

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

STATE OF VERMONT,
OFFICE OF THE GOVERNOR,
March 10, 2004.

Hon. ORRIN G. HATCH,
Chairman,
Hon. PATRICK J. LEAHY,
Ranking Democratic Member, U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATORS: I am writing to express my strongest support for U.S. Attorney Peter Hall for appointment to the U.S. Court of Appeals, 2nd Circuit.

Peter's record of service of the people of Vermont is exemplary. As U.S. Attorney, he has been a strong and effective leader in Vermont's anti-terrorism effort. Peter has been a principal organizer in promoting "Operation Safe Commerce," an international initiative aimed to track and monitor cargo shipments that could be susceptible to terrorist attacks.

In addition, Peter has been an active leader in promoting the President's "Project Safe Neighborhoods" initiative designed to make our streets safer by taking guns out of the hands of convicted felons.

I unequivocally support Peter for the judgeship. He is a dedicated public servant, a strong leader, and will be an asset to the 2nd Circuit.

Sincerely,

JAMES H. DOUGLAS,
Governor.

Mr. LEAHY. Equally clear, however, is Peter's commitment to the law, to fair judging, to leaving any partisan label or interest at the courthouse door. Unless somebody knew his background, they would have no idea whether he is Republican or Democrat. He is a committed officer of the court, totally fair to both sides. In fact, he is the type of nominee every President should send up. I wish we would see more like him. He is universally respected. He has proven himself over long years of Federal service and private practice to be a straight-shooting, fairminded person. Any litigant in a Federal courtroom can be confident they will get a fair hearing and a fair shake from him, no matter what their political affiliation is or whether they have any. I am pleased—I am more than pleased, I am proud—to support his confirmation.

One example of the fairness and lack of bias litigants in the Second Circuit can expect is seen in his answers to one of the questions I asked him at his nomination hearing before the Judiciary Committee. I asked him what his practice would be if a case came to the Second Circuit, a case that had been in the U.S. Attorney's office when he was there, even if he had not been the attorney handling the case. His answer, which I commend to all nominees, is a model of fairness, and was also a model of simplicity. He told me he would recuse himself from any case that had been before his office while he was there. No ifs, ands, or buts. That is one of the reasons why the Senate Judiciary Committee, which sometimes can be divided on issues, voted unanimously to support his nomination.

His qualifications, experience, and support across the political spectrum make him the kind of consensus nomi-

nee that proves when there is thoughtful consideration and collaboration, this process works as it should. That is why I will be pleased to vote to confirm him today.

Actually, an interesting sidebar on this, when he is confirmed to the Second Circuit, President George W. Bush will call his father, former President George Herbert Walker Bush, and say, I beat your record for judicial confirmations. During the 4 full years of the 41st President's administration, former President Bush managed to have 192 judicial nominees confirmed by the Senate. With today's vote, the Senate will have confirmed, even before the year is over, 193 of President George W. Bush's judicial nominations. That allows him to say he has had more judges confirmed with bipartisan cooperation by the Senate than President Reagan did in his first term of office, or his father did, or President Clinton in his last term of office.

I mention these statistics being of interest.

I am one lifelong Vermonter who is very proud of another Vermonter, Peter Hall. This is one of those things in our very special little State that will bring everybody together across the political spectrum. We have tried not to tell Peter he does have to spend some time in New York City each month because the Second Circuit sits there, but I think he will be able to work a great deal of his time in Vermont. Like me, that is one of the best of all possible worlds. You can be home on weekends.

I understand from the leadership we will vote on this and another judicial nomination later this afternoon.

Although I know the Presiding Officer is hanging on every word I might be saying, 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. HATCH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. TALENT). Without objection, it is so ordered.

EXECUTIVE SESSION

NOMINATION OF DIANE S. SYKES TO BE UNITED STATES CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT

Mr. HATCH. Mr. President, I ask that the Senate now proceed in executive session to consider Executive Calendar Nos. 591 and 604 as provided under the previous order.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report the nomination.

The legislative clerk read the nomination of Diane S. Sykes, of Wisconsin, to be United States Circuit Judge for the Seventh Circuit.

The PRESIDING OFFICER. There are 60 minutes evenly divided for debate on this nomination.

Mr. HATCH. I do not intend to take all of our time, and I hope the other side will not take all of its time.

I rise to support the nomination of Justice Diane S. Sykes to the Seventh Circuit Court of Appeals, and to urge my colleagues to support her. There is no doubt that she is well prepared to join the Federal bench. A graduate of Marquette University School of Law, Justice Sykes served as a law clerk to the Honorable Terrence T. Evans in the Eastern District of Wisconsin. As a litigator in private practice, she specialized in civil litigation in State and Federal court.

Justice Sykes will bring almost 12 years of judicial experience to the Seventh Circuit. Since 1999, when she was appointed by Governor Tommy Thompson to fill a mid-term vacancy, she has served on the Wisconsin Supreme Court. She won election for a ten-year term on the court in 2000 with 65 percent of the vote. Judge Sykes appealed to so many of her State's voters because she is a careful, qualified jurist and not an activist.

Before coming to the Wisconsin Supreme Court, Justice Sykes served as a trial judge on the Milwaukee County Circuit Court, winning election to a 6-year term in 1992. Prior to her service as a State judge, Justice Sykes practiced commercial litigation for 7 years at one of Wisconsin's most prestigious law firms. She also clerked for Judge Evans, district judge for the Eastern District of Wisconsin after her graduation from Marquette University Law School.

Not surprisingly, the ABA rated her well-qualified for appointment to the Seventh Circuit. She has also received broad support, including that of both Wisconsin Senators.

Despite her strong credentials and the level of support she enjoys, there continues to be some misinformation and distortions regarding her record. First, of course, is the suspicion by some that she might be pro-life and thus presumptively unqualified for service on the Federal bench. Opponents cite one 1993 case on which she ruled while she served as a county judge in Milwaukee. She was then accused of declaring admiration for pro-life protestors and issuing jury instructions favorable to those protestors.

The Milwaukee newspaper that printed these accusations issued a formal retraction and apology less than a month later. The apology noted, among other things, that the language of Justice Sykes' jury instruction was specifically recommended for use by the Wisconsin Criminal Jury Instructions Committee, and was used by judges throughout the State. The apology further noted that Justice Sykes sentenced the protestors to 2/3 of the maximum sentence permitted by law. The record is clear that Justice Sykes, during sentencing, stated "whether you

like it or not, [an abortion clinic] is a legal, legitimate business, and it has the same right to be free from interference of this sort as any other business."

Justice Sykes also clarified, in answers to written questions that "my favorable comment about the goal [those] defendants sought to achieve was a reference to their underlying goal of reducing the number of abortions, as is clear from the following statement from my sentencing remarks: 'I think that people on both sides of the abortion issue would probably agree with you that reducing the number of abortions in this country is a desirable goal.' My sentencing remarks also reflect extensive consideration of the seriousness of the offense and criticism of the defendants' conduct and tactics. . . [A]nd the 60-day jail sentence I imposed, at two-thirds of the maximum, could not be characterized as unduly lenient or a 'validation' of the defendants' beliefs."

I hope it is not the argument of those who are concerned about Judge Sykes that any judge who at any time suggests that fewer abortions is a desirable goal is disqualified from the Federal judiciary.

I know also that some Senators are concerned about some of Justice Sykes' other answers to post-hearing written questions. A careful reading of her answers will show that Justice Sykes answered her written questions as completely and accurately as the Wisconsin Code of Judicial Conduct allows. Specifically, Wisconsin Supreme Court Rule 60.06(3) prohibits sitting judges from engaging in extra-judicial commentary with respect to particular cases or legal issues that would appear to commit the judge in advance or suggest a promise or commitment of a certain course of conduct regarding particular cases or legal issues. As her answers point out quite eloquently, "there is a range of opinion in the legal community regarding the scope of so-called 'commitments' clauses in judicial ethics codes. To the extent that [others] disagree, I must keep my own counsel and abide by my interpretation of the obligations of my oath, the duties of my office, and the requirements of the Code, which are binding on me."

In those same written questions Justice Sykes was asked whether she believed that the Supreme Court's decisions in *Roe* and *Griswold* constituted "judicial activism", whether they were "unprincipled" and whether they were consistent with "strict constructionist" philosophy.

Justice Sykes avoided criticizing these cases out of a good faith belief that to do so would violate her ethical obligations under Wisconsin law. Her answers followed the same path as at least four of President Clinton's Circuit Court nominees who refused to give their personal views or criticize Supreme Court precedent on various issues, precisely because those issues might come before them as sitting judges.

Justice Sykes did state as follows: "I can unequivocally state, however, that I believe that *Roe* and *Miranda* are the law of the land, and if I am confirmed to the Seventh Circuit, I would be duty bound to follow and would follow these and all other precedents of the United States Supreme Court." She further stated that she believes "that *Roe* and *Griswold* constitute binding precedent," which she would follow "without hesitation" if confirmed to the Seventh Circuit.

Justice Sykes has also been labeled as pro-prosecution and anti-Miranda, implying that she would not be a fair judge. Contrary to the misrepresentations of her opponents, she has often ruled in favor of criminal defendants in Fourth Amendment and other cases involving questions of constitutional criminal law, siding against government actors many times. Justice Sykes' real record shows that she reaches outcomes by applying the law to the facts, as she should.

For example, in the *State v. Knapp* case, Justice Sykes agreed with the majority in a case involving a custodial interrogation that the statements made by a suspect in custody were not in compliance with the dictates of *Miranda* and could not be used by the prosecution against him. In the *State v. Church* case, she overturned an increased sentence of an individual convicted of criminal assault, concluding that the increased sentence was presumptively vindictive, in violation of the defendant's right to due process, and that the presumption was not overcome by adequate, objective new factors in the record justifying the increase.

Also, in the *State v. Schwarz* case Justice Sykes ruled in favor of a probationer in a Fifth Amendment case because his probationary officer during offender treatment compelled him as a condition of probation to admit to the crime of which he was convicted. She specifically held that a probationer cannot be compelled to admit to the crime of conviction before the time for a direct appeal has expired or an appeal has been denied because the Fifth Amendment privilege extends to those already convicted, whether in prison or on probation.

There is another argument against Justice Sykes which I have heard, regarding her dissent in *State v. Carlson*, which needs to be set straight. She stands accused of improperly finding harmless error in a trial court's seating of a non-English speaking juror in a criminal case. At first blush this does seem like harmful, not harmless, error. Again, a careful reading of her response to this issue illuminates the truth of this matter. She clarified that there was significant evidence in the trial court record that the juror in question did understand English. He had lived in the country for 20 years and passed a citizenship test. He held a driver's license and a fishing license. He was employed as a factory worker, where pre-

sumably he had to comply with various State and Federal safety procedures, and he had previously testified, without an interpreter, at a post-conviction hearing. Justice Sykes stated, properly, that "when there is competing evidence, it is the job of the trial court—not the appellate court—to evaluate and weigh it, and make findings of fact. . . . Under well-established rules of appellate review, factual findings of the trial court are reviewed deferentially, and are not disturbed unless clearly erroneous, that is, factually unsupported. . . . The majority in *Carlson* disregarded this deferential standard of review and substituted its own view of the facts for that of the trial court; it was this failure to follow the applicable legal standard that I objected to in my dissent."

I thought we all wanted judges who understand their role and not pursue an activist agenda. I think we should be pleased that a nominee to a Federal appellate court properly understands her appellate role. It is quite unfortunate that some would misrepresent Justice Sykes' principled dissent in this case as evidence of activist tendencies. It is precisely the opposite. It demonstrates restraint and respect for her role as an appellate judge.

Justice Sykes' record represents the antithesis of the activism that I have heard all of my colleagues say they do not want to see from judges nominated to our Federal courts. The Senate should be in the business of approving judges who have demonstrated that they respect the judicial role and will not substitute their own policy preferences for those expressed by the legislature. Judge Sykes' record in this regard is impeccable, and I will be pleased to vote with Senators KOHL and FEINGOLD to confirm her to the Seventh Circuit. I urge my colleagues to vote with us.

The PRESIDING OFFICER. The Senator from Wisconsin is recognized.

Mr. KOHL. Mr. President, it is my pleasure to rise today in support of the nomination of Wisconsin Supreme Court Justice Diane Sykes to the Federal judiciary. She has been nominated to fill one of the Wisconsin seats on the Seventh Circuit Court of Appeals to replace retiring Judge John Coffey.

Justice Sykes brings an impressive background to this important position. She is a lifelong resident of Wisconsin. She was born in Milwaukee, attended Marquette University Law school, clerked for Federal Judge Terry Evans in Milwaukee, and practiced law for a top Wisconsin law firm. Justice Sykes left private practice in 1992 to serve as a Milwaukee County circuit judge, a position she held until 1999. She was then appointed to the Wisconsin Supreme Court in 1999, and she won reelection to a 10-year term in the year 2000. She is to be commended for her devotion to public service and praised for her qualifications for the Seventh Circuit Court of Appeals.

We are not the only ones to recognize her abilities. A bipartisan Wisconsin

Federal Nominating Commission, which has been screening judicial candidates for Wisconsin Senators of both parties for 25 years, selected Justice Sykes and three others from an impressive list of applicants for this position. All four finalists were well qualified and all deserved to have their names forwarded to the President for his selection. Wisconsin's process should be a model because it finds qualified applicants and takes much of the politics out of judicial selection.

The American Bar Association agrees with our evaluations as well. A substantial majority of the committee rated her "well qualified."

It is worth discussing, if only briefly, that some have expressed opposition to Justice Sykes' nomination. We will likely hear some of that dissent during that debate today. The primary argument against her is she was not totally forthcoming in her answers to questions asked during her hearing. We do not find that argument compelling. Rather, she would not have received the support of our bipartisan nominating commission without answering their questions. Further, she would not have received my endorsement had she not answered in a forthright and direct manner the questions we asked of her during our interview with Justice Sykes.

Justice Sykes has earned a reputation as a fine lawyer and as a distinguished jurist during her career in Wisconsin. Lawyers throughout the State, regardless of their political persuasion, echo this sentiment.

We expect Justice Sykes to not only be a credit to Wisconsin, but also to administer fair justice for all who come before her. We look forward to her confirmation today, and to her taking a seat on the Seventh Circuit Court of Appeals.

Mr. FEINGOLD. Mr. President, for 25 years, the bipartisan Wisconsin Federal Nominating Commission has been recommending high-quality candidates for Federal judgeships in our State. First created in 1979 by Senators William Proxmire and Gaylord Nelson, the Commission is an independent panel selected by Wisconsin elected officials and the State Bar of Wisconsin to review applications for Federal District Court and Court of Appeals vacancies in Wisconsin, as well as U.S. attorney vacancies. The composition of the Commission assures that selections for these important positions will be made based on merit, not politics. Senator KOHL and I have worked hard to maintain and strengthen the Commission throughout our time in the Senate, and I am very proud that it has survived for the past quarter century, under Presidents and Wisconsin Senators from both political parties.

I am pleased to put the spotlight on the Commission today, on the occasion of the floor vote on Justice Diane Sykes, who is the latest product of this bipartisan process. I am pleased that Justice Sykes' nomination has pro-

ceeded swiftly, thanks to the collaborative nature of the Commission process. Despite some initial resistance, the Bush administration agreed to have candidates for this Seventh Circuit vacancy go through the Commission process. Under the joint leadership of Dean Joseph Kearny of the Marquette University Law School and Professor Frank Turkheimer of the University of Wisconsin Law School, the Commission worked extremely hard under a very tight deadline. It recommended four qualified candidates, including Justice Sykes. Senator KOHL and I, working with Representative SENSENBRENNER, the senior Republican officeholder in the State, decided to forward all four names to the White House, and the President selected Justice Sykes from the four.

I met with Justice Sykes late last summer after the Commission had recommended her along with the other three candidates. I had a chance to question her about her background, her qualifications, and her judicial philosophy. There are a number of topics on which we do not see eye to eye, but I believe Justice Sykes is well qualified to fill this seat on the Seventh Circuit. In particular, I have great respect for her commitment to public service. Talented young lawyers have many more remunerative options that they can pursue. She has been a judge in our State since 1992.

I have always maintained that with cooperation and consultation between the President and home State Senators, the judicial nomination process can be far less contentious and, frankly, far less frustrating, than it has been over the past several years. Recognizing that ideological differences are inevitable in this process as control in the Senate and in the White House change hands, it would serve those who choose and confirm Federal judicial nominees well to follow the example of the Wisconsin Federal Nominating Commission.

Mr. President, it is my hope that the work of the Wisconsin Federal Nominating Commission, the nomination of Justice Sykes, and her smooth confirmation will send a signal to the White House, to my colleagues on both sides of the aisle, and to the country, that we can, in fact, work together in a bipartisan way to fill judicial vacancies. I urge my colleagues to support this nomination.

Mr. LEAHY. Mr. President, today we are turning to the nomination of Justice Diane Sykes to a seat on the U.S. Court of Appeals for the Seventh Circuit. She has been nominated to a seat which is actually not even vacant yet. Justice Sykes is nominated to replace Judge John Coffey, who has not yet retired. Her confirmation vote today shows how fast the administration is moving to pack the courts, including future vacancies, with its ideological nominees.

Justice Sykes comes before us with the support of my colleagues, Senator

KOHL and Senator FEINGOLD—two Senators whose opinions I value very much. She also comes before us with a 12-year judicial record—both at the trial court level and with the Supreme Court of her home State of Wisconsin. I have looked closely at her record and although I greatly value the opinion of my colleagues from the State of Wisconsin, I have made my own judgment regarding her fitness for this important lifetime appointment.

After reviewing Justice Sykes' written record, I was disturbed by the clear patterns that emerged. I worry that, if confirmed, Justice Sykes will continue to be an activist judge for a lifetime on the Federal bench. For this reason I voted against her nomination in committee and will oppose her confirmation today.

I share Justice Sykes' own concerns, which she described to the Federalist Society last year in a speech she delivered about the "politicization of the judiciary." As Members of the Senate we must ensure that we confirm nominees who will be impartial arbiters of justice. With today's vote we have confirmed 192 of this President's judicial nominations. These nominees have been from a variety of backgrounds. A significant percentage of them had been very active in the Republican Party and in ideological groups such as the Federalist Society. I voted to confirm nominees when I am confident that as judges they would be able to shed their historical advocacy and act impartially once they take their oath of office.

Unfortunately, Justice Sykes' record on the State court bench demonstrates that she has had difficulty separating her personal views from her judicial decisions. In civil cases, she consistently rules against workers and injured plaintiffs in favor of big business. In criminal cases, she routinely rules against the rights of criminal defendants in favor of broad rights for the Government.

Justice Sykes has repeatedly taken a very narrow approach to interpreting the fourth amendment, upholding broad exceptions to allow warrantless police searches. She continuously questions *Miranda*—a bedrock precedent of constitutional law. For example, Justice Sykes was the lone dissenter from the Wisconsin Supreme Court's decision to exclude evidence gained as the result of an interrogation that clearly violated a defendant's *Miranda* rights. Her rulings have jeopardized other constitutional rights of criminal defendants, as well. In one case, in a decision that was later reversed, Judge Sykes ruled that a lawyer's advice to a defendant to lie on the witness stand was not sufficient to conclude that the defendant was deprived of his right to effective counsel. Justice Sykes was also the lone dissenter on the Wisconsin Supreme Court arguing that a defendant had no right to a new trial when one of the jurors did not speak or understand English. Justice Sykes' pattern of

going to great lengths to reduce the protections for criminal defendants enshrined in our Constitution is greatly disturbing.

In addition to what I was able to learn from her judicial record, I was equally disappointed by her testimony before the Judiciary Committee. Our distinguished colleague from Illinois, Senator DURBIN, submitted thoughtful questions to Justice Sykes following her hearing. She refused to answer many of his questions, including whether she believed that *Roe* and *Griswold* were "unprincipled decisions" or were "consistent with strict constructionism," whether the existence of the right to privacy was a "feat of judicial activism," and whether the Warren court went too far in creating individual rights. Her reason for not answering those questions was that she was precluded by Wisconsin's code of judicial conduct. However, that code only prohibits a judge from commenting on "particular cases or legal issues that would appear to commit the judge in advance or suggest a promise or commitment of a certain course of conduct in office regarding particular cases or legal issues." Her blanket refusals to respond to questions by members of the Judiciary Committee are unacceptable.

I am seriously concerned about the type of Federal judge Justice Sykes would be if confirmed and I vote against her nomination to the Seventh Circuit Court of Appeals.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. We are prepared to yield the remainder of our time and I believe the remainder of the time for the other side of the aisle, except for 20 minutes which should be reserved for Senator DURBIN on both nominees.

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

Mr. HATCH. 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. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be dispensed with.

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

Mr. DURBIN. Mr. President, in a short period of time, we are going to consider the nomination of Diane S. Sykes to be U.S. Circuit Judge for the Seventh Circuit.

I take this opportunity on the floor of the Senate to express specifically why I will vote against this nomination.

This is my home circuit, the Seventh Circuit, which includes Illinois, Wisconsin, and Indiana, so I believe I have a special responsibility to bring extra scrutiny to this nomination. I acknowledge that Judge Sykes has the support of her home State Senators, and I do not take that support lightly. Senators FEINGOLD and KOHL have

worked hard to establish a bipartisan nominating commission in Wisconsin, both for district and circuit court nominations, and I know they have a special obligation to support the nominee who is the product of that process.

I was initially inclined to defer to my Wisconsin colleagues and support the nomination, but after taking a close look at Justice Sykes' background and many of her answers to my questions, I now regret to say I have serious doubts about her fitness for a lifetime appointment to the bench.

Let me be specific. First, let me address Justice Sykes track record regarding the criminally accused. As a member of the Wisconsin Supreme Court, Justice Sykes has not always treated criminal defendants fairly. We expect those who are guilty of crimes to be treated fairly and firmly. We understand the presumption of innocence and we understand that those who have committed terrible crimes must pay a price.

Listen to what Justice Sykes has said about her own judicial temperament. When she ran for reelection to the supreme court in Wisconsin in the year 2000, the *Milwaukee Journal Sentinel* said the following about Justice Sykes:

In her five years on the felony bench, Sykes developed a reputation as one of the heaviest sentencing judges in Milwaukee County in recent memory.

Then the *Wisconsin State Journal*, Justice Sykes admitted:

I have a reputation as a hanging judge, that's true.

I ask my colleagues, do these statements sound like the judicious statements of a person seeking a lifetime appointment to a position where she will be asked repeatedly by those who are presumed innocent to be treated fairly?

During her 2000 campaign for the Wisconsin Supreme Court, Justice Sykes ran radio ads stating that she was such a tough sentencer that defense lawyers tried to avoid her court. She also told a reporter that in light of her tough sentences, a wing of the Wisconsin maximum security prison was informally named after her.

Do these sound like temperate statements by a person who will be asked to honor the presumption of innocence and treat all persons in her court fairly?

Let me mention a specific case which troubles me greatly in which Justice Sykes anticriminal defendant bias reared its ugly head. In the case of *State v. Carlson*, the Wisconsin Supreme Court ruled 6 to 1 to overturn a conviction and permit a new trial—not to exonerate a defendant but to permit a new trial—because one of the jurors in this criminal case did not speak or understand English. Justice Sykes was the lone dissenting vote. The juror in this case, whose native language was Lao, received a questionnaire which asked if he could understand the English language well enough to serve

on the jury. The juror checked the box "no." He did not understand English well enough to serve on a jury. Under Wisconsin law, the clerk was required at that point to strike the juror from the jury pool. The trial judge, nevertheless, allowed that juror who did not understand the English language to remain on the jury and the defendant was convicted.

Justice Sykes, seeking a lifetime appointment to the second highest Federal court in the land, was the only member of the Wisconsin Supreme Court to vote to uphold the conviction, and concluded this was a harmless error, that a juror could sit in judgment in a criminal trial incapable of understanding the language being spoken in the courtroom. She was the only Wisconsin Supreme Court justice to conclude that such a juror was no obstacle to justice.

Would any one of us in the Senate or any of us following this debate want our fate decided by a juror who could not even understand the words spoken in our defense?

In another case in which she was the trial judge, *State v. Fritz*, Judge Sykes denied the defendant's ineffective assistance of counsel claim when the defendant's own attorney advised him to lie on the witness stand. Judge Sykes was unanimously reversed. The court of appeals wrote the overwhelming weight of authority is to the contrary; indeed, the sixth amendment of the Constitution is one such authority.

Let me speak to another concern about Justice Sykes. I have great concern about her candor. I believe she made misleading statements to the Senate about a 1993 case in which she was the trial court judge. The case involved the prosecution of two abortion clinic protesters who shut down a Milwaukee clinic by welding their legs to the front of a car parked at the clinic entrance. It took blowtorches and firefighters to remove them.

These defendants had a long history of anti-abortion activity. One had been arrested 80 times in abortion protests; another, 20 times. The defendants had injunctions against them for their protests. As the *Milwaukee Journal Sentinel* reported just this week, they had companion cases in front of Judge Sykes for other anti-abortion crimes they had committed. One of the defendants had appeared before her six times in one of those cases. They were leaders, well known in Milwaukee's anti-abortion community, at a time when that city was one of the Nation's hubs for that activity.

In a statement submitted to Judge Sykes just days before the sentencing, one of the defendants equated abortion with the Holocaust and slavery. He called abortion clinics "death camps." He called doctors "hired killers." At the sentencing hearing, Judge Sykes praised these defendants. She told them:

I do respect you a great deal for having the courage of your convictions and for the ultimate goals that you sought to achieve by this conduct.

She also said:

As far as your character and history and background, obviously, you possess fine characters. I agree with everything that's been said on that basis. It's a unique case in that respect, that you have otherwise been exemplary citizens. Your motivations were pure.

I asked Justice Sykes in writing why she heaped this praise on the defendants, given the fact they had been arrested 100 times for anti-abortion protests. She responded that she was unaware of their arrest records and that, in any event, there was no evidence in the record of a history of arrests in connection with their protest activity.

I ask unanimous consent to have printed in the RECORD a copy of my written questions to Justice Sykes and her written answers.

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

9. You were the trial judge in a 1993 case involving two anti-abortion activists, Michael Scott and Jack Lightner, who were convicted of blocking a door to a Milwaukee abortion clinic. The protesters blocked the doorway by binding their legs with welded pipes to the front of a car; they were removed by firefighters with blowtorches. You sentenced the protesters to 60 days in prison with work-release privileges but not before praising their motives. You told the defendants: "I do respect you a great deal for having the courage of your convictions and for the ultimate goals that you sought to achieve by this conduct." You also stated: "As far as your character and history and background, obviously you possess fine characters" and are "exemplary citizens." And you told the defendants, "Your motivations were pure."

A. There are 3 factors that you considered in sentencing: (1) the nature of the offense, (2) the character, history, and background of the defendants, and (3) the interests of the community. With respect to the second factor, you stated that the defendants had "fine characters" and were "exemplary citizens." According to press reports, one of the defendants in this case had been arrested 80 times in abortion protests, and the other had been arrested 20 times. Why did you believe that they possessed "fine characters" and were "exemplary citizens"?

Answer: It is axiomatic under Wisconsin law that defendants have a right to be sentenced upon facts that are of record. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). The press reports referenced in your question, and the arrests which the question attributes to the press reports, were not facts of record in the case; I was, to the best of my recollection, unaware of these reports. Even if I had been aware of the press reports, it would have been legally improper for me to consider them as they were outside the record in the case.

The case in question was a 1993 misdemeanor disorderly conduct prosecution of two individuals arising out of an abortion clinic protest. Most disorderly conduct prosecutions in Milwaukee County involve acts of domestic violence, bar fights, and the like, and defendants in misdemeanor court are often recidivists with recent criminal records for offenses such as battery, theft, prostitution, drunk driving, and so forth. At sentencing in this case, the prosecutor took the unusual step of standing silent, choosing not to make a sentence recommendation. The defense attorneys and the defendants urged a sentence of community service.

Judges are required under Wisconsin sentencing law to take into account mitigating and aggravating factors regarding the gravity of the offense, the character and background of the offender, and the interests of the community. *McCleary*, 49 Wis. 2d at 276. At the sentencing in this case, the facts of record about the defendants' backgrounds demonstrated that they were atypical misdemeanor defendants: they were generally law-abiding, educated, employed individuals with stable families, no drug or alcohol problems, and no rehabilitative needs. Although one defendant had a couple of extremely old, minor convictions from the mid-1970s and a more recent disorderly conduct fine, this conduct was so remote and/or inconsequential as to not be relevant to that defendant's current status before the court. While both defendants admitted to active, continued involvement in anti-abortion protests, this was the first criminal conviction of this type for both defendants, and there was no evidence in the record of a history of arrests in connection with their protest activity. As I noted in my sentencing remarks, the offense was not committed out of any sort of self-interest, the defendants were not violent, assaultive or threatening, and they did not resist arrest in the case. Accordingly, none of the usual criminal motivations or sentence aggravating factors was present.

As a result, both defendants stood before the court, based upon the facts of record, as exemplary citizens with fine characters, which I was required to note as a mitigating factor separate and apart from the seriously disruptive and disorderly conduct they engaged in at the abortion clinic. I took substantial note of the seriousness of the offense during my sentencing remarks, including the following: "the community has a right to expect that the public order and that legitimate businesses will not be disrupted and interfered with in a way that rises to criminal dimensions, and this would be true even where the people who are engaging in this kind of conduct are exercising their free speech rights and free assembly rights and are in pursuit of goals that are not in and of themselves illegal." And further: "The community obviously . . . has a strong interest in deterring this type of conduct both by you and by others." And further: "What especially concerns me about this case is . . . your willingness and expressed intention to go beyond mere peaceful picketing to clinic blockades and other types of more dramatic methods to stop abortions from taking place, and these methods over time have the potential to cause the community even more serious harm, and to the extent that it can, my sentence has to protect the community at least for an interim period from these kind of tactics."

The options for sentencing in the case included community service, a fine, probation—or up to 90 days in jail. Based upon a balance of the mitigating and aggravating factors, I sentenced the defendants to 60 days in jail, which represented two-thirds of the potential maximum jail sentence for this crime.

B. Please explain what you mean when you told the defendants that you had a great deal of respect for "the ultimate goals you sought to achieve by this conduct."

Answer: The evidence in the case established that the goal the defendants sought to achieve by their protest was reduction of the number of abortions in our community. As I noted in my sentencing remarks: "I think that people on both sides of the abortion issue would probably agree with you that reducing the number of abortions in this country is a desirable goal." It was that ultimate goal that I respected.

C. The Milwaukee Journal Sentinel wrote that you gave the defendants in this case

"unusual leeway to argue that the social value of their protest outweighed their violation of the law." However, during your campaign for the Wisconsin Supreme Court, you stated that you were "a firm believer in personal responsibility and individual accountability, and I'm well known that that." Why, in the case involving abortion protesters, did you give "unusual leeway" to the defendants?

Answer: There was nothing "unusual" about my handling of the case, as later admitted by The Milwaukee Journal. The newspaper properly corrected the record in a retraction dated April 8, 1993, in which the editors noted that applicable law and a well-accepted jury instruction allowed the jury to take into consideration any social value or contribution to the public interest of the defendants' conduct in determining whether it constituted disorderly conduct. I have attached a copy of that retraction. The jury instruction is based upon Wisconsin case law involving disorderly conduct prosecutions in the context of political protests. See WI Jury Instructions—Criminal, 1900, n.4. The abortion protester case, therefore, was unusual only in the sense that there are not very many disorderly conduct prosecutions arising out of political protests. My handling of the case did not, therefore, represent "unusual leeway" to the defendants in this context.

Mr. DURBIN. Mr. President, while it is true that there was no mention of the 100 arrests in the record of the case, this fact was well known because the Milwaukee Journal ran a story about this the day the defendants were convicted.

As to her claim there was no evidence in the record of the defendant's arrest history, that is just wrong. I reviewed the record of the case and it tells a totally different story than what Justice Sykes told the Senate. There are at least four different references in the record to the defendant's arrest history.

For example, the defendant's sentencing statement said:

I have been in jail before for similar activities to the one in question before you today.

Another example, a statement by the assistant district attorney at the sentencing hearing. The prosecutor said:

Here there is no evidence that these defendants have made any effort to conform their conduct to the requirements of law. Instead, both have been charged since this case has been pending with additional criminal violations.

The prosecutor noted that:

[defendant Michael] Skott has also engaged in conduct which has precipitated his arrest and subsequent criminal hearing.

Now, when I asked Justice Sykes in her follow-up written questions to explain the discrepancies between her earlier statements and the actual record in court, she dissembled. She said her definition of "history of arrests" did not include arrests that stem from civil violations nor arrests that occurred during the pendency of the case.

These distinctions by Justice Sykes are completely artificial. An arrest is an arrest. But rather than admit she made a mistake in her initial answer, she persisted in her contradictory and confusing portrayal of the case.

I ask unanimous consent to have printed in the RECORD a copy of my follow-up written questions to Justice Sykes and her written answers.

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

ADDITIONAL QUESTIONS OF SENATOR RICHARD J. DURBIN TO JUSTICE DIANE SYKES, NOMINEE FOR THE SEVENTH CIRCUIT COURT OF APPEALS—APRIL 5, 2004

1. You were the presiding judge in a 1993 abortion case involving the conviction of two anti-abortion activists, Michael Skott and Jack Lightner, who were convicted of disorderly conduct for cementing their legs to a car in order to block the door to a Milwaukee abortion clinic.

In a previous question I posed to you, I asked why you called the defendants convicted in this case "fine characters" and "exemplary citizens" at their February 9, 1993 sentencing in light of the fact that one defendant had been arrested 80 times in abortion protests and the other 20 times. Although a January 22, 1993 Milwaukee Journal article about the defendants' conviction reported that Mr. Skott had been arrested 80 times in abortion protests and his co-defendant Jack Lightner had been arrested 20 times, you have stated that you were unaware of the press reports. You also stated that, in any event, "there was no evidence in the record of a history of arrests in connection with their protest activity."

However, a sentencing statement filed with the Court on February 4, 1993 by one of the defendants, Michael Skott, indicates otherwise. Mr. Skott wrote: "Now it is your job as an elected representative of this county to sentence me, Judge Sykes. I have been in jail before for similar activities to the one in question before you today." At the sentencing hearing, held on February 9, 1993, you stated: "I have reviewed carefully the sentencing statement by Mr. Skott."

Additionally, the Assistant District Attorney stated at the sentencing hearing: "Here there is no evidence that these defendants have made any effort to conform their conduct to the requirements of law. Instead, both have been charged since this case has been pending with additional criminal violations." The prosecutor also stated that "Mr. Skott has also engaged in conduct which has precipitated his arrest and subsequent criminal charging under the same—purview of the same issue," and "I understand and I know that he [Skott] has been many times found guilty in municipal court and has on occasion served time in the House of Correction for his failure to pay fines on commitments."

A. How do you reconcile your statement that "there was no evidence in the record of a history of arrests in connection with their protest activity" with Mr. Skott's statement that "I have been in jail before for similar activities to the one in question before you today"?

See below.

B. How do you reconcile your statement that "there was no evidence in the record of a history of arrests in connection with their protest activity" with the Assistant District Attorney's statement that "Here there is no evidence that these defendants have made any effort to conform their conduct to the requirements of law. Instead, both have been charged since this case has been pending with additional criminal violations"?

See below.

C. How do you reconcile your statement that "there was no evidence in the record of a history of arrests in connection with their protest activity" with the Assistant District

Attorney's statement that "Mr. Skott has also engaged in conduct which has precipitated his arrest and subsequent criminal charging under the same—purview of the same issue"?

See below.

D. How do you reconcile your statement that "there was no evidence in the record of a history of arrests in connection with their protest activity" with the Assistant District Attorney's statement that "I understand and I know that he [Skott] has been many times found guilty in municipal court and has on occasion served time in the House of Correction for his failure to pay fines on commitments"?

ANSWER

In misdemeanor sentencing hearings in Milwaukee County Circuit Court during this time period, the prosecutor would typically advise the court of a defendant's prior criminal history as a part of the State's sentencing argument and recommendation. Unlike today, there were no computers on the bench and judges relied upon the prosecutor to present evidence of a defendant's prior criminal record at sentencing. Newspaper articles are outside the record and therefore not a proper source of sentencing information. A prior criminal record is an aggravating factor for sentencing purposes, and the lack of a prior criminal record is generally considered to be a mitigating factor. As I indicated in my earlier responses, the prosecutor in this case took the unusual step of standing silent at sentencing, making no record of the defendants' history in this regard and making no sentencing recommendation on behalf of the State.

After the defense attorneys made their sentencing arguments, the prosecutor belatedly requested an opportunity to address the court, which was granted. She stated, "I can inform the court I have no knowledge of Mr. Skott having any prior criminal conviction. I may be incorrect. I understand and know that he has been many times found guilty in municipal court and has on occasion served time in the House of Correction for his failure to pay fines on commitments. However, I am not aware of any criminal convictions. I see he's shaking his head no, so that's a correct statement." The prosecutor then noted that the other defendant, Mr. Lightner, had been convicted of two offenses nearly twenty years before (which, as I indicated in my earlier responses, was too remote and insignificant to the conduct before the court to have much bearing upon sentencing), and had more recently been fined for disorderly conduct (circumstances unspecified.) The prosecutor did not mention any history of municipal citations for protest activity on the part of Mr. Lightner. In his written sentencing statement Mr. Skott indicated only very generally that he had been in jail for his protest activities; as indicated above, he confirmed that the case before the court constituted his first criminal conviction.

I concluded from this very generalized record information that Mr. Skott's prior protest activity had generated only municipal citations rather than criminal arrests and charges. Municipal court in Milwaukee handles only local ordinance matters—traffic tickets and citations for ordinance violations punishable by civil forfeiture—not state crimes. Municipal violations are non-criminal and do not ordinarily involve arrests. Rather, they usually involve the issuance of a ticket or citation, which requires the defendant's appearance in municipal court or payment of a forfeiture in lieu of appearing in court. Occasionally, when a municipal forfeiture is imposed and remains unpaid, the defaulting defendant may be or-

dered to serve a few days in jail on a "commitment" for nonpayment of the forfeiture. The matter remains civil in nature. Accordingly, having been found guilty in municipal court and having served time in jail on municipal "commitments" does not equate in our system to having a history of arrests or criminal convictions. As I have previously noted, the arrest histories mentioned in the newspaper article were not part of the sentencing record before the court.

The prosecutor in this case also made a generalized statement about a new charge that apparently had been issued against the defendants for protest-related conduct that occurred after the case then before the court had been charged. I did not construe this as a constituting a history of arrests, although the record reflects that I certainly took it into consideration for sentencing purposes, together with the information about the municipal court matters and the other relevant facts in the record. In my sentencing remarks I noted that the defendants "obviously have a history of this kind of behavior . . . and I need to take that into consideration." I also stated that "rehabilitation in the conventional sense in this case is unlikely to occur. I suppose it is possible that you would learn a lesson from this case and not continue in these activities if you view the trial as I do, and that is as a rejection by the community of these kinds of tactics." I concluded that "[b]ased on the record, however, and based on what I've heard of your intentions, I don't have a great deal of confidence that you will take that message to heart, and my sentence has to reflect that fact." As I indicated in my earlier responses, I imposed a sentence of 60 days in jail, two-thirds of the available maximum. In light of the record evidence regarding the seriousness of the offense, the defendants' character and backgrounds, and the interests of the community, this sentence was neither too harsh nor unduly lenient.

The trial and sentencing hearing in this case took place more than 11 years ago. My responses to these and your earlier questions are based primarily on my review of the pertinent parts of the case file, most notably the transcript of the sentencing hearing, a copy of which is enclosed. I have a generalized independent recollection of this case, but have relied on the enclosed transcript for the details, and have attempted to place those details in the context of the law and general sentencing practices in Wisconsin.

2. In his sentencing statement, Mr. Skott equated abortion with the Holocaust and slavery, and he called abortion clinics "death camps" where "a hired killer contracts out to end what has been labeled a problem." At the sentencing hearing, you told Mr. Skott and his co-defendant that "obviously you possess fine characters," "you have otherwise been exemplary citizens," "your motivations were pure," and "I do respect you a great deal for having the courage of your convictions and for the ultimate goals that you sought to achieve by this conduct." Can you understand why some people would view your favorable comments about the defendants as a validation of their beliefs?

ANSWER

I do not believe that my sentencing remarks, when read in their entirety and not out of context, could be considered a "validation" of the defendants' beliefs or rhetoric. My more favorable remarks about the defendants' "motivations," "courage of conviction" and "character" were not directed at the validity of their beliefs, but, rather, represented the legally-required evaluation of the defendants' character and motivations to determine whether any of the usual aggravating criminal motivations or background

factors were present in the case. Also, my favorable comment about the goal the defendants sought to achieve was a reference to their underlying goal of reducing the number of abortions, as is clear from the following statement from my sentencing remarks: "I think that people on both sides of the abortion issue would probably agree with you that reducing the number of abortions in this country is a desirable goal." My sentencing remarks also reflect extensive consideration of the seriousness of the offense and criticism of the defendants' conduct and tactics, as I have previously discussed. My sentencing remarks were fair and even-handed, and the 60-day jail sentence I imposed, at two-thirds of the maximum, could not be characterized as unduly lenient or a "validation" of the defendants' beliefs.

Mr. DURBIN. In light of Justice Sykes' statements in the case, I have serious concerns about whether she recognizes the fundamental right of privacy and about her ability to rule fairly in cases involving constitutionally protected rights to privacy.

But let me be clear. My opposition to this nominee is not because I am pro-choice on the abortion record and Justice Sykes may be pro-life. I and my Democratic colleagues have voted for over 95 percent of President Bush's nominees—191 judges as of today. It is likely that the vast majority of them were pro-life on the abortion issue.

Deborah Cook, now a judge on the U.S. Court of Appeals for the Sixth Circuit, was endorsed by the Ohio Right to Life organization. Lavenski Smith, a judge on the Eighth Circuit, sought to make all abortions in Arkansas illegal except to save the life of the mother. Michael Fisher, now on the Third Circuit, advocated that abortion is wrong and should be illegal even in cases of rape and incest. I voted for all three of these pro-life nominees.

I voted for James Browning, a judge we recently confirmed to the district court in New Mexico. Judge Browning had spoken at pro-life rallies and called the pro-choice position "the tyranny of the majority over the minority." He called on people who are pro-choice to "make the choice of life, not holocaust." Despite his passionate feelings, I voted to confirm him.

Why? Because unlike Justice Sykes, these judicial nominees—all of them I have mentioned, who do not share my views on this important issue—were honest and candid and open in their dealings with the committee. I think that is the bottom line. Even if I disagree with the nominee's point of view, I expect them to be honest and candid.

I have appointed in the district courts of Illinois men and women who do not share my views on critical issues. But I do not ask that of them. I do not come to any nominee with a litmus test, nor do I come to Justice Sykes with such a test.

I am also disappointed that Justice Sykes chose not to answer some basic questions I asked about some fundamental constitutional rights. Instead, she tried to hide behind the Wisconsin Code of Judicial Conduct.

Justice Sykes' refusal to answer my questions is in stark contrast to an

Ohio Supreme Court justice whom the Senate confirmed with my vote last year: Sixth Circuit nominee Deborah Cook.

I asked both nominees the exact same questions: whether they thought *Roe v. Wade* and *Miranda v. Arizona*—two landmark Supreme Court cases—were consistent with strict constructionism. I have asked this question over and over. Justice Cook answered my question with painful but direct honesty. This is what Justice Cook said:

If strict constructionism means that rights do not exist unless explicitly mentioned in the Constitution, then the cases you mention likely would not be consistent with that label.

That is a candid answer. I am certain it is an answer Justice Cook knew I did not agree with personally, but she was honest, and I respected her for it.

When Senator DEWINE of Ohio came to me and said, "I believe she is a good and fair person," I said: "I will give her the benefit of the doubt. I will support her nomination because of her candor and honesty."

Now, contrast that with the answer I received from Justice Sykes to the exact same question. She said:

This question requests a critique of certain United States Supreme Court cases that I am or will be required to interpret and apply as a judge in individual cases before the court. The Wisconsin Code of Judicial Conduct prohibits judges from engaging in extrajudicial commentary with respect to particular cases or legal issues that would appear to commit the judge in advance or suggest a promise or commitment of a certain course of conduct in office regarding particular cases or legal issues.

This is a major-league evasion. If judicial nominees could each hide behind the local code of ethics in their State and say they could not even tell us where they stand on landmark Supreme Court decisions, such as *Miranda* and *Roe v. Wade*, and whether these decisions are consistent with a certain judicial philosophy, then the Senate Judiciary Committee should turn out its lights and the Senate should walk away from any role in advising and consenting to judicial nominees. But that is not what I swore to uphold when I took the oath of office to serve in the Senate.

What Justice Sykes sent to me in response to that question was evasion with a capital "E," and I do not believe the Senate should accept such responses.

Justice Sykes' refusal to answer my questions was not only evasive but erroneous. I contacted Steven Lubet, an expert on judicial ethics and a law professor at Northwestern University Law School in Chicago. I showed him Justice Sykes' responses to my questions, and he wrote a letter stating that the Wisconsin Code of Judicial Conduct does not prevent Justice Sykes from answering my questions.

So this is my conclusion, having considered these three elements: first, that Justice Sykes has taken pride in the

fact that she is known as a hanging judge and is extreme in her sentencing procedures; second, that she was not open and honest with me in the sentencing of a case which involved people who were well known to be serial, at least, arrestees, if not criminals, because of their conduct; and, third, that she would not answer the most basic questions about her judicial philosophy, which I think goes to the core of our responsibility in the Senate Judiciary Committee.

Time and again, Justice Sykes has demonstrated she does not possess the qualities necessary to inspire the confidence we should expect from a Federal judge. She has been nominated to serve for the rest of her natural life on the second highest court in America. I do not believe she can provide the good judgment, candor, or fairmindedness that we must demand of each person seeking such an important appointment. I will vote "no" on this nomination.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Tennessee is recognized.

Mr. ALEXANDER. Mr. President, I ask unanimous consent to speak for up to 5 minutes as in morning business.

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

(The remarks of Mr. ALEXANDER and Ms. LANDRIEU pertaining to the introduction of the legislation are printed in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

LEGISLATIVE SESSION

The PRESIDING OFFICER (Mr. ALEXANDER). The Senate will return to legislative session.

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2005—Continued

Mr. STEVENS. Mr. President, I ask unanimous consent that the Chair lay before the Senate the Defense appropriations bill.

The PRESIDING OFFICER (Mr. ALEXANDER). Without objection, it is so ordered. The clerk will report.

The legislative clerk read as follows:

A bill (H.R. 4613) making appropriations for the Department of Defense for the fiscal year ending September 30, 2005, and for other purposes.

AMENDMENT NO. 3490

Mr. STEVENS. Mr. President, I send an amendment to the desk on behalf of the Senator from Montana, Mr. BAUCUS.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Alaska [Mr. STEVENS], for Mr. BAUCUS, proposes an amendment numbered 3490.

Mr. STEVENS. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.