

EDUCATION SAVINGS ACT

Mr. KENNEDY. Mr. President, for most Americans a college education is an important part of the American dream. But a recent survey found that 82 percent of the public believe that rising costs will soon put a college degree out of reach for most families.

Between 1980 and 1986, college tuition increased by 75 percent, while family income grew by 33 percent. Tuition at one of America's best colleges can easily cost $12,000 a year. For children born in 1987, the annual bill may be over $30,000 when they are ready for college. And that is just for tuition. Room, board, books, and supplies will add much more to the price. For all but the very wealthy, that is not a dream. It is a nightmare.

We cannot allow rising costs to put a college degree out of reach. Widespread access to higher education is the Nation's best hope for economic growth and social progress. Families must be able to afford the best possible education for their children.

The most effective way to do this is to encourage families to save money for future college expenses. But for many families, saving money is a difficult proposition. We are proposing, therefore, to create an incentive to save for education through the purchase of U.S. savings bonds.

We have never encouraged families to save for education. In fact, whether families put money away for a luxury cruise, a fur coat, a new car or a college education, they are taxed on their savings. That policy is out of touch with America's real priorities.

The program we propose today emphasizes the importance of saving for higher education. It is a simple, sensible way to help families save for college. It will give children security in their future, and a goal to strive for. It will not create a new Government bureaucracy or spending program.

Our plan works like this: If a family buys a U.S. savings bond and uses it to pay for their child's higher education, the interest earned on that bond will be tax free. Bonds will be turned over to an eligible higher education institution as payment for tuition. At the present time, the tax on interest earned on savings bonds is deferred until the bond is redeemed. Our plan would eliminate the tax completely, and give families an incentive to save for college expenses by investing in America.

Savings bonds are an ideal investment to help American parents invest in their children's education.

First—and most important in these uncertain times—savings bonds are a safe investment. They are backed by the full faith and credit of the U.S. Government. There is no risk that savings will be lost.

Second, our proposal does not require complex rules or new institutions. If a child does not attend college, the bond is still fully redeemable and the proceeds can be used for any purpose. The interest is then subject to tax in the normal fashion.

Third, savings bonds are a familiar way to save. According to recent surveys, lower- and middle-income families, those with children under 18, and minorities prefer savings bonds to stocks, mutual funds, and other instruments of savings. To ensure that those who most need help will be the ones who benefit, the tax exemption will be reduced beginning at an income of $75,000 and will be completely phased out at $150,000.

Fourth, savings bonds are convenient. About 50,000 companies encourage employees to purchase them through payroll deductions—an effective method to put money away for the future. Approximately 75 percent of savings bonds are now bought through payroll deductions. Bonds are also readily available at banks and other financial institutions and can even be bought through the mail. Parents would have easy access to the program—with no application to fill out or difficult choices to make.

And finally, the plan will encourage the sale of savings bonds. If the sale of savings bonds grows by 10 percent, for example, that will generate $1 billion.

Our proposal makes significant improvements over other current proposals for college saving. Some States are offering programs of their own, but they can only be used within the State. The creation of a new form of savings bonds for education has also been suggested, but we see no need for such duplication and complexity, when regular U.S. savings bonds can do the same job better.

The Federal commitment to college aid is well-established. The Reagan administration's efforts to cut back student assistance programs have failed; if anything, those efforts have solidified the Federal role. Student aid programs should be increased, not placed on the chopping block.

The Federal role is, and must remain, focused on financial resources for economically disadvantaged students, and Senator PELL and I are strong supporters of that role. But rising costs threaten to put a college degree out of reach of average families, and we must find a safe, convenient, and simple way to help them meet tuition.

We have long known the value of investing in education—and the cost of not doing so. Today we link two longstanding American institutions—the U.S. education system and U.S. savings bonds. Each will benefit the other, and make America stronger in the future.

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By Mr. REID:

S.J. Res. 208. Joint resolution designating June 12 to June 19, 1988, as "Old Cars Week;" to the Committee on the Judiciary.

OLD CARS WEEK

Mr. REID. Mr. President, I am today introducing a resolution to designate 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 36 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 colleague in the House, Representative BOB DORNAN, in sponsoring a resolution to designate June 12-19, 1988 as "Old Cars Week."

I encourage 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. DODD, the name of the Senator from Connecticut [Mr. WEICKER] 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. 1085

At the request of Mr. GLENN, the name of the Senator from South Carolina [Mr. HOLLINGS] was added as a cosponsor of S. 1085, 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 cosponsors 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. LAUTENBERG, the names of the Senator from Kansas [Mr. DOLE] 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 Doby and posthumously to Jack Roosevelt Robinson 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. 1522

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. 1522, 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. DODD, the name of the Senator from Rhode Island [Mr. CHAFEE] was added as a cosponsor 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 coins, and for other purposes.

S. 1752

At the request of Mr. BAUCUS, the names of the Senator from Nevada [Mr. HECHT], the Senator from Montana [Mr. MELCHER], the Senator from Minnesota [Mr. DURENBERGER], and the Senator from Alabama [Mr. HEFLIN] 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. LEVIN] 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. GARN], the Senator from Texas [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 February 21, 1988, 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. DECONCINI] 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. BOSCHWITZ], 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 Wyoming [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 Mississippi [Mr. COCHRAN], 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 North Carolina [Mr. HELMS], the Senator from Colorado [Mr. WIRTH], 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. LAUTENBERG], the Senator from Rhode Island [Mr. CHAFEE], the Senator from Connecticut [Mr. DODD], the Senator from Virginia [Mr. WARNER], and the Senator from Tennessee [Mr. GORE] were added as cosponsors 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. HELMS) 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 decisions; 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 ideals of ordered liberty which gave 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 confirmation hearings and in all other proceedings, witnesses will be accorded proper respect and need never fear intimidation or reprisal for their testimony.

## SENATE RESOLUTION 302—EXPRESSING 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 system;

Whereas Fiji enjoyed a government based upon free, fair and openly competitive elections from 1970 until May 14, 1987;

Whereas the recently elected Prime Minister of Fiji, Dr. Timoci Bavandra (a native Fijian), and his coalition government composed of both native Fijians and Indian Fijians have been deposed by a military coup led by Colonel Sitiveni Rambuka;

Whereas the military government of Colonel Rambuka has announced its intention to establish a political system that denies the principle of one person/one vote for all Fijians; and

Whereas the establishment and maintenance of democratic political institutions 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 nonnative 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 and feel the penalties that will fall upon all Fijians if democracy is not restored soon. The longer we delay our denunciation of the abolition 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. 748) 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 elements of that approach, have achieved those fundamental objectives and, accordingly, should be retained;

(3) the responsibility of the Federal Government for the storage, disposal, and transportation of, and research and development on, radioactive waste makes it imperative that the Federal Government explicitly assume its responsibility in this Act to provide full, equitable, and efficient compensation to the public for all damages and injuries arising out of a nuclear incident relating 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 96-164); and

(4) based upon the experience gained in implementing the present system of providing compensation for accidents involving nuclear materials, and in light of developments that have taken place since the Congress last extended and amended such system, 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 to—

(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:

"b. (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 writing, which it may revise from 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 cost and on reasonable terms from private sources. Such financial protection may include private insurance, private contractual indemnities, self insurance, other 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 of liability insurance 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 1987, include, in determining such maximum amount, private liability insurance available under an industry retrospective rating plan providing for premium charges deferred in whole or major part until public liability from a nuclear incident exceeds or appears likely to exceed the level of the primary financial protection required of the licensee involved in the nuclear incident: *Provided*, That such insurance is available to, and required 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 following any nuclear incident under such a plan shall be not more than $60,000,000 in 1987 dollars (but not more than $12,000,000 in 1987 dollars in any one year) for each facility required to maintain the maximum amount of financial protection.

"(B) The amount which may be charged a licensee under the industry retrospective rating plan required pursuant to subparagraph (A) of this paragraph following any nuclear incident shall not exceed 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 taxes which may be applicable to any deferred premium provided for in this Act shall be the responsibility of the licensee and shall not be included in the retrospective premium established by the Commission. 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 requirements as are necessary to assure availability of funds to meet any assessment of deferred premiums within a reasonable time when due, and may provide reinsurance or shall otherwise guarantee the payment of such premiums in the event it appears that the amount of such premiums will not be available on a timely basis through 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 revenues derived therefrom or any other property or revenues of such licensee to secure such reimbursement and consent to the automatic revocation of any license.

"(D)(i) If the aggregate annual deferred premiums assessed pursuant to paragraph (2)(A) of this subsection for a nuclear incident are insufficient to indemnify public liability claims resulting from such incident in a timely manner as such public liability claims arise, the Commission is authorized to issue, and shall request the Congress to appropriate sufficient funds for issuing, obligations to the Secretary of the Treasury for the purpose of compensating such claims, 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.

"(ii) The aggregate amount of such obligations, including any interest to be paid on such obligations, shall not exceed the balance of deferred premiums to be assessed pursuant to paragraph (2)(A) of this subsection for such nuclear incident.

"(iii) 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 indemnified shall not be required to exceed the amount of financial protection provided in that year pursuant to paragraph (2)(A) of this subsection.

"(iv) 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 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.

"(v) 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.

"(vi) 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 balance of deferred premiums to be assessed 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 a rate determined by taking into consideration 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 the 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, purchases, and sales by the Secretary of the Treasury of obligations under this pragraph shall be treated as public debt transactions of the United States.".

SEC. 4. INDEMNIFICATION AGREEMENTS FOR LICENSEES OF NUCLEAR REGULATORY COMMISSION.

Section 170c. of the Atomic Energy Act of 1954, as amended, is amended by striking "August 1, 1987" each place it appears and inserting "August 1, 2017.

INDEMNIFICATION AGREEMENTS FOR ACTIVITIES UNDERTAKEN UNDER CONTRACT WITH THE DEPARTMENT OF ENERGY

SEC. 5. Section 170d. of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"d. (1)(A) In addition to any other authority the Secretary of the Department of Energy (hereinafter in this section referred to as the Secretary) may have, the Secretary shall until August 1, 2017, enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a nuclear incident.

"(B)(i) 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 this Act or any other law, 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 site or facility, and the construction and operation of any such site or facility. For all such activities, the authority conferred upon the Secretary pursuant to subsection 170 d. (1)(A) shall be the exclusive means of indemnification under this section.

"(ii) 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 produced as a result of the generation of electricity in a civilian nuclear power reactor, including the transportation of such materials to a storage or disposal site or 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 surge nuclear incident established under subsection e(1)(A), from the nuclear waste fund established pursuant to section 302 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10222).

"(iii) 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 not specified in clause (ii), including the transportation 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.

"(iv)(I) In the event of a nuclear incident that arises out of or results from or occurs in the course of activities undertaken by the Secretary in connection with 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 site or facility, and the construction and operation of any such site or facility, the Secretary shall determine the extent to which such incident involves materials produced as a result of the generation of electricity in a civilian nuclear power reactor, or materials resulting from other activities, or both, and based upon such determination, render a decision as to the appropriate source of funds, in accordance with clauses (ii) and (iii), to be used in compensating public liability claims.

"(II) The funds to be used to compensate public liability claims pursuant to this subparagraph shall be provided in a manner and in such amounts as are appropriate to ensure that the funds necessary to compensate such claims are shared on a pro rata basis, in accordance with the determination rendered pursuant to subclause (I). The decision on the sources of such funds shall be final and conclusive. Within ninety days of the date of enactment of the Price-Anderson Act Amendments Act of 1987, the Secretary shall promulgate standards and regulations for making the determinations required under this subparagraph.

"(2) In agreements of indemnification entered into pursuant to subsection 170 d. (1), the Secretary may require its contractor to provide and maintain financial protection of such a type and in such amounts as the Secretary shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, in an amount equal to the aggregate level of liability for a single nuclear incident established under subsection e(1)(A), excluding costs of investigating and settling claims and defending suits for damage in the aggregate for all persons indemnified in connection with such contract and for each nuclear incident: *Provided*, That this amount of indemnity shall be reduced by the amount of the financial protection that the Secretary requires of the contractor.

"(3) Notwithstanding paragraph (2) of this subsection, if the maximum amount of financial protection required of licensees pursuant to subsection 170 a. is increased by the Commission, the amount of indemnity, together with any financial protection required of the contractor, shall at all times remain equal to the maximum amount of financial protection required of licensees pursuant to subsection 170 a. The amount of indemnity provided contractors pursuant to this subsection shall not, at any time, be reduced in the event that the maximum amount of financial protection required of licensees is reduced.

"(4) In the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Secretary pursuant to this subsection shall not exceed $100,000,000.

"(5) 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.

"(6) 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.

"(7) The amounts of indemnity 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 deemed to have been so modified as of the effective date of the Price-Anderson Act Amendments Act of 1987.

"(8) Any public liability claims arising in connection with agreements entered into pursuant to section 170 d. (1) and resulting from a nuclear incident involving nuclear material that has been illegally diverted from its intended place of confinement or intended transportation route shall be compensated in accordance with the provision of this subsection, in the event that:

"(A) the Secretary has title to such nuclear material; or

"(B) title to such material cannot be identified."

"(9) The Funds provided in accordance with agreements of indemnification under paragraph (1) shall be the exclusive source of payments for public liability claims where such liability does not exceed the aggregate level of liability established under subsection e(1)(A).".

AGGREGATE LIABILITY FOR A SINGLE NUCLEAR INCIDENT

SEC. 6. Section 170 e. of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"(e)(1)(A) With respect to nuclear incidents involving

"(i) licensees required to have and maintain financial protection equal to the maximum amount of liability insurance available from private sources, and

"(ii) contractors with whom the Secretary has entered into an agreement of indemnification, pursuant to subsection 170 d., the aggregate liability for a single nuclear incident of persons indemnified, including the reasonable costs of investigating and settling claims and defending suits for damage shall not exceed the maximum amount of financial protection required of licensees pursuant to subsection 170 a.: *Provided, however*, That the aggregate liability for nuclear incidents involving contractors with whom the Secretary has entered into an agreement of indemnification, pursuant to subsection 170 d.; shall not, at any time, be reduced in the event that the amount of financial protection required of licensees required to have and maintain financial protection equal to the maximum amount of liability insurance available from private sources is reduced.

"(B) With respect to nuclear incidents involving licensees other than those specified in subsection 170 e. (1)(A)(i), the aggregate liability for a single nuclear incident of persons indemnified, including the reasonable costs of investigating and settling claims and defending suits for damage, shall not exceed (i) the sum of $500,000,000 together with the amount of financial protection required of the licensee, or (ii) if the amount of financial protection required of the licensee exceeds $60,000,000, such aggregate liability shall not exceed the sum of $560,000,000 or the amount of financial protection required of the licensee, whichever amount is greater.

"(C) In the event of a nuclear incident involving damages in excess of the amount of aggregate liability, the Congress will thoroughly review the particular incident, in accordance with the procedures set forth in subsection 170 i., 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.

"(2) With respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection 170 d. is applicable, such aggregate liability shall not exceed the amount of $100,000,000 together with the amount of financial protection required of the contractor.".

CONGRESSIONAL REVIEW OF COMPENSATION PLANS

SEC. 7. Section 170 i. of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"i. (1) After any nuclear incident that will probably require payments by the United States under this section, the Secretary or the Commission as appropriate, shall make a survey of the causes and extent of damage, and shall submit such report forthwith to the Congress, to the Congressmen of the affected districts, to the Senators of the affected States, and, except for information which would cause serious damage to the national defense of the United States, to the public, to the parties involved, and to the courts. The Secretary and the Commission shall report annually to the Congress on the operations under this section.

"(2) Upon a determination by a court, pursuant to subsection 170 o., that public liability from a single nuclear incident may exceed the aggregate liability under subsection 170 e., the President of the United States shall, within ninety days after such determination, submit to the Congress—

"(A) a report setting forth the causes and extent of damage and the estimated requirements for full, equitable, and efficient compensation and relief of all claimants;

"(B) one or more compensation plans, containing a recommendation or recommendations as to the relief to be provided; and

"(C) any additional legislative authorities necessary to implement such compensation plan or plans.

"(3) Any compensation plan transmitted to the Congress pursuant to paragraph (2) shall bear an identification number and shall be transmitted to both Houses of Congress on the same day and to each House while it is in session.

"(4) No such compensation plan may be considered approved for purposes of subsection 170 e. (1) unless between the date of transmittal and the end of the first period of sixty calendar days of continuous session of Congress after the date on which such action is transmitted to such House, each House of Congress passes a resolution described in paragraph 6 of this subsection.

"(5) For the purpose of paragraph 4 of this subsection—

"(A) continuity of session is broken only by an adjournment of Congress sine die; and

"(B) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day calendar period.

"(6)(A) This paragraph is enacted by Congress—

"(i) As an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by clause (B) and it supersedes other rules only to the extent that it is inconsistent therewith; and

"(ii) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.

"(B) For purposes of this paragraph, the term 'resolution' means only a resolution of either House of Congress the matter after the resolving clause of which is as follows: "That the approves the compensation plan numbered submitted to the Congress on , 19 .", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one compensation plan.

"(C) A resolution once introduced with respect to a compensation plan shall immediately be referred to a committee (and all resolutions with respect to the same compensation plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(D)(i) If the committee to which a resolution with respect to a compensation plan has been referred has not reported it at the end of twenty calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from further consideration with respect to such compensation plan which has been referred to the committee.

"(ii) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same compensation plan), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

"(iii) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same compensation plan.

"(E)(i) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been discharged to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

"(ii) Debate on the resolution referred to in clause (i) of this subparagraph shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to.

"(F)(i) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution or motions to proceed to the consideration of other business, shall be decided without debate.

"(ii) Appeals from the decision of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedures relating to a resolution shall be decided without debate.".

SEC. 8. DATE OF EXEMPTION FROM FINANCIAL PROTECTION REQUIREMENT.

Section 170 k. of the Atomic Energy Act of 1954, as amended, is amended—

(1) by striking "August 1, 1987" each place it appears and inserting "August 1, 2017"

WAIVER OF DEFENSES

SEC. 9. (a) Section 170n. (1) of the Atomic Energy Act of 1954, as amended, is amended—

(1) by adding "or" at the end of subparagraph (c);

(2) by adding the following new paragraphs (d), (e) and (f).

"(d) arises out of or results from or occurs in the course of activities undertaken by the Secretary, including activities undertaken by contract, in connection with the storage or disposal of high-level radioactive waste, spent nuclear fuel, or transuranic waste, including the transportation of such materials to a storage or disposal site or facility, and the construction and operation of any such site or facility,".

"(e) arises out of or results from or occurs in the course of the construction, possession, or operation of any facility licensed under section 53, 63, or 81 of this Act, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection pursuant to subsection 170a., or

"(f) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 53, 63, or 81 of this Act, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection pursuant to subsection 170 a."; and

(3) by striking all after "thereof" in clause (iii) to the end of the sentence.

(b) Subsection n. of section 170 of the Atomic Energy Act of 1954, as amended, is amended—

(1) in paragraph (1) by—

(A) inserting after "the Commission" the following: "or the Secretary, as appropriate,"; and

(B) striking out "a Commission" in clause (c) and insert in lieu thereof "a Department of Energy"; and

(2) in paragraph (2), by inserting after "the Commission" the following: "or the Secretary, as appropriate,".

JUDICIAL PROCEDURES FOR LIABILITY IN EXCESS OF FINANCIAL PROTECTION

SEC. 10. Section 170 o. of the Atomic Energy Act of 1954, as amended, is amended as follows:

(a) in paragraph (3) by inserting after "The Commission", both places such phrase appears the following: "or the Secretary, as appropriate"; and

(b) by striking out the text of paragraph (4) and inserting in lieu thereof the following: "The court shall review the costs associated with investigating, settling, prosecuting, and defending claims to determine whether such costs are reasonable and equitable and to determine whether the party seeking such costs has—

"(A) litigated in good faith;

"(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 prompt settlement or adjudication of such claims.".

JUDICIAL REVIEW OF CLAIMS ARISING OUT OF A NUCLEAR INCIDENT

SEC. 11. (a) CONSOLIDATION OF CLAIMS.—Section 170 n. (2) of the Atomic Energy Act of 1954, as amended, is amended—

(1) in the first sentence—

(A) by striking "an extraordinary 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 petition 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, whichever occurs later.".

(b) DEFINITION OF PUBLIC LIABILITY ACTION.—Section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014), as previously amended by this Act, is further amended by adding at the end the following new 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 involved occurs, 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. 2210(n)) is amended by adding at the end the following new paragraph:

"(3)(A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (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—

"(i) the United States district court having jurisdiction under paragraph (a) determines that the aggregate amount of public liability is likely to exceed the amount of primary financial protection available under subsection b.; or

"(ii) 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 only of members who are United States district judges or circuit judges.

"(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.

"(C) It shall be the function of each management panel—

"(i) to consolidate related or similar claims for hearing or trial;

"(ii) to establish priorities for the handling of different classes of cases;

"(iii) to assign cases to a particular judge or special master;

"(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

"(v) 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;

"(vi) 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

"(vii) 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.".

DATE OF REPORT TO CONGRESS BY NUCLEAR REGULATORY COMMISSION AND DEPARTMENT OF ENERGY

SEC. 12. Section 170 p. of the Atomic Energy Act of 1954, as amended, is amended by striking out "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) Subsections g., h., j., and m. of section 170 of the Atomic Energy Act of 1954, as amended, are amended by inserting after "The Commission" or "the Commission" wherever they appear the following: "or the Secretary, as appropriate,".

(b) Subsection f. of section 170 of the Atomic Energy Act of 1954, as amended, is amended by striking "Commission" the first two times it appears and inserting in lieu thereof "Commission or the Secretary, as appropriate,".

PRESIDENTIAL COMMISSION ON CATASTROPHIC NUCLEAR ACCIDENTS

SEC. 14. Section 170 of the Atomic Energy Act of 1954 (42 U.S.C. 2210) is 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 under subsection e., as appropriate.

"(2)(A) The study commission shall consist of not less than seven and not more than eleven members, who—

"(i) shall be appointed by the President; and

"(ii) shall be representative of a broad range of views and interests.

"(B) The members of the study commission shall be appointed in a manner that ensures that not more than a mere majority of the members are of the same political party.

"(C) Each member of the study commission shall hold office until the termination of the study commission, but may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

"(D) Any vacancy in the study commission shall be filled in the manner in which the original appointment was made.

"(E) The President shall designate one of the members of the study commission as chairperson, to serve at the pleasure of the President.

"(3) The study commission shall conduct a comprehensive study of appropriate 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 under subsection e., as appropriate, and shall submit to the Congress a final report setting forth—

"(A) recommendations for any changes in the laws and rules governing the liability or civil procedures that are necessary for the equitable, prompt, and efficient resolution and payment of all valid damage claims, including the advisability of adjudicating public liability claims through an administrative agency instead of the judicial system;

"(B) 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

"(C) recommendations for any special standards or procedures necessary to decide and pay claims for latent injuries caused by the nuclear incident.

"(4)(A) The Chairperson of the study commission may appoint and fix the compensation of a staff of such persons as may be necessary to discharge the responsiblities of the study commission, subject to the applicable provisions of the Federal Advisory Committee Act (5 U.S.C. App.) and title 5, United States Code.

"(B) to the extent permitted by law and requested by the chairperson of the study commission, the Administrator of General Services shall provide the study commission with necessary administrative services, facilities, and support on a reimbursable basis.

"(C) The Attorney General, the Secretary of Health and Human Services, and the Director of the Federal Emergency Management Agency shall, to the extent permitted by law and subject to the availability of funds, provide the study commission with such facilities, support, funds and services, including staff, as may be necessary for the effective performance of the functions of the study commission.

"(D) The study commission may request any Executive agency to furnish such information, advice, or assistance as it determines to be necessary to carry out its functions. Each such agency is directed, to the extent permitted by law, to furnish such information, advice, or assistance upon request by the chairperson of the study commission.

"(E) Each member of the study commission may 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.

"(F) The functions of the President under the Federal Advisory Committee Act (5 U.S.C. App.) that are applicable to the study commission, except the function of reporting annually to the Congress, shall be performed by the Administrator of General Services.

"(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 Act Amendments 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 end the following new subsection:

"r. LIMITATION ON LIABILITY OF LESSORS.—No person under a bona fide lease of any utilization or production facility (or part thereof or undivided interest therein) shall be liable by reason of an interest as lessor of such production or utilization 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 adding 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 and operation 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 by the Secretary, 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 after "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:

"ee. 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 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 under State law 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 an agreement of indemnification covering such incident.

"(B) Subparagraph (A) applies to any nuclear incident or evacuation covered by an agreement of indemnification under—

"(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).".

PRECAUTIONARY EVACUATIONS

SEC. 18. (a) COSTS INCURRED BY STATE GOVERNMENTS.—Section 11 w. of the Atomic Energy Act of 1954 is amended by inserting after "nuclear incident" the first place it appears the following: "or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation)".

(b) DEFINITION.—Section 11 of the Atomic Energy Act of 1954, as previously amended by this Act, is further amended by adding at the end the following new subsection:

"ff. The term 'precautionary evacuation' means an evacuation of the public within a specified area near a nuclear facility, or the transportation route in the case of an accident involving transportation of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste to or from a production or utilization facility, if the evacuation is—

"(1) the result of any event that is not classified as a nuclear incident but that poses imminent danger of bodily injury or property damage from the radiological properties of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste, and causes an evacuation; and

"(2) initiated by an official of a State or a political subdivision of a State, who is authorized by State law to initiate such an evacuation and who reasonably determined that such an evacuation was necessary to protect the public health and safety.".

(c) LIMITATION.—Section 170 of the Atomic Energy Act of 1954 is amended by adding at the end the following new subsection:

"t. LIMITATION ON AWARDING OF PRECAUTIONARY EVACUATION COSTS.—No court may award costs of a precautionary evacuation unless such costs constitute a public liability.".

CIVIL PENALTIES

SEC. 19. The Atomic Energy Act of 1954, as amended, is further amended by adding a new section 234A as follows:

"Section 234A. CIVIL MONETARY PENALTIES 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 rule, regulation or order related to nuclear safety prescribed or issued by the Secretary of Energy pursuant to this Act (or expressly incorporated by reference by the Secretary for purposes of nuclear safety) shall be subject to appropriate enforcement action or a civil penalty of not to exceed $100,000 for each 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. (1) The Secretary shall have the power to compromise, modify or remit, with or without conditions, such civil penalties and to prescribe regulations as he may deem necessary to implement this section.

"(2) In determining the amount of any civil penalty under this subsection, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

"c. (1) Before issuing an order assessing a civil penalty against any person under this section, the Secretary shall provide to such person notice of the proposed penalty. Such notice shall inform such person of his opportunity to elect in writing within thirty days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.

"(2)(A) Unless an election is made within thirty calendar days after receipt of notice under paragraph (1) to have paragaph (3) apply with respect to such penalty, the Secretary shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5, United States Code, before an administrative law judge appointed under section 3105 of such title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

"(B) Any person against whom a penalty is assessed under this paragraph may, within sixty calendar days after the date of the order of the Secretary assessing such 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 promptly assess such penalty, by order, after the date of the receipt of the notice under paragraph (1) of the proposed penalty.

"(B) If the civil penalty has not been paid within sixty calendar days after the assessment order has been made under subparagraph (A), the Secretary shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have the authority to review de novo the law and facts involved, and shall have

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.

"(4) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (2), or after the appropriate district court has entered final judgment in favor of the Secretary under paragraph (3), the Secretary shall 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 such final 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 Technologies, Inc. (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 1954, as amended, is further amended by adding a new subsection c. as follows:

"c. Any individual director, officer or employee of a person indemnified under an agreement of indemnification under section 170d. (or of a subcontractor or supplier thereto) who, by act or omission, knowingly and willfully violates or causes to be violated any section of this Act or any nuclear safety-related rule, regulation or order issued thereunder by the Secretary of Energy (or expressly incorporated by reference by the Secretary for purposes of nuclear safety), which violation results in or, if undetected, would have resulted in a nuclear incident as defined in subsection 11 q. shall, upon conviction, be subject to a fine of not more than $25,000, or to imprisonment not to exceed two years, or both. If the conviction is for a violation committed after the first conviction under this subsection, punishment shall be a fine of not more than $50,000, or imprisonment for not more than five years, or both.".

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)(1) 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 affiliation. The 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 Secretary, but shall not be under the control of, or subject to supervision by, any other officer of the Department.

"(2) There shall also be in the Office a 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 without regard to political affiliation. The Deputy shall assist the Inspector General for Nuclear Programs in the administration of the Office and shall during the absence or temporary incapacity of the Inspector General for Nuclear Programs, or during a vacancy in that Office, act as Inspector General for Nuclear Programs.

"(3) The Inspector General for Nuclear Programs or the Deputy may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress.

"(4) 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.

"(5) 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.

"(b) 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 carried out or financed by the Department for the purpose of promoting health, safety and sound environmental management in the administration of its nuclear programs and operations;

"(3) to recommend policies for, and to conduct, supervise, or coordinate other relationships between the Department and other Federal agencies, State and local governmental agencies, and nongovernmental entities with respect to (A) all matters related to the promotion of health, safety and sound environmental management in 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 or issued by the Secretary (or expressly incorporated by reference by the Secretary for purposes of nuclear safety); and

"(4) to keep the Secretary and Congress fully and currently informed, by means of the reports required by subsection (c) and otherwise, concerning serious problems or deficiencies relating to health, safety or environmental management in the administration of nuclear programs and operations administered or financed by the Department, to recommend corrective action concerning such problems and deficiencies, and to report on the progress made in implementing such corrective action.

"(c)(1) The Inspector General for Nuclear Programs shall, not later than May 31 and November 30 of each year submit to 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. Such reports shall include, but need not be limited to—

"(A) a description of significant problems and deficiencies relating to the administration of programs and operations of the Department disclosed by such activities during the reporting period;

"(B) a description of the recommendations for corrective action made by the Office during the reporting period with respect to significant problems or deficiencies identified pursuant to subparagraph (A);

"(C) an identification of each significant recommendation described in previous reports under this subsection on which corrective action has not been completed;

"(D) a summary of violations of nuclear safety-related rules, regulations or orders prescribed or issued by the Secretary (or expressly incorporated by reference by the Secretary or purposes of nuclear safety) identified and brought to the attention of proper authorities and the disposition of these matters at the time of the report; and

"(E) information concerning the numbers and types of audit reports completed by the Office during the reporting period.

"(2) Within sixty days of the transmission of each semiannual report to the Congress, the Secretary shall make copies of such report available to the public upon request and at a reasonable cost.

"(d) The Inspector General for Nuclear Programs shall report immediately to the Secretary and to the appropriate committees and subcommittees of Congress whenever the Office becomes aware of particularly serious or flagrant problems or deficiencies relating to health, safety and sound environmental management in the administration of nuclear programs and operations of the Department. The Deputy and Assistant Inspectors General for Nuclear Programs shall have particular responsibility for informing the Inspector General for Nuclear Programs of such problems or deficiencies.

"(e) The Inspector General for Nuclear Programs—

"(1) may make such additional investigations and reports relating to the administration of the nuclear programs and operations of the Department as are, in the judgment of the Inspector General for Nuclear Programs, necessary or desirable;

(2) shall respond in a timely fashion to any request from either House of Congress or from a committee thereof for an investigation relating to health, safety or environmental problems with the administration of nuclear programs or operations of the De-

partment by carrying out the investigation requested and submitting a report to the Secretary and to Congress thereon or by stating in writing the reasons why the Inspector General for Nuclear Programs does not believe the investigation requested is justified; and

"(3) shall provide such additional information or documents as may be requested by either House of Congress or, with respect to matters within the jurisdiction, by a committtee or subcommittee thereof.

"(f) Notwithstanding any other provision of law, the reports, information, or documents required by or under this section shall be transmitted to the Secretary and to Congress, or committees or subcommittees thereof, by the Inspector General for Nuclear Programs without further clearance or approval. The Inspector General for Nuclear Programs shall insofar as feasible, provide copies of the reports required under subsection (c) to the Secretary sufficiently in advance of the due date for the submission to Congress to provide a reasonable opportunity for comments of the Secretary to be appended to the reports when submitted to Congress.

"(g) In addition to the authority otherwise provided by this section, the Inspector General for Nuclear Programs, in carrying out the provisions of this section, is authorized—

"(1) to have access to all records, reports, audits, reviews, documents, papers, recommendations, and other material available to the Department which relate to programs and operations with respect to which the Inspector General for Nuclear Programs has responsibilities under this section;

"(2) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this section, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court; and

"(3) to have direct and prompt access to the Secretary when necessary for any purpose pertaining to the performance of functions under this section.

"(h) In carrying out the responsibilities specified in subsection (b)(1), the Inspector General for Nuclear Programs may obtain services, including services of experts and consultants, as authorized by section 3109 of title 5, United States Code, at rates not to exceed the daily rate prescribed for grade GS-18 of the General Schedule under section 5332 of title 5, United States Code, for persons of Government service employed intermittently.

"(i) In carrying out his duties and responsibilities under this section, the Inspector General for Nuclear Programs shall—

"(1) give particular regard to the activities of the Inspector General under section 208 with a view toward avoiding duplication and insuring effective coordination and cooperation; and

"(2) report expeditiously to the Attorney General whenever the Inspector General for Nuclear Programs has reasonable grounds to believe there has been a violation of Federal criminal law.

"(j)(1) The Office of the Inspector General for Nuclear Programs may receive and investigate complaints or information from an employee of the Department (or an employee of any person under contract with the Department) concerning the possible existence of an activity constituting a violation of nuclear safety-related rules, regulations or orders prescribed or issued by the Secretary (or expressly incorporated by reference by the Secretary for purposes of nuclear safety).

"(2) The Inspector General for Nuclear Programs shall not, after receipt of a complaint or information from such an employee, disclose the identity of the employee, unless the Inspector General for Nuclear Programs determines such disclosure is unavoidable during the course of the investigation.

"(3) Any employee of the Department (or an employee of any person under contract with the Department) who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to the Office of the Inspector General for Nuclear Programs, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

"(k) Any request for appropriations for the Department submitted to Congress shall identify in a detailed budget justification the portion of such request intended for support of the Office of the Inspector General for Nuclear Programs, and shall include the comments of the Inspector General for Nuclear Programs on the differences, if any, between the amounts requested and the assessment of the Inspector General for Nuclear Programs of the budgetary needs of the Office.".

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 panel shall report by January 20, 1989, to the President and Congress with specific recommendations for legislation, regulations, 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 facilities and operations, 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 Occupational Safety and Health Administration) 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, including the feasibility of their application to the Department's nuclear programs, the potential impact of their application on achievement of the goals of these programs, and the impact on 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 based on their expertise in areas including but not limited to health and safety, Department of Energy contractor operations, physical sciences, environmental regulations, waste management, national security, and weapons technology.

(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 travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5, United States Code.

(4) DIRECTOR AND STAFF.—(A) The panel shall have a director who shall be appointed by the panel and who shall be paid at a rate not to exceed the minimum rate of basic pay payable for level GS-16 of the General Schedule.

(B) The panel may appoint such additional staff personnel as the panel considers appropriate and may pay such staff at rates not to exceed the minimum rate of basic 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 provisions 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 chapter 53 of such title relating to classification and General Schedule pay rates.

(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 3109(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 to assist the panel in carrying out the panel's duties.

(7) The panel is authorized to secure from any department, agency or individual 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 made by the chairman.

(8) The chairman of the panel shall request the head of each Federal department or independent agency which has an interest in or responsibility with respect to the matters under evaluation by the panel to

appoint a liaison officer who shall work closely with the panel and its staff. These departments 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 colleague 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 clear one of these pending bills for action.

Today we are introducing an amendment to S. 748 that will continue 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 facilities. Under Price-Anderson, there is a ready source of funds that would be available to compensate the public for damages resulting from a nuclear accident. Without 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. Existing nuclear power reactors licensed by NRC will continue to be covered under the current Price-Anderson system for the term of their operating licenses, but the public compensation pool would be limited to about $700 million. Our legislation would increase that pool of funds to almost $7 billion.

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 term of the existing contracts 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 liability 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 the $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 of DOE facilities.

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 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 activities.

SECTION 3

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 nuclear reactors, would be $6.76 billion, including the $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.

SECTION 4

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.

SECTION 5

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.

SECTION 6

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 assuming 110 licensed reactors. In the event of an accident involving damages in excess of the amount of aggregate liability, Congress, would review the incident in accordance with procedures set forth in subsection 170 i. of the Act and take whatever action is necessary.

SECTION 7

This section amends subsection 170 i. of the Atomic Energy Act of 1954 to provide for the submission of compensation plans to Congress whenever it appears that public liability from a nuclear incident may exceed the aggregate liability limit set under subsection 170 e. Such compensation plans would be considered by Congress under expedited procedures set forth in the new subsection.

SECTION 8

This section extends subsection 170 k. of the Act until August 1, 2017. Subsection 170 k. authorizes the Commission to indemnify licensees engaged in educational or nonprofit activities.

SECTION 9

This section amends subsection 170 n. 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.

SECTION 10

This section amends subsection 170 o. to provide for court review of legal costs paid in actions under the Act.

SECTION 11

This section amends subsection 170 n. 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.

SECTION 12

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.

SECTION 13

This section contains conforming amendments.

SECTION 14

This section establishes a Presidential Commission on Catastrophic Nuclear Accidents to study means of fully compensating victims of a catastrophic nuclear accident.

SECTION 15

This section absolves from liability from a nuclear incident any person who has a lease interest in the facility where the incident occurs that person is in possession and control of the facility at the time of the incident.

SECTION 16

This section provides that when the Secretary of Energy undertakes activities in connection with the management of nuclear waste involving the handling of waste by employees of the Secretary, the Secretary will be considered as if he were a contractor under the Price-Anderson Act for purposes of liability actions.

The section also describes the calculation of the inflation adjustment to be used in the Act.

SECTION 17

This section prohibits the awarding of punitive damages under the Act in actions where the United States must pay the damages.

SECTION 18

This section extends the coverage of the Act to include precautionary evacuations that are ordered even though no nuclear incident occurs.

SECTION 19

This section authorizes the Secretary of Energy to assess a civil penalty on a contractor covered by the Act who violates any Departmental rule, regulation or order related to nuclear safety.

SECTION 20

This section makes any individual employed by a contractor under the Act eligible for criminal penalties for a knowing and willful violation of any Departmental rule, regulation or order related to nuclear safety.

SECTION 21

This section establishes within the Department of Energy an Inspector General for Nuclear Programs to supervise auditing and investigative activities related to the promotion of health, safety, and sound environmental management of the Department's nuclear activities.

SECTION 22

This section establishes 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-overdue legislation.

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 Price-Anderson Act for contractors 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 contractor 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 renewal on the Senate floor 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 damage to 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 not go unnoticed. As I have previously stated, the current Price-Anderson Statute has already expired. 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 $160 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. What once was characterized as an impending 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 with the Department absent the indemnity provisions of Price-Anderson. But what we also were hearing was that the Department would not allow these important defense-related activities to cease, 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 found in Price-Anderson, to indemnify its contractors for third-party liability arising from hazardous undertakings in support of national security. And that statute has already replaced Price-Anderson in the recent renewal of a crucial contract with the University of California for operation of two very key laboratories—Lawrence Livermore and Los Alamos. And it appears that this statute will also provide sufficient protection to EG&G Measurements, Inc., to allow them to renew their contract, at the end of this year, for activities at the Nevada Test Site. So it seems that, so far, atomic defense contractors with DOE are comfortable with the provisions of Public Law 85-804, and that DOE will be able to continue conducting "business as usual."

Mr. President, I can assure you that, despite the fact that our commercial nuclear plants and our nuclear-related defense activities at DOE laboratories are surviving quite well without Price-Anderson, we are not wasting our time here in attempting to get this Price-Anderson renewal legislation enacted into law. The reason we are not wasting our time is quite simple—it centers around the potential victims' ability to receive prompt and adequate compensation for any injuries or damages suffered if a nuclear accident should occur.

We must ask ourselves, what is better from the victims' compensation perspective: if an accident occurred at one of our commercial nuclear plants, would victims be better off having the $700 million of indemnification available under the present law, or the $7 billion under the legislation we offer you now, with additional compensation funds made available, if necessary, under expedited congressional procedures? If an accident occurred at a Department of Energy facility, would victims be better off with $500 million of indemnification coverage now available under the present Price-Anderson law, or would they 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 procedure is 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 defense 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 APPROPRIATION, 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. . LAND CONVEYANCE, FORT JACKSON, SOUTH CAROLINA.

Subsection (e)(1) of section 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 $2,300,000, 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. . 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—

(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. 2241(b)), 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 bidding,

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.

(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 maintained under paragraph (1) 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 any 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.

## CATASTROPHIC ILLNESS COVERAGE

### RIEGLE (AND GRASSLEY) AMENDMENT NO. 1043

Mr. RIEGLE (for himself and Mr. GRASSLEY) proposed an amendment to the bill (S. 1127) to provide for Medicare catastrophic illness coverage, and for other purposes; 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; or

(2) refund to the employee or retired former employee an amount equal to the actuarial 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.

## 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 receive testimony concerning the Greenhouse Effect and Global Climate Change.

Those wishing to submit written statements should write to the Committee on Energy and Natural Resources, U.S. Senate, Room SD-364, Senate Dirksen Office Building, Washington, 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 information of the Senate and the public the postponement of a joint hearing before the Subcommittee on Water and Power of the Committee on Energy and Natural Resources and the Select Committee on Indian Affairs.

The hearing regarding S. 1415, the Colorado Ute Indian Water Rights Settlement Act of 1987, which was previously scheduled for October 28, 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, FEDERALISM, AND THE DISTRICT OF COLUMBIA

Mr. BYRD. Mr. President, I ask unanimous consent that the Subcommittee on Government Efficiency, Federalism, and the District of Columbia, of the Committee 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. Without 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 session of the Senate on October 23, 1987, to hold a hearing on Small Business Retirement and Benefit Extension Act, S. 1426.

The PRESIDING OFFICER. Without 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 Reforms.

The PRESIDING OFFICER. Without 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. Without objection, it is so ordered.

## ADDITIONAL STATEMENTS

### U.S. ASSISTANCE TO NSZZ SOLIDARNOSC

● Mr. SYMMS. Mr. President, both the Senate and the House of Representatives are now on record in support 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 operations appropriations bill for fiscal year 1988. The Senate has, by voice vote, approved an amendment to the

State Department authorization bill setting aside $1,000,000 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, either in subcommittee or on the floor.

I believe we have, through our support of Solidarity, struck a tremendous blow for freedom in Poland. I am particularly gratified that Congress has gone on record so decisively against giving in to the various threats which have emanated from the Jarulzelski regime. Moreover, that regime should understand that Congress is willing to stand beside Solidarnosc in its continuing fight for freedom.

Mr. President, I ask that a letter to Congressman JACK KEMP from the clandestine executive leadership of Solidarity, the Temporary Coordination Commission [TKK], be printed in the RECORD.

The letter follows:

GDANSK, SEPTEMBER 20, 1987.

Hon. JACK F. KEMP,
*U.S. Representative,*
*Washington, DC.*

DEAR SIR: Authorized by the clandestine executive leadership of NSZZ "Solidarnosc" in Poland—the Temporary Coordinating Commission (TKK), I would like to express our warm thanks for you 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 1,360,000 dollars. This includes: support for each of the ten regional NSZZ "Solidarnosc" organizational structures and for the central body headed by our 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 our Coordinating Office Abroad in Brussels, and for the maintenance of a fund designed to aid independent publications and organizations which cooperate 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" dated 26 June 1987.

The TKK accepts responsibility for receipt and disbursement 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 applied by the TKK in connection with the donations are described in the enclosed document entitled "Guidelines Concerning Aid From Abroad for NSZZ 'Solidarnosc' " dated 4 October 1986, which was reconfirmed at a recent TKK meeting.

For more than five years the authorities of Poland and their allies have failed to supress NSZZ "Solidarnosc" either by dampening its vitality or by disintegrating its organization. Their vehemence is one measure of our success. More important measures are: the support of our members, the involvement of our activists and the growing help from our sympathizers abroad.

Please accept our gratitude for your very meaningful initiative in the United States Congress to appropriate one million dollars for our Union in the upcoming 1988 fiscal year.

Sincerely yours,

——— ———.

*THE NSZZ "SOLIDARNOŚĆ" BUDGET FOR AID FROM ABROAD IN 1988*

| | *Thousands* |
|---|---|
| 1. Aid fund: | |
| 1.1. Financial and legal aid on a regular basis to repressed persons and their families | $50 |
| 1.2. Reserves | 10 |
| Subtotal | 60 |
| 2. Organizational fund: | |
| 2.1. The national leadership: | |
| 2.1.1. The central body | 30 |
| 2.1.2. The secretariat | 20 |
| 2.2. The regional structures: | |
| 2.2.1 Dolnośląski (Wrocław) | 30 |
| 2.2.2. Śląsko-Dąbrowski (Katowice) | 30 |
| 2.2.3. Małopolska (Kraków) | 30 |
| 2.2.4. Gdańsk | 30 |
| 2.2.5. Mazowsze (Warsaw) | 30 |
| 2.2.6. Ziemia Łódzka (Łódź) | 20 |
| 2.2.7. Pomorze Zachodnie (Szczecin) | 20 |
| 2.2.8. Wielkopolska (Poznań) | 20 |
| 2.2.9. Toruńsko-Bydgoski (Toruń) | 20 |
| 2.2.10. Środkowo-Wschodni (Lublin) | 20 |
| 2.3. Reserves (new structures) | 20 |
| Subtotal | 320 |
| 3. Equipment fund (purchase and transport from abroad): | |
| 3.1. Printing equipment | 360 |
| 3.2. Spare parts and printing materials | 160 |
| 3.3. Communication and computer equipment | 60 |
| 3.4. Other equipment | 20 |
| Subtotal | 600 |
| 4. The Brussels office fund | 180 |
| 5. Support fund: | |
| 5.1. Support for independent organizations, groups and individuals not assoicated with NSZZ "Solidarność" | 100 |
| 5.2. Support for independent press and publishing houses not associated with NSZZ "Solidarność" | 100 |
| Subtotal | 200 |
| Total | 1,360 |

June 26, 1987.

TEMPORARY COORDINATING COMMISSION [TKK] OF NSZZ "SOLIDARNOŚĆ."●

## HONORING FLOYD J. McCREE AND LEEBERTA McCREE

● Mr. RIEGLE. Mr. President, I rise today to pay tribute to Floyd and Leeberta 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 politics 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 Register 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, elevated 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

Committeeman—Buick Foundry.
Executive Board, UAW Local 599.
Member, UAW's Michigan Foundry Council.
Secretary, Genesee County Democratic Party.
Chairman, Genesee County Democratic Party.
Delegate Democratic National Convention.
President Parkland P.T.A.
Divisional Superintendent, Metropolitan Baptist Church Sunday School.
Board of Directors Urban League of Flint.
President of Urban League of Flint.
Trustee National Urban League.
Central City Optimist Club.
Board of Directors, Economic Development Corp.

Community Civic League.
Chairman, County Government, United Fund Drive.
National Association of Register of Deeds.
N.A.C.O.—National Association of Counties.
Chairman Citizens Probation Authority.
Register of Deeds—Genesee County—First Black elected County Officer.
Former Member—United States Council of Mayors.
Chairman Genesee County Action Program.
Board of Directors—NAACP.
Foreman General Motors Foundry.
Tall Pine Council.
Former Board Member Genesee County Federation of the Blind.
Genesee County Plat Board.
Member Metropolitan Church.
Member Urban Coalition.
Mayor of the City of Flint—first Black Mayor in the State of Michigan.
Board Member of Flint Retirement Homes Inc.
Board of Directors of Big Sisters, former president.
Two time co-chairman Education Millage renewal drive.
President of Model Cities EDC and M.C.D.C.
Flint Compensation Commission.
Member of Flint General Hospital Board of Trustees.
Board of Directors Visually Impaired, former President.
FEMMA Board of Directors.
Emergency Services Council.
Sub Committee Planning United Way.
J.O.B.S. for Flint, Chairperson.
Member of United Way Emergency Allocation Committee.
Former member of Board of Directors of Genesee Township Economic Development.
Board of Directors Foss Avenue Christian Church School.
Member of Vehicle City Lodge No 1036 (Elks).
Member of Rose of Sharon Lodge (Masons).
Member VFW Post 3791.
And many many more.●

## THE LEGACY OF H.R. GROSS

● Mr. GRASSLEY. Mr. President, in September, we on Capitol Hill lost a friend and colleague, former Iowa Congressman H.R. Gross. He was a remarkable man, whose commitment and tenacity as a public servant earned him a legendary reputation.

Henry Lane Hull, writing for the Rappahannock Record in Kilmarnock, VA, recently recalled for his readers the legend that is H.R. Gross. Though he had never met H.R., Mr. Hull writes, "It was impossible not to know of him."

I ask, Mr. President, that Mr. Hull's column be included in the RECORD.

The column follows:

EXCERPTS

(By Henry Lane Hull)

Last week while in Washington I read in the newspaper the obituary of former Republican Congressman H.R. Gross of Iowa, who died on Tuesday after a long battle with Alzheimer's Disease. My mind immediately returned to the 50's and 60's when I 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 Gross was the star of the show on the floor of the House.

I never met Congressman Gross, but living in Washington during the 26 years of his reign in Congress, it was impossible not to know of him. He was an Iowa farm boy who served his country in the Mexican border war and in the First World War until he was discharged for disability after being badly gassed. He then studied journalism and became a reporter. Later he worked in radio with future President Ronald Reagan, and was first elected to Congress in 1948, the year of the Truman upset, a tide he balked to win.

Mr. Gross stayed in the House for 13 terms until he decided to retire at age 75. He was 88 when he died, and recalling my delight in watching him in action a quarter of a century ago, I decided to attend his funeral at Fort Myer Chapel in Arlington National Cemetery.

H.R. Gross was born in the last century and he embodied values of an earlier America. He was a rural Midwesterner who looked for ways to promote economy in government, and above all, to discharge waste and wastemakers. He saw a basic trust between the taxpayers—the governed, and the taxspenders—those in government who readily spent what they collected. For his time in Congress he put himself in between the two.

Probably no member of Congress ever cast as many "no" votes. To do that, Mr. Gross positioned himself on the floor during debate. He saw the work of Congress to be there rather then in committees or junketeering at the taxpayer's expense. Closest to his heart was the desire for a balanced federal budget, and attendant to it was the goal of making a start towards systematic repayment of the federal deficit.

Those goals of course, he never reached, and when he died last week our country owed debts even beyond his greatest fears. His funeral was a simple service devoid of pomp and waste, just as he would have liked. His casket was taken to the grave in a hearse rather than on the military caisson pulled by horses. That probably saved the taxpayers as well.

Senator Charles Grassley of Iowa was there, along with a handful of retired Congressmen, but symbolic of Mr. Gross' failure to obtain a balanced budget, the leadership of the House was absent, along with that of the Executive branch, both seeming to have forgotten the man who tried to stand in the way of waste for so many years.

There will probably never be a monument to H.R. Gross in Washington, nor will his name ever again be a household word as it was during his days of lonely battling on the floor of the House. For years Congress designated his bill for the balanced budget as "H.R. 144." The "H.R." stood both for 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 federal budget, that would be H.R. Gross' enduring monument, for it would show that this feisty old Midwesterner's values and dreams were indeed the stuff of which America was made.●

## NEGOTIATING WITH THE PRESIDENT

● Mr. ADAMS. Mr. President, all of us are obviously pleased by the President's announcement yesterday that he is personally willing to discuss deficit reduction with the Congress and that, in those discussions, everything but Social Security is on the table. That is, of course, good news.

But I do want to comment about the tone of the remarks the President made in his press conference last night. Let me quote one of his statements. In response to one question, the President of the United States of America declined to indicate what he would propose because "for about a quarter of a century I was doing some negotiating for a union against the employers. And you don't talk in advance about strategy or about what you will or won't do, or there's no point in having the negotiations."

Now hold on just a minute. Even labor and management don't approach negotiations that way any more. Most have recognized the need to approach discussions from a less confrontational point of view. Maybe the spirit of secrecy and strategy the President invoked last night are appropriate when he goes to a foreign capitol to talk about arms control with the Soviet Union. But Capitol Hill isn't a foreign capitol—It is the home of a co-equal branch of our Government.

I half expected when I came in today to have someone introduce a resolution suggesting that the Congress not adopt any appropriations bills or consider reconciliation legislation for fear that it would "undercut the President during the delicate negotiations she is beginning." We get those sorts of resolutions every time we talk to the Soviets in Geneva and, given the President's remarks last night, I thought that someone might offer such a resolution today. The fact that it hasn't been done is a hopeful sign: it indicates that the Congress, at least, recognizes that the executive and legislative branches are not adversaries but partners in the process of creating a budget and resolving the deficit problems which threaten all of us.

Let me make three brief additional comments about the tone of the President's remarks last night.

First, he continues to blame the Congress in general and the Democrats in particular for deficit spending. Please let us remember that no President ever had $200 billion a year deficits until this President took office—and he took office with a Republican controlled Senate and he kept control of the Senate for 6 years.

Second, the President persists in claiming that the Congress "wouldn't even look at" the budget he had developed and submitted. In truth, we all know that the Congress had an up and

down vote on his budget, as submitted, earlier this year. It got 18 votes in the U.S. Senate.

Third, and finally, the President suggested that the Congress and the Executive look at the budget-making process differently. He said that he talks with the "men and women who have to run the programs * * * deciding how much money they require * * *." And I suspect the President does it just that way. The way the Congress does it is different. We don't just talk with the men and women who run the programs, we also talk with the men and women who depend on those programs. And they tell us that the people who run the programs have no idea about the impact that their requests would have on the ability of kids to get a decent education; on the ability of our society to clean up the environment; on the ability of our industry to become more competitive; and the ability of our people to get decent health care; on the ability of youngsters to get the kind of training they need to hold decent jobs; on the ability of our country to become what it should be—a great and generous land which builds for the future while protecting the needs of all of its citizens in the present.

Mr. President, I support the idea of a meeting between the President and the Congress. But we ought not have a "summit" meeting and we ought not be engaged in "negotiations." We ought to have a meeting, a discussion, between two co-equal branches of Government who have mutual concerns and a mutual interest in developing a workable program for dealing with our problems. I hope that is the way the President will approach his budget meetings with the congressional leadership on this issue. Then, perhaps the President might approach other issues in the same way, perhaps he will decide that he might talk with us—instead of trying to walk around us—on a host of other issues where he has decided to ignore the need to work with the Congress. He could talk with us about the Persian Gulf as required by law; he could talk with us about the way to interpret the ABM Treaty to which we gave our advice and consent; he could talk with us about who he will nominate to the Supreme Court before he decides to send up a name rather than sending up a name designed to offend us as much as the last one.

We have budget problems, yes. But we have some process problems as well. And I hope we will address both in the next few weeks.●

## S. 1575, THE AIDS FEDERAL POLICY ACT OF 1987

● 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, 16,667 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 179,000 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 measure, S. 1220, of which I am a cosponsor. 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 be termed "an answer" for this disease, it has been shown that testing for the AIDS virus accompanied by appropriate counseling on preventative 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.

S. 1575 is, in my view, a crucial component in the much-needed Federal response to the AIDS crisis. This legilsation has been supported by the American Medical Association, the Centers for Disease Control, and the U.S. Surgeon General. It has the backing of virtually every professional health organization. Most importantly, it answers the urgent need for leadership in the midst of this epidemic. And the answer is thoughtful, compassionate, and effective.

The challenge we face is immense. To rise to it, we must provide for a national effort to fund research for vaccines and cures. We must provide education, both through the media and directly to individuals through counseling and testing in a concerted effort to prevent further infections. We must care for those already sick. We must unite in this effort, preventing nonmedical based discrimination.

The combined provisions of S. 1220 and S. 1575 address all of these goals. Together they make up the most comprehensive Federal response to this epidemic to date. I am proud to be part of this response, and I urge my colleagues on both sides of the aisle to join in meeting the challenge posed by AIDS.●

## 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 community 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 accords.

So, 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 let this opportunity slip by. Too many families are counting on our help.●

## S. 1811—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 burden that pension benefits present to the steel industry. Pension benefits and shutdown benefits are, indeed, a serious and expensive problem for the steel industry, just as they are 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.

Fourth. It is alleged that this solution will be less expensive to the taxpayers and pension plan premium payers 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.

Though 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. The refuseniks in the Soviet Union are a prime example of a people "locked in," like animals, unable to leave. And 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 before it brings us down.

The article follows:

[From the Wall Street Journal, Sept. 11, 1987]

THE RETURN OF THE PORK-BARREL CONGRESS

(By Tom Miller)

Congressmen have returned from their August recess and are on their way to confirming fears that last November's election would usher in particularly profligate times vis-a-vis the home folks.

A review of 18 "pork-barrel and subsidy" votes in the House and 10 such votes in the Senate this year reveals a 100th Congress that is snout deep in feeding frenzy at taxpayers' expense.

The latest PBS (Pork Barrel and Subsidies) Index compiled by the Competitive Enterprise Institute finds House members resisting the spending lure, mostly for projects and grants for their districts, only 27% of the time, and senators "just saying no" only 30% of the time. Both figures are down from last year's PBS ratings of 36% for the House and 47% for the Senate.

When House Speaker Jim Wright and Senate Majority Leader Robert Byrd resolved last January to set a new tone in Congress, with the Senate back in Democratic control and the Reagan administration weakened by the Iran-Contra investigation, they weren't kidding. The House and Senate displayed their priorities right off the bat by overriding presidential vetoes of "clean-water" and highway reauthorization bills bulging with special-interest construction projects.

Since then, the House has rejected efforts to increase national park fees, curtail Army Corps of Engineers water projects, eliminate low-priority highway demonstration projects, trim spending for the Economic Development Administration and Amtrak, reduce Small Business Administration loans, cut energy-research boondoggles, impose Coast Guard user fees on recreational boaters, consider closing unneeded military bases, and limit elevator-operator featherbedding in House office buildings.

The Senate's record includes rejection of efforts to terminate Urban Development Action Grants, end the legal protection of agricultural marketing orders, delete "urgent" supplemental funding for a weed study center, derail creation of an international debt-relief organization aimed at bailing out big banks, limit trade adjustment assistance entitlements, and block tariff rebates for certain sugar importers.

The spirit of a Congress that passes the pork then asks for second helpings was best illustrated in May when Pennsylvania Democrat Joseph Kolter (PBS rating of 0) circulated a form among his colleagues on the House Public Works Subcommittee "inviting" them to contribute pet projects to a list of airport improvements in specified congressional districts that he intended to offer as an "enhanced discretionary authority" amendment. In defense of Mr. Kolter, California Democrat Doug Bosco (PBS of 8) explained, "As far as I can see, there's really only one basic reason to be on the Public Works Committee. I want to bring home projects for my district. . . . [It is] certainly not for intellectual stimulation."

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 Foley, Majority Whip Tony Coelho, Budget Committee chairman William Gray, Ways and Means Committee chairman Dan Rostenkowski, Energy and Commerce Committee chairman John Dingell, Public Works Committee chairman James Howard, and presidential candidate Richard Gephardt. Republicans Frank Horton, Robert 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 53, compared with the average House Democrat score of 9.

A similar partisan division appears among senators. The average Senate Democrat PBS score is 8, 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, one finds 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 Lungren (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 restraint seemingly 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. Mr. 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 am particularly pleased that the academy has chosen to recognize Mr. Brodsky's literary achievements. He is a unique figure, one who has attained great stature for his writing in two languages—both his native Russian and his adopted English.

At this time in the evolving relationship between the United States and the U.S.S.R., it is timely to examine the treatment of the Soviet Union's great writers. There have been five Soviet Nobel laureates in literature: Ivan Bunin in 1933, Boris Pasternak in 1958, Mikhail Sholokhov in 1965, and Alexandr Solzhenitsyn in 1970.

Their achievements are one measure of the creative potential of the people of the Soviet Union. Their treatment by the Government is one measure of the level of civilization the Soviet Union has attained.

Pasternak was not permitted to receive his award, and his novel, "Dr. Zhivago," was not published. Solzhenitsyn, while permitted to receive his award, was exiled to the West, and his book, "The Gulag Archipelago," was also not published.

Brodsky, the newest laureate, has only had four of his poems officially published in the Soviet Union. His works circulate in illegal underground samizdat efforts. Like Solzhenitsyn, Brodsky was expelled from the Soviet Union.

Two of these laureates, Solzhenitsyn and Brodsky, now reside in the United States. The Soviet Union's loss is our gain. But the Soviet Union's loss is also the world's loss, because we cannot know how many other brilliant, creative minds have been cowed, stifled, or killed by repressive Soviet cultural, literary, and political policies. These minds could have made a great contribution to world culture and the world as a whole is poorer for their silence or enforced mediocrity.

I take note of this situation because, as a former chairman of the Commission on Security and Cooperation in Europe, better known as the Helsinki Commission, I have spent years pressing for improved Soviet compliance with their promises concerning cultural rights in the Helsinki Final Act. The Soviet regime of censorship and repression, which is only now beginning to loosen somewhat under Gorbachev's glasnost, must come to an end for the Soviet Union to become a fully respected member of the community of nations.

At such Helsinki process events as the Budapest Cultural Forum and the Vienna review meeting of the Conference on Security and Cooperation in Europe, speakers from many western and neutral states have documented extensive and pervasive Soviet violations of their Helsinki accords commitments. The reported planned publication of "Dr. Zhivago" and of some of Joseph Brodsky's work shows that the Soviet authorities are now beginning to correct some of these violations.

We cannot and must not be satisfied, however, until literary giants like Pasternak, Solzhenitsyn, and Brodsky are as honored in the land of their birth as they are here. When that time comes, we can have much more confidence that any trust and understanding which has been built up between our two societies can not be swiftly swept away by some Kremlin ukase.

While we in the United States argue about freedom of speech, our arguments are not about the core of this basic right. Freedom of speech is a fundamental part of the fabric of our society, of our politics, our economy, our Government, and our religious life. We fight about issues along the margins of the right of freedom of speech—commercial speech, obscenity, prior censorship, the clash between personal privacy and the media's coverage of newsworthy people.

When the Soviet Union accepts and respects the core of the right to freedom of speech, then we can have increased respect for their Government's views. Once there is freedom of speech, writers will not be forced into exile and works will not be banned.

The Soviet regime's inability to tolerate diverse or opposing views shows the lack of maturity of their society. If you believe mere words can hurt you, you must be very insecure indeed—insecure in ways nuclear weapons, tank armies, and fleets of warships and bombers cannot cure. They have made progress under glasnost, but glasnost is hardly a Soviet version of the first amendment.

Even if the Soviet Union were to adopt our first amendment as an amendment to the Soviet Constitution, it would still only be a step in the right direction. In theory, limited freedom of speech is already protected in the Soviet Union. But that protection is only theoretical, because both their actual official practices and their interpretations of their constitution, statutes, and regulations are arbitrary, capricious, and under the direct political control of the Communist Party of the Soviet Union.

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 affairs 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 a resident of 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 on page 10, Brodsky is quoted as saying:

I'm the happiest 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. One is entitled "Soviet Exile Wins Nobel for Literature," and the other is entitled "Joseph Brodsky's Art of Darkness."

The material follows:

[From the New York Times, Oct. 23, 1987]

EXILED SOVIET POET WINS NOBEL PRIZE IN LITERATURE

(By 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 underground 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 teaches for part of the year at Mount Holyoke College in Massachusetts.

"I'm sort of doubly proud as a Russian and as 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 15 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 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 Solzhenitsyn and Pasternak, but they would be silly to do so because here 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 Foreign Ministry spokesman, said "the tastes of the Nobel Prize committee are somewhat strange sometime," and added that he would have preferred V.S. Naipaul, the novelist born 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 here 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 $330,000. The formal presentation for Nobel laureates from all fields is Dec. 10.

Although the deliberations are secret, an academy member confirmed that Mr. Brodsky was a finalist last year when Wole Soyinka, a Nigerian poet, won. This year, according to some accounts, Mr. Brodsky won out over a list of finalists including Mr. Naipaul, Octavio Paz, a Mexican critic and poet, and the reputed runner-up, Camilo Jose Cela, a Spanish poet born in 1916.

A 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 example of the Nobel Prize going to a really serious, committed, great writer."

Mr. Brodsky's award was announced here in the traditional way. As a clock chimed the hour at 1 P.M., Professor Allen stepped into a crowded meeting room in the stock exchange building in the Old Town. His back pressed against the door and his face trembling slightly with excitement, he said Mr. Brodsky's name and a cheer went up, indicative of the following the author has among the literati here.

"A DIVINE GIFT"

"For Brodsky, poetry is a divine gift," said the biographical statement distributed to reporters. It noted the "luminous intensity" of his language and his "quite amazing mastery of the English idiom" in a collection of poems published in 1986, "History of the Twentieth Century."

That collection and a 1986 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 shifted language," 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 May 24, 1940, Mr. Brodsky dropped out of 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 developing his gift for dramatic recitations that are described as verging on musical performances.

Scholars place him in the Russian modernist 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—drawn to him by the conviction, often expressed by admirers, that Mr. Brodsky was "the real thing."

"His rise was meteoric. Beginning from the first poems, everybody was sure that this is the best Russian poet living," said Tomas Venclova, an assistant professor of Russian literature at Yale, who met Mr. Brodsky 20 years ago.

While 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 1983, 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 1963 when it published his epigram to a poem by Miss Akhmatova.

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[From the New York Times, Oct. 23, 1987]

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.

"On the Death of Zukhov (1974), written in London, translated by George L. Kline, and reprinted in "A Part of Speech"

It's not the statue itself that matters here, because Comrade Lenin is depicted in the usual quasi-romantic fashion, with his hand poling into the air, supposedly addressing 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 smacks 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. In this 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. People's eyes glitter inside the church like pebbles splashed by the tide.
What is Salvation, since a tear magnifies like glass a future perfect tense? The choir, time and again, sings in the key of the Cross of Our Father's gain, which is but our loss.
There will be a lot, a lot of Almighty Lord, Should I say that you're dead?
You touched so brief a fragment of time. There's much that's sad in the joke God played.
I scarcely comprehend the word "you've lived"; the date of your birth and when you faded in my cupped hand are one, and not two dates.
Thus calculated, your term is, simply stated, less than a day.

"The Butterfly" (1973), translated by George L. Kline, in "A Part of Speech"

The eastern tip of the Empire dives into night;
cicadas fall silent over some empty lawn;
on classic pediments inscriptions dim from the sight as a final cross darkens and then is gone like the nearly empty bottle on the table.
From the empty street's patrol car a refrain of Ray Charles' keyboard tinkles away like rain.

"Lullaby of Cape Cod" (1975), translated by Anthony Hecht, in "A Part of Speech"

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[From the New York Times, Oct. 23, 1987]

POET REFLECTS ON FORTUNES OF LITERATURE

(By Francis X. Clines)

LONDON, October 22—"Life has a great deal up its sleeve," said Joseph Brodsky, who was exiled from the Soviet Union as a "social parasite" 15 years ago and lauded today as the winner of the Nobel Prize in literature.

Smoking a cigarette, sipping some whisky, listening intently to each bit of praise and curiosity flowing his way, Mr. Brodsky displayed a gentle mix of pride, surprise and love of life itself as he sought to account for his fortune.

"What provides you with subject matter is your own language—and that's all," he said, heading off cliché notions that the turmoil of the Soviet Union itself is a crucible for great poetry.

"It sort of coils in your mind, that sort of thing, and dictates something to you," said the poet, obviously savoring his own experiences with language. "A writer is a tool of the language rather than the other way around."

The 47-year-old Mr. Brodsky had just sat down to have lunch at a Chinese restaurant with the novelist John le Carré when someone ran in with the news of the award. He admitted to delight and couched that in humor: "A big step for me, a small one for mankind." And through the day he repeated the hope that the prize would signal to the world the fine quality of modern Russian poetry.

"It's Russian literature that got it," he said. Then he added with a smile: "And it's an American citizen that got it."

RECALLS OTHER RUSSIAN WINNERS

He recalled the pride of past Nobel awards to Pasternak and Solzhenitsyn. "I hope the good people back home feel that way now," said the Nobel laureate, who has had only four poems legally published in the Soviet Union but countless others in well-thumbed bootleg versions. He has been negotiating lately with Soviet publishing officials who have asked to publish some more.

Mr. Brodsky declined to draw any broad political conclusions about the day. When asked whether the award would assist the glasnost campaign to open Soviet society, he said simply, "It won't hurt." When asked how far the Soviet Government still had to go toward freeing artists, he thought a moment, apologized in advance for his rudeness and said: "They have a long way to go. Imagine England under Cromwell. That's about it."

Still, he carefully made it clear that any suffering he had had to bear for resisting the dictates of the Soviet literary bureaucracy had provided no special strength to him as a poet.

"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) misdirect your fervor, take much of your energy so that you may become a more accomplished ethical writer than esthetical 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 taste 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 centralized state," he added. This is because a good poet, one way or another, almost becomes "a national property," he said, in reaching "a certain linguistic plateau above which you may rise."

Mr. Brodsky thought a moment and, as if recalling his own path through the language, continued, "The moment you rise above it you get noticed by the reading public, but also by the watchdogs."

He sipped his whisky, as if toasting some unstated idea. "I'm a clear-cut case of a condition which is called exile," said the poet.

[From the Washington Post, Oct. 23, 1987]

SOVIET EXILE WINS NOBEL FOR LITERATURE

(By David Remnick)

Exiled poet Joseph Brodsky won the Nobel Prize for Literature, just days after the official theoretical journal of the Soviet Communist Party renounced its "cowardly, mistrustful" treatment of creative artists for the past 50 years.

Though only 47, Brodsky has been considered a master of the Russian language and a poet of the highest rank since he was a young man in Leningrad. In 1963, Soviet authorities sent him to a work camp in the Arctic Circle for the crime of "parasitism" and then exiled him to the West in 1972. Brodsky, who has been a citizen of the United States since 1977, lives in New York and teaches at Mount Holyoke College.

While Brodsky was having lunch yesterday with spy novelist John Le Carre at a Chinese restaurant in London, a friend burst in to tell the poet that the Swedish Academy had given him the $340,000 award.

Brodsky ordered a whiskey.

"I'm delighted and slightly bewildered," he said in a telephone interview. "I don't really know how it will play in Moscow. Though I must tell you, I think they can survive it."

The reaction in Moscow was divided. Soviet Foreign Ministry spokesman Gennadi Gerasimov said it was "a good thing" that the award would focus attention on 20th-century Russian verse, but as for Brodsky himself, Gerasimov said, "The tastes of the Nobel committee are strange sometimes."

Andrei Sakharov, who won the Nobel Peace Prize in 1975, called the award "a very good sign," and novelist Fazil Iskander said Brodsky "is a truly great poet who made a great step forward in Russian literature."

Some artists were more reticent. Poet Andrei Voznesensky, who has returned to official favor in recent times, said, "I had better say nothing" about the award.

Future official reaction may reveal about the course of *glasnost*. This week, Kommunist, the party's theoretical-journal, published an unsigned editorial saying, "The mightier the Soviet state became, the more cowardly, mistrustful and often suspicious were the departments and official organs in charge of culture."

Of the editorial, Brodsky laughed and said, "it's about time."

The academy cited Brodsky for his "all-embracing authorship, imbued with clarity of thought and poetic intensity." For his own part, Brodsky said he had hoped the prize would go to Trinidadean-born novelist V.S. Naipaul.

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.

Brodsky is the fifth Russian-born author to win the Nobel Prize, following Ivan Bunin in 1933, Boris Pasternak in 1958, Mikhail Sholokhov in 1965 and Alexander Solzhnitsyn in 1970.

Soviet officials did not permit Pasternak to accept the Nobel Prize and did not allow the publication of his novel "Doctor Zhivago." 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 Gulag Archipelago," and he was exiled to the West.

"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 such as Yevgeny Rein, who lives in Leningrad, and poets of the past such as Osnip Mandelstam, 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 his only regret was that some of the great writers of the century—James Joyce and Marcel Proust among them—have been overlooked by the academy.

Asked by reporters 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.)

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[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 print some of Brodsky's work in December. "About that, I will not celebrate too much," Brodsky says.

Only those Russians who have read his books in underground editions or attended Brodsky's legendary readings in the communal apartments of Leningrad before the government exiled him 15 years ago know the unique pitch of his voice and his turn of mind, his "Elegy for John Donne" and "Lullaby of Cape Cod."

And yet, in a long interview at his home in New York before he left for England, Brodsky expressed only a bitter disinterest, a profound sort of boredom: Glasnost, Gorbachev, once-forbidden art exhibits and movie screenings—all the new "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 terribly social."

Brodsky speaks with the weary darkness of a dying man. Part of his bearing, the rolling eyes and condescending, stagy sighs, derives from a lifelong sense of drama 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 artery with a surgical wire.

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 goes through pack after pack of cigarettes with the dumb I'll-live-forever abandon of a teen-ager. Friends worry if he has surrendered, if there is something even suicidal in his behavior. He greets a photographer at the door with, "Do you have cigarettes? I'm dying for cigarettes." He is a man who knows his sentences.

Brodsky has learned to abandon certain hopes. As he was leaving the Soviet Union in 1972—leaving behind a son, parents, friends, readers, his cherished city of Leningrad—Brodsky wrote a letter to the Soviet leader, Leonid Brezhnev: "Dear Leonid Ilich . . . 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 patriotism is not oaths from a high platform, but how he writes in the language of the people among whom he lives . . . Although I am losing my Soviet citizenship, I do not 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 to let his parents visit him. 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 tickle my ego. If anything, I feel a little bit fastidious 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. Country is . . . it's people, basically. And I'm one of them. And I'm more or less enough for myself. What's happening in Russia now is devoid of autobiographical interest for me. Maybe it's egocentric, Whatever it is, 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 was ruled by creatures who by all human accounts should be considered degenerates. 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 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 "Less Than One"

The little boy, Brodsky, was the son of middle-class Jewish parents. His father was discharged from the navy, Brodsky says, "in accordance with some seraphic ruling that Jews should not hold substantial military rank." The family got by mainly on the earnings of Brodsky's mother Maria, 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 was precocious both in literature and political disgust. Mornings he would sit in school and try to avoid the gaze of Lenin, whose portrait was on every classroom wall, in every textbook, on postage stamps and ruble 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 uptight, with that meaningless expression on his face which could be mistaken for anything, preferably a sense of purpose. This face in some way haunts every Russian and suggests some sort of standard for human appearance because it is utterly lacking in character." Trying to ignore those images, Brodsky writes, "was my first attempt at estrangement."

One winter morning when he was 15, he could stand it no longer, not the monotonous teaching, not the gaze of the Leader. He walked out of class and never returned. It was time to begin an education: literary and sentimental. Reading the classics of Russian and English when he could—Dostoevsky, Platonov, Frost and Auden among his favorites—Brodsky began to work.

"I got caught up in the proletariat the way Marx describes it." He worked as a stoker, a photographer, a sailor, 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 in this unpleasant way. I was an assistant to the coroner, opening up corpses, taking the innards out, opening skulls, taking the brains out."

At around the same time as he began his physical labor, he started his literary work, learning English 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 fringe publication, *Sintaksis.* Some of those early efforts won the approval of Anna Akhmatova, a fellow Leningrader and one of the century's great poets.

In his early twenties Brodsky was already considered an original. The mark of his poetry has always been an extraordinary command of rhythm and sound; scholars have written of Brodsky's poems as musical scores. He is a technical genius. Of Brodsky, poet and critic Robert Hass writes, "In America, a metrical poem is likely to conjure up the idea of the sort of poet who wears ties and lunches at the faculty club. In Russia it suggests the moral force of an art practiced against the greatest personal odds, as a discipline, solitary and intense."

Brodsky's sensibility, too, is stubbornly individual, cosmopolitan—something that

annoys 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 politics 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 teaching 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 place and there was not much to distinguish it culturally. Then there appeared, as if from nowhere, a young man who looked like he'd completely missed the dreariness of socialist realism. 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," a "semiliterary parasite whose pornographic and anti-Soviet poetry" was corrupting the young. The paper said that the young man affected "velvet trousers" and had once tried to steal an airplane and fly to the West. He was harassed by the police and twice thrown into a mental hospital. To avoid the authorities, he slept in the home of a different friend every night. By 1964, Brodsky's KGB file was getting fat.

"Every life has a file, if you will," he says now. "The moment you get a little bit well known, they open a file on you. The file begins to get filled up with this and that, and if you write your file grows in size all the faster. It's a sort of Neanderthal form of computerization. Gradually, your file occupies too much space on the shelf and simply a man walks into the office and says, 'This is a big file. Let's get him.' "

They got him.

*Judge: "What is your profession?"*

*Brodsky: "Translator and poet."*

*Judge: "Who has recognized you as a poet? Who has enrolled you in the ranks of poets?"*

*Brodsky: "No one. Who enrolled me in the ranks of human beings?"*

*Judge: "Did you study for it?"*

*Brodsky: "What?"*

*Judge: "To be a poet. Didn't you try to take courses in school where one prepares for life, where one learns?"*

*Brodsky: "I didn't believe it was a matter of education."*

*Judge: "How is that?"*

*Brodsky: "I thought that it came from God."*—from a smuggled transcript of Brodsky's 1964 trial

For the crime of "parasitism," a soviet judge, one Mrs. Saleleva, sentenced Brodsky to five years at a state farm near Arkhangelsk on the White Sea. The origins of the charge are still not known precisely, but it is likely that many of the party-line writers of Leningrad at the time wanted no part of such an independent, talented figure.

During the day Brodsky crushed stones, chopped wood and shoveled manure. At night he read Louis Untermeyer's anthology of American and British verse. From the book's tiny photographs of his heroes—Frost, Auden, Hardy—he tried to imagine what sort of men they were. As an exercise in language and imagination, he would read the first and last stanzas of their poems and "try to imagine what would come between."

"I was quite happy in Arkhangelsk," he says, "because, well you see, I used to live in communal apartments all the time. I'm not trying to be ridiculous or funny, but it was rather pleasant to find yourself in isolation, in solitary. Subsequently, I was sent to a village. I liked it in its own way because it sounded to me very much like the tradition of a hired man in any world-class poem. That's what I was, a hired man. I was working for a collective farm. The hired man's duties were my duties. I was doing all sorts of agricultural work, and it felt, in a rough way, pastoral.

"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. You 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, a sense of the nation. I was a city boy until then. If they had wanted to punish me, they should have kept me in a communal apartment. Then I would have become a wreck."

After 18 months of protests from artists inside the country and abroad, Soviet officials let Brodsky come home to Leningrad. The harassments, though, continued and he was denied permission to publish or travel abroad.

Finally, in 1971, Brodsky received two invitations to emigrate to Israel. Though Jewish by birth, Brodsky has never been observant or a refusenik. He has distanced himself from Western Jewish groups and he never saw Jerusalem as his home. "I'm 100 percent Jewish by blood, but by education I'm nothing. By affiliation I'm nothing. I'm neither Catholic not Protestant. Protestant sounds good but I don't think I am.

"It turned out that I'm a bad Jew," he says. "I'm a bad Jew, a bad Russian, a bad everything."

When the Ministry of the Interior asked Brodsky why he did not accept the invitations to Israel—by now they were eager to be rid of him—the poet said he had no desire to leave the Soviet Union. He was then told that if he valued his life, he would go. On June 4, 1972, Brodsky was given a visa, relieved of a stack of manuscripts and put on a plane to Vienna. There he was met by the late Carl Proffer, founder of Ardis Publishers and professor of Russian literature at the University of Michigan. Proffer acted as Brodsky's Virgil, arranging for a meeting with W.H. Auden near Vienna and for a job in Ann Arbor as the university's poet-in-residence.

The next year, Harper & Row published Brodsky's "Selected Poems," translated by George L. Kline. Auden wrote the introduction, praising Brodsky as an artist "with an extraordinary capacity to envision material objects as sacramental signs, messengers from the unseen."

Auden's blessing was as powerful in the West as Akhmatova's had been in the Soviet Union. Unlike Solzhenitsyn, who resists learning the language and life of his new country, and unlike many émigrés who are frustrated by the small audience for their work in the West, Brodsky has thrived here, first in Ann Arbor and now in New York. Farrar, Straus, & Giroux has published translations of "A Part of Speech" and will soon issue "To Urania."

"I wondered whether I would understand the people," Brodsky says. "In Russia, the moment a person opens his mouth you know where he's from. There's the uniformity of experience of an individual in Russia. When you're about 7 years old you get into school and you get put in this factory of this bureaucracy or whatever. The options are computable. Here it's tremendously diverse."

He is famous in New York not only as a poet, but as a romancer and a literary celebrity not quite in spite of himself. He can be helpful to his émigré friends—he has helped boost the reputation of such novelists as the author of "Kingaroo," Yuz Aleshkovsky. But he can play tough, too, recommending that a publisher not bother with Vassily Aksyonov's novel, "The Burn."

*Brodsky has no idea how lucky he is. A spoiled darling of fate, he fails to appreciate it and sometimes mopes. It is time that he understood that a man who walks the streets, the key to his own door in his pocket has been well and truly let at liberty*—from Nadezhda Mandelstam's "Hope Abandoned"

Nadezhda Mandelstam was not alone in her impatience with Brodsky. People would rather see him more humble, more active in this society and that cause. He insists, 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. If not, I'm miserable."

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 bush, and getting up on crooked legs,/walks away (his tracks like a line of writing)/into the heart of the continent." His strange condition, his "apartness," suits him.

"You see, I don't want to be either the *crème de la crème* or a martyr. I'd rather be a novelty, especially in a democracy that doesn't understand the language I wrote in. I'm an ultimate novelty 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 an honest man or given to lies; whether he is an ambitious man. One should define oneself first of all in those terms, and only then in terms of culture, race, creed."

Politics, to him, is a kind of noise. Sometimes the noise registers and becomes part of the poetic material, but more often Brodsky's material is deep within himself. His poems "begin with a kind of hum," with the sort of pleasure a bird feels when he sings for the sake of singing. The ferment in the Soviet Union feels too distant, too vulgar to dominate song.

"See, I grew up in the sort of cultural milieu that always regarded conversations about the political discourse as tremendously low-brow. The government, the state, they're just objects of jokes rather than serious consideration. I can't possibly take them seriously." As a poet, Brodsky says, "I don't have principles. I have nerves."

"In general, in this country, every discourse in literature in 15 minutes degenerates into a conversation about ethics, morality and this and that. The Holocaust and the consequences of it. Well, I find it terribly boring, predictable and unimportant, because what matters about literature is esthetic achievement."

Brodsky's pessimism embraces not just Moscow, but the entire planet:

"I think the day will come when everything will be published. Because I think in no time the Soviets are going to realize that it really matters very little what's published and not published. They are bound to realize what the West realized long ago, that there are far worse fates for books than not being published or burned. It's that books are not being read.

"In the West you have every opportunity for civilization to triumph. But what do you do with the opportunities? This is a large issue. The species goofed long ago. One has a choice, either to learn or not to learn. And invariably the bulk of human beings 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 relieved of responsibility. Literature is simply the most focused form of the demands on the evolution of the species. It imposes a certain responsibility, moral, ethical and esthetic responsibility, and the species simply doesn't want to oblige.

"Literature sort of makes your daily operation, your daily conduct, the management of your affairs in the society a bit more complex. And it puts what you do in perspective, and people don't like to see themselves or their activities in perspective. They don't feel quite comfortable with that. Noboby wants to acknowledge the insignificance of his life, and that is very often the net result of reading a poem."

Brodsky's English is good enough for complicated conversation and elegant prose, but he writes his most ambitious and best verse in Russian. Often the translations are muddy. 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, "is like wandering through the ruins of a noble building."

Such clumsiness hurts. Language is the house that 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 sense of the Russian language. It lives its own life within me and sometimes just sort of pops up to the surface, yeah?" By writing his poems, he ensures that no oppressor, no heart attack, even 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 goodby to his guests and then walks to the corner candy store for a few packs of cigarettes.●

## INFORMED CONSENT: TEXAS

● Mr. HUMPHREY. Mr. President, many times a day, in clinics across this Nation, women are consenting to abortion without first being fully informed of the risks, effects, and alternatives. My office has received hundreds of letters testifying to this reality, a reality that has led to many cases of serious depression and other negative effects. I ask unanimous consent that one such letter from the State of Texas be inserted into the RECORD at the conclusion of my statement.

Mr. President, this injustice should not be allowed to continue. My informed consent legislation, S. 272, and S. 273, would require that women considering abortion be provided with sufficient information to make an informed choice. I urge my colleagues to support the legislation, and help bring an end to this unjust discrepancy in medical practice.

The letter follows:

FEBRUARY 10, 1987.

DEAR SENATOR HUMPHREY: Thirteen years ago I became pregnant at the age of twenty. I was not married and the father of my baby refused to marry me. He did, however, make me an appointment with a "Problem Pregnancy" clinic in Houston. I know my meeting with the man at the clinic did not last more than fifteen minutes. The man assured me that having an abortion was the easiest, quickest and wisest solution to my "problem". Other alternatives were not even discussed. Do you suppose he received a "kickback" for each abortion he arranged? This man convinced me that if I were to have a baby I would disgrace myself and my family.

An appointment was set up for me with the doctor who performed the abortion. Absolutely nothing was explained to me about the abortion procedure. I remember crying the moment I laid down on the table and the nurse patted my hand and told me it would be "over in a minute".

If only I had gone to an alternative counseling center, such as a Pro-Life Crisis Pregnancy Center. They are the people who truly offer counseling and options.

The nurse who told me it would be over in a minute was wrong! I have lived with the grief of my murdered baby for thirteen years. I have two children now and I wonder how they would feel about their Mommy if they knew what I had done.

No one told me about the guilt and shame I would suffer for the rest of my life if I did have the abortion.

Thank you, sir, for your concern for women who are considering abortions. May God bless you as you prepare to introduce an informed consent bill.

Respectfully yours,

Mrs. TOMMY VASEK,
*Texas.*●

## 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 Medicare catastrophic illness legislation bill, the Senate proceed to the consideration of the Department of Transportation appropriations bill.

The PRESIDING OFFICER. Is there objection? The Chair hears none. It is so ordered.

Mr. BYRD. Mr. President, the order that the majority leader, after consultation with the minority leader, is authorized at any time to proceed to the consideration of that bill, the Department of Transportation appropriations bill, still stands, does it not, as an order of the Senate?

The PRESIDING OFFICER. The Senator is correct.

Mr. BYRD. And it will so be the order, still, following going to that measure on Tuesday or Wednesday following the disposition of the catastrophic illness bill?

The PRESIDING OFFICER. The Senator is correct.

## ORDERS FOR TUESDAY, OCTOBER 27, 1987

### RECESS UNTIL 9 A.M.

Mr. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until the hour of 9 o'clock on Tuesday next.

The PRESIDING OFFICER. Is there objection?

Mr. DURENBERGER. There is no objection on our side.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD. That being Tuesday morning.

### VOTE ON THE MILITARY CONSTRUCTION APPROPRIATION BILL

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 PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. BYRD. Mr. President, that requires a waiving of paragraph 4 of rule XII. I ask that rule be waived.

The PRESIDING 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 PRESIDING 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.

### THE DOT 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 designess 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 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 mimutes, 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 catastrophic illness 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. RIEGLE.

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 conference.

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 is interested, 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.

Incidentally, 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 movie 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 "Patton," I saw it twice. Once at the White House, and once 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 Minnesotan 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 1978 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.

So I would once again renew my offer that despite the lack of past association that the majority leader might have with baseball and despite the lack of a major league baseball team in West Virginia or other opportunities that might in the past have presented the majority leader, this is a unique year in baseball. This is one of the youngest teams, certainly one of the most Cinderellaish of baseball teams, and the experience of enjoying that sport under a roof in a State like Minnesota, with a whole lot of people, including their Senators, standing around waving their homer hankies, so to speak, is really something that this body and its leader ought not to pass up.

Mr. BYRD. I thank the distinguished Senator. I used to like to play a little baseball myself back in the days when we could not afford to buy a good catcher's mitt and mask. I liked to play the position of catcher in sandlot baseball. I watched the Cardinals last night put it over the Minnesota Twins.

Mr. DURENBERGER. Reserving the right to object.

Mr. BYRD. And I watched them on the previous day do the same, and I am kind of pulling for them on tomorrow because I do want to watch on Sunday the seventh game of the series.

I know West Virginia does not have a big league baseball team. West Virginians do like to watch baseball. They like football and they like basketball. They are also sharpshooters. Of course, we have all heard of Mary Lou Retton. But at the same time Mary Lou Retton was winning her honors, we had a young West Virginian by the name of Ed Etzel who won the award in shooting. Of a possible score of 600—60 rounds, 10 points on each round, he hit the bull's eye for 10 points each on 59 of them, and got nine points on the 60th one, a total score of 599. So West Virginians not only like politics, but they are also good marksmen. I would be so bold as to say that it would take 50 Soviet divisions and they still would not be able to take West Virginia, if it just depended on infantry, cavalry, and artillery.

Incidentally, as a footnote, in World War II, West Virginians were, as to the percentage of the eligible male population serving, No. 5 among the States, and in VIETNAM AND Korea, West Virginia was No. 1 in casualties as to the percentage of the total eligible male population. So we take seriously our politics, and West Virginians generally like sports. I do not mean to say I do not like sports. I like boxing I like baseball, and I like football, but I just cannot do everything else that I do and go to the games.

I have never played a game of golf in my life, but I have done a few other things. I have read all of Shakespeare's plays within the last year, 37 of them. I read the entire Old Testament, 853 pages of the King James Version of the Bible, during the August recess, and I just finished the New Testament last Saturday, the last word thereof being the word "amen." I have read most of "Plutarch's Lives" within the last year, and am on my second turn at reading Webster's Abridged Dictionary. I also find time to read poetry and play the fiddle.

But I do not say that my interests need to be the interests of every other person. Some people like to go the ball games, some like to watch TV, and some like to play the fiddle. All of these are really good American "sports" whatever else we may call them.

So I say to the distinguished Senator that on the seventh game I will be pulling with him for the Twins to show that I am even-handed. I like to feel that I have a balanced approach to things. I pulled for the Cardinals when they were behind. Now, in order to see the seventh game on Sunday, because tomorrow I have to go back to the Mountain State and be at a Jefferson-Jackson Day dinner, I will not get to see that game. So I am hoping the Cards will win tomorrow. Let us see. If they win tomorrow, how many will that make them?

Mr. DURENBERGER. If the distinguished majority leader will yield, if they win tomorrow, he will not have the opportunity to pull for the Twins on Sunday. So why doesn't he just forget about tomorrow, and I will take care of tomorrow. With him pulling for the Twins on Sunday, that will be the best I have been able to get of the majority leader in 9 years. [Laughter.]

Mr. BYRD. OK. That is a deal.

## RECESS UNTIL 9 A.M., TUESDAY, OCTOBER 27, 1987

Mr. BYRD. Mr. President, if there be no further business to come before the Senate, and if the distinguished Senator has no further statement concerning the Twins or other advice, or any other business he would like to transact, I move that the Senate stand in recess until the hour of 9 o'clock a.m. on Tuesday.

The motion was agreed to; and, at 5:06 p.m., the Senate recessed until Tuesday, October 27, 1987, at 9 a.m.

## CONFIRMATIONS

Executive nominations confirmed by the Senate October 23, 1987:

DEPARTMENT OF DEFENSE

JOHN J. WELCH, JR., OF TEXAS, TO BE AN 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.

THE ABOVE NOMINATIONS WERE APPROVED SUBJECT TO THE NOMINEES' COMMITMENT TO RESPOND TO REQUESTS TO APPEAR AND TESTIFY BEFORE ANY DULY CONSTITUTED COMMITTEE OF THE SENATE.

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 DESIGNATIED BY THE PRESIDENT UNDER TITLE 10, UNITED STATES CODE, SECTION 601:

*To be lieutenant general*

MAJ. GEN. DONALD J. KUTYNA [redacted] FR, UNITED STATES 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. BURPEE, [redacted] FR, 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. DAVIS, [redacted] 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 1370:

LT. GEN. JAMES E. LIGHT, JR., [redacted] FR, 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 1370:

LT. GEN. EDWARD L. TIXIER, [redacted] FR. 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. JOHNSTON, [redacted] 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, [redacted] U.S. ARMY.

THE U.S. ARMY NATIONAL GUARD OFFICERS NAMED HEREIN FROM APPOINTMENT AS A RESERVE COMMISSIONED OFFICER OF THE ARMY, UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 593(A), 3371 AND 3384:

*To be major general*

BRIG. GEN. JAMES F. FRETTERD, [redacted]

*To be brigadier general*

COL. JOHN W. SCHAEFFER, JR., [redacted]
COL. SIMON C. KREVITSKY, [redacted]

THE UNITED STATES ARMY RESERVE OFFICERS NAMED HEREN FOR APPOINTMENT AS RESERVE COMMISSIONED OFFICERS OF THE ARMY, UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTIONS 593(A), 3371 AND 3384:

*To be major general*

BRIG. GEN. CLYDE R. CHERBERG, [redacted]
BRIG. GEN. ROBERT C. HOPE, [redacted]
BRIG. GEN. ALVIN W. JONES, [redacted]
BRIG. GEN. FELIX A. SANTONI, [redacted]
BRIG. GEN. RICHARD E. STEARNEY, [redacted]
BRIG. GEN. MARK W. TENNEY, [redacted]

*To be brigadier general, USAR*

COL. WOODROW A. FREE, [redacted]
COL. BARCLAY O. WELLMAN, [redacted]
COL. STEPHEN H. SEWELL, JR., [redacted]
COL. CLAUDE J. ROBERTS, JR., [redacted]
COL. PAUL R. LISTER, [redacted]
COL. PAUL N. REVIS, [redacted]
COL. GENE P. HALE, [redacted]
COL. ROGER H. BUTZ, [redacted]

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, xxx-xx-xxxx/1110. U.S. NAVY.

IN THE MARINE CORPS

MARINE CORPS NOMINATIONS BEGINNING PEDRO GUTIERREZ, AND ENDING JOHN A. WILSON, JR., WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD OF OCTOBER 1, 1987.

IN THE NAVY

NAVY NOMINATIONS BEGINNING RODOLFO LLOBET, AND ENDING ROBERT L. DUELL, WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD OF SEPTEMBER 30, 1987.

NAVY NOMINATIONS BEGINNING STEPHEN A. EILERTSON, AND ENDING EARL H. HARLEY, WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD OF OCTOBER 1, 1987.

## 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.**