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Back in the dark days of McCarthyism, he was the first Senator to really speak out to object to the way in which hearings that were being conducted then were being guided, the direction they were taking, and the tone of that entire experience. He has served very capably as chairman of the Armed Services Committee, as chairman of the Appropriations Committee, and as President pro tempore of the Senate.

We have had a few Senators from our State of Mississippi, Mr. President, who have earned national recognition and commendation because of their leadership as national figures here in the Senate.

Pat Harrison was one; John Sharp Williams was another; L.Q.C. Lamar also comes to mind.

I think as we reflect on Senator STENNIS' career, we have to all agree that JOHN STENNIS also should be placed among those giants of Mississippi history who have served our State and this Nation in the U.S. Senate.

We will certainly miss him, but our best wishes go with him. We know that we will continue to call upon him for his advice and counsel in the months and years ahead.

Mr. President, I thank the distinguished leader for yielding.

The PRESIDING OFFICER. The majority leader.

## ORDER OF PROCEDURE

Mr. BYRD. Mr. President, I hope we might get an agreement with respect to the time for debate on the Bork nomination for the remainder of today. This would not affect action on tomorrow but will only deal with today.

Mr. President, I wonder if we can go until 9 o'clock. That would give us 6 hours of debate today. We could have that equally divided and controlled by the leaders or their designees.

Mr. THURMOND. Mr. President, I think we can finish this debate by Friday night. A lot of Members on our side will want to speak. I was going to suggest that we go to about 7:30 or 8.

Mr. BYRD. Mr. President, I have no greater respect for any Senator in this body than for the distinguished Senator from South Carolina [Mr. THURMOND]. But this Senator does not want to go until Friday evening to have a final vote on this nomination if we can possibly avoid it.

Of course, Senators may speak and prevent an earlier vote from happening, if Senators wish to stand and speak. But there is no reason why this Senate should spend the rest of this week on the Bork nomination.

We have three appropriations bills that are ready for action. We have the catastrophic illness legislation. I think it is extremely important that this Senate act on catastrophic illness this Friday, if at all posible, for the reason that the chairman of the Finance Committee Mr. BENTSEN, is involved in the reconciliation legislation; he is involved in the conference on the trade legislation; and he is going to be managing the catastrophic illness legislation. He is not so ubiquitous as to be in all three of these places at once.

I think that, out of consideration for him and other Members on both sides of the aisle who have to manage the catastrophic illness legislation—and it is vitally important to the American people—we should get on with that legislation before this week is out.

It is my intention to go back to that legislation as soon as the Bork nomination is disposed of. If we want to hold back that legislation, catastrophic illness, just by droning on and on and on about the Bork nomination, then, of course, catastrophic illness will have to wait. But we do not have a lot of time for the reasons I have already stated.

If we cannot get an agreement on the Bork nomination, Mr. President, then we will just stay in this evening as long as Senators wish. I have a short speech on the nomination. I will be glad to put it in the RECORD. I am not going to close the Senate at 7:30 tonight if Senators wish to speak. I do not mean that to sound cryptic or abrupt or as a brusque answer in response to the distinguished Senator from South Carolina. He is a gentleman. He is a man who has always considered his colleagues. He is courteous and he is a Senator on the other side of the aisle who has said that in his opinion we could finish this debate, I believe he said 3 days when others were talking of 4 or 5 days or longer.

Mr. THURMOND. That is right, 3 days.

Mr. BYRD. So that the Senator has been very reasonable from the start.

But I must say to the distinguished Republican leader and to the distinguished Senator from South Carolina, I cannot as majority leader be responsible in my own eyes, and say that we will quit today as early as 7:30 on the Bork nomination.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The Republican leader, Mr. Dole.

Mr. DOLE. Mr. President, we apparently will not get an agreement on time today, but it seems to me once this nomination is before us it may go more quickly than some expected; it may take a bit longer. But I would say that in an effort to get to the nomination we have been trying to cooperate with the majority leader, with time agreements on the Byrd-Warner amendment to try to keep it moving, so there is obviously no effort to delay the business of the Senate. But I do believe that the Bork nomination to 40-some Members and to millions of people is a very important matter. I would suggest that those who feel strongly about the nomination on both sides may not want to be here to 9, 10 or 11 o'clock at night; they would like to be heard in the daytime, morning or afternoon. But as the majority leader has already recognized, certainly the distinguished Senator from South Carolina is and will be cooperative. It could be that this matter will roll along very quickly. But I would be happy to do what I can to move it along as the majority leader knows.

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

Mr. BYRD. Yes.

Mr. THURMOND. I might say there will certainly be no desire on my part to delay this matter. I was ready to go starting Monday and we could have finished tonight. But I estimate about 3 days would be required since so many are interested in it. It has created so much interest that I think 3 days would be reasonable. If we can finish sooner, it suits me.

Mr. BYRD. Mr. President, I thank the distinguished senior Senator from South Carolina. I do not doubt at all that he does wish to proceed in an orderly and reasonable way and finish action on this nomination soon. But, Mr. President, I see no alternative but just to go to the nomination and let Senators speak as they will as wish.

Mr. President, the Senate will be in session as long this evening as Senators wish to speak.

## EXECUTIVE SESSION

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate go into executive session and proceed to the consideration of the nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Is there an objection? Hearing none, it is so ordered.

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.

Mr. BIDEN addressed the Chair.

The PRESIDING OFFICER. The Senator from Delaware [Mr. BIDEN], the chairman of the committee.

Mr. BIDEN. Mr. President, I hope we can move somewhat expeditiously on this nomination.

Mr. President, the Senate Judiciary Committee has completed what I consider to be, and I think many do, a significant constitutional debate on an issue that is as old as the Republic,

and that is what is the role of Government in the lives of individuals and the rights of individuals to cede to their Government certain rights. The debate that has gone on for over 200 years in this Republic has been one about whether or not our rights as individuals emanate from a grant of the Government or whether or not the Government has certain rights that individuals have ceded to that Government. The essence of the debate relating to the nomination of Judge Bork to be an Associate Justice of the Supreme Court in this Senator's opinion revolves around that age-old question. In the words of former Secretary of Transportation, William Coleman, the debate is about whether "we are held together as a nation by a body of constitutional law constructed on the premise that individual dignity and liberty are the first principles of our society," or as former Representative Barbara Jordan eloquently told the committee, our debate was about whether, in the future as in the past, "The Supreme Court will throw out a lifeline when legislators and Governors and everybody else refuse to do so."

Today, as we begin here on the floor of the Senate our historic debate on the nomination of Robert Bork to the Supreme Court, it seems to me it is the obligation of every Senator to maintain the same level of seriousness and substance that characterized the proceedings before the Judiciary Committee.

The debate between Judge Bork and the committee members should set the example for us here on the floor, for as most acknowledge, those for and against Judge Bork, it was a thoughtful, educational, and enlightening discussion of constitutional principle.

The witnesses, for and against the nomination, largely maintained this high standard. This was no parade of ideologues or interest groups before the committee, both either from the left or from the right, and many of those, by the way, on the left and the right who were parts of interest groups would have been very informed and competent witnesses. But, nonetheless, they did not participate.

The men and women who participated—who testified for and against the nomination of Robert H. Bork to the Supreme Court—were, with few exceptions, of the highest integrity, the sharpest intellect, and the greatest learning in the law.

These were panels of unprecedented distinction: top law professors and deans, leaders of the bar, respected former office-holders from the highest levels of Government, both Democratic as well as Republican administrations. This was a debate of consequence and caliber.

And throughout, Republican and Democratic committee members alike acclaimed the fairness of the hearings.

I challenge any one of the Members of this body to show us where in the record it would indicate otherwise, that the hearings were anything other than fair.

In Judge Bork's 32 hours of forthright testimony, he was free to speak as much or as little as he wished with as much or as little detail as he desired, and to answer every accusation, charge, question, and compliment that was put before him.

I kept my commitment to Judge Bork that every single witness he requested would testify. On the other hand, dozens of witnesses against the nomination were turned away by the chair. When it was finally over, this 12th day of hearing with over 100 witnesses, 62 of the witnesses who appeared to testify in favor of the nomination of Judge Bork. And 48 appeared in opposition.

No, there was no mud-slinging or name-calling in the committee. I hope no Senator will adopt such tactics on the floor, for to do so would debase the standards of this noble Chamber.

As with any legislative decision of great moment, a prudent decison on confirmation of a Supreme Court Justice must be rooted in the substantive record.

In this case, the record that was set before and compiled by the Judiciary Committee is beyond dispute the most extensive, detailed, and complete record ever compiled on a Supreme Court nomination.

This is the entirety of the record before us, the report before us. The record is much, much larger. It is complete, and it is as complete as any that was ever done. There is no reason in my view that any Senator need reach beyond the record for his or her decision on this nomination.

And the reasons for the votes of my colleagues on the Judiciary Committee are forthrightly stated by each of my colleagues and their statements when they voted. And those who have announced in the Senate against this nomination, they announced based upon reasons that are well rooted in the record. Let us look at a few of them. Perhaps the most basic reason of all underlying our opposition is a matter of principle. The principle of human dignity, that our rights come not as a gift from the Government but as a gift from the grace of God.

The right to privacy. Judge Bork told us that because he does not know how to limit this right, he cannot find that it exists—unlike every Supreme Court Justice for the last 65 years.

The first amendment and dissenting speech: Judge Bork says he "accepts" Brandenburg as "settled law" but still finds its "clear and present danger" standard to be a "fundamentally wrong interpretation of the first amendment."

Such a conflict suggests that he would apply Brandenburg narrowly, or would say it doesn't apply at all—as he did in calling Cohen versus California and Hess versus Indiana obscenity cases, when no member of the Court in either case found the vulgarity of the speech at issue was relevant to its protection.

Equal protection: Here, there are several difficulties with his position.

First, Bork said through June of 1987 that the equal protection clause "should have been kept to matters of race and ethnicity," and now he says it applies to everything.

Second, Bork says his "reasonableness" standard is very much like Justice Stevens' rationality standard, but there are several critical differences.

Judge Bork's standard is so general that it is potentially arbitrary for exactly the reason he has condemned many other judicial standards:

It has failed historically to protect women because it is undemanding. It now lacks a "principled" way to generate greater attention to discrimination against certain groups—one that does not depend on the judge's own values to determine what is reasonable.

It omits the test in Stevens's standard that the benefit from the Government's classification must outweigh the harm to the groups affected.

Finally, it omits the part of Stevens's standard that makes it inherently unreasonable to use statistical generalizations to justify discrimination against specific members of a group.

Judge Bork made it clear at the hearings that statistical generalizations would be enough to justify discriminatory classifications under his standard—he stated this in regard to the different male and female drinking ages addressed by the Supreme Court in Craig versus Boren.

And on civil rights; Judge Bork's past record of decision at key moments is especially troubling. On public accommodations, on the constitutionality of State poll taxes and of Congress' power to strike down literacy tests, on understanding the nature of discrimination underlying restrictive convenants voided in Shelley versus Kramer—from all of this record, we may or may not be able to project how Judge Bork would rule in specific future cases. But we can see a disturbingly narrow, technical basis for judging great questions of human liberty.

Encompassing all of these issues are two basic matters of principle. One is the principle of human dignity: that our rights come not as a gift from the Government but by the grace of God.

In the majestic phrases of the Constitution, Justice Brandeis saw "the

right to be let alone," Justice Cardozo saw a noble vision of "ordered liberty."

Justice Harlan saw "postulates of respect for the liberty of the individual," Justice Powell saw "values deeply rooted in this Nation's history and tradition."

They were referring in each of these cases to rights which were not specifically enumerated nor able to be found in the text of the constitution.

In the same majestic phrases, Judge Bork seems, sadly, to see a fatal vagueness in the protection of individual rights, and an expansive field for temporary majorities to wreak their will upon the minority and upon individuals.

And at the hearings, Judge Bork held firmly to his view that we possess our liberties because the Constitution names them, and that rights not named are granted or withheld at the pleasure of the Government, placing him squarely at odds with our great tradition of fundamental, unenumerated rights—a tradition of which the Supreme Court liberal as well as conservative jurists over the past 75 years have seen and found with little difficulty, a tradition of which the Supreme Court has been the great and sometimes the only defender of these unenumerated rights.

A second principle which was hotly contested and debated in the hearing was the question of equality. The fundamental question of how this Justice, this potential Justice, this judge, Judge Bork, would deal with the equally fundamental question of "the dozens of other landmark cases," to use his term, that he has long rejected.

He has rejected dozens of landmark cases as "being wrongly decided" or being "unconstitutional." He has set out for us on numerous occasions the fact that he thought much of what has gone before was not well founded, much of what the Court has done went beyond their writ.

But he came before us, and he committed himself to accept these landmark cases or many of them at least as "settled law," although he strongly disagreed with them and strongly disagreed with the reasoning in these cases.

This commitment—though it was given in good faith and should properly be accepted as such—still leaves many concerns too great to justify his confirmation.

A judge with Robert Bork's constitutional philosophy cannot stay faithful to that philosophy if he continues to expand "unconstitutional" precedents.

He says that the rationale for a number of landmark cases is unprincipled, and in some cases, unconstitutional. Yet, he comes before us, and he says in the specific area, for example, that he will abide by the settled law. How does he remain consistent with the principle that he says requires him to read the Constitution a certain way, and at the same time accept the settled law with which he has such profound disagreement?

That philosophy may not require him to overturn "settled" precedents he thinks are wrong, but it does require him to confine them, to halt their growth.

The cases at issue are not overruled, the commitment not to overturn settled law is thus genuinely honored—but gradually the principle behind that law is eroded.

For areas like equal protection for women, which are largely unmapped, or like dissenting speech, which are always under pressure, this philosophy risks dangerous consequences.

Under a jurisprudence of "original intent" and settled law, precedents for individual rights in these areas seem fated to become lonely outposts surrounded by majoritarian forces.

And that, combined with his historically unfounded and judicially unprecedented view of fundamental, unenumerated rights, threaten the traditional core of our national character and our constitutional history, and justify—indeed, urge—the rejection of this nomination by the Senate.

For under our living Constitution, every generation has the task of harmonizing the liberty and popular sovereignty that comprise free government. If we circumscribe liberty within such historical bounds, we betray the heritage of our forebears and endanger the legacy of our descendants.

As we approach the Senate's moment of action on this nomination, however, we have been told that the judiciary is being dangerously politicized, and that as a result the independence of the judiciary is in great jeopardy.

I will acknowledge that there has been politicization. But any politicization has been driven by President Reagan's single-minded pursuit of a judiciary packed with his ideological allies.

It is President Reagan who has politicized this matter by allowing his Justice Department to adopt litmus tests for nominees to be Federal judges, by failing to include even one Democrat among his nearly 70 appointments to the Federal appeals courts; unprecedented campaigning for Republicans across the country just last year, saying that Democratic Senators would, in the quote offered by my Democratic colleague from North Carolina, allow "drugs, thugs, and hoodlums" to pervade society by placing "a bunch of sociology majors on the bench." Is that not politicizing how we choose and who we choose for the Court? Or by nominating Judge Bork to pursue his ideological agenda on the Supreme Court—an agenda that has been repudiated by Congress—in the face of a warning from key Senators and from his own staff that the nomination would be the most controversial and divisive one he could make.

The nomination was greeted by the right as the means to realize their social agenda and spoke of it in the clearest political terms:

> Here is the chance to have the Court tilt in favor of Ronald Reagan's social and civil rights agenda. (Bruce Fein, *Reuters North European Service*, 7/3/87);
>
> We have the opportunity now to roll back 30 years of social and political activism by the Supreme Court. (Daniel Popeo, *Wash. Post* 7/6/87)

Thereafter, the right-wing groups explicitly organized an election-style campaign—with phone banks, TV, radio, and newspaper ads—that is exactly what the Republicans are attacking today:

> You can surmise that whatever the liberals have, we're going to have—radio, television, newspaper ads. (Richard Viguerie, *Wash. Post* 7/7/87);
>
> We're going in with newspaper ads, with television ads, with radio spots. (Bill Roberts of "We The People," CBS Evening News, 7/23/87)

This politicization has also come from the scrupulous inattention, among many of Judge Bork's proponents, to the extensive and substantive committee record upon which most Senators have rested their votes.

These vague claims about "distortions" and "lynch mobs" and "misleading advertisements" and most of all about "political campaigns," are nothing but a smokescreen to distract the Senate and the American people from the testimony of Judge Bork, the other witnesses and the committee record.

Any Senators who fail to focus their remarks on the merits of this decision; any Senators who fail to root their discussion of the merits in the record that was set before and established by the committee, are making it clear: They accept a politicized process; and they are, in effect, challenging the sincerity of the reasons given for our decisions by those of us who oppose this nomination.

Let me make this choice clear to every Senator. We can make our cases on the merits, and set forth for the American people and for history exactly why we are for or against this nomination. That is the only proper course. Or we can start on the very dangerous road of personal attacks on the integrity of our colleagues, which will threaten the mutual respect and the personal restraint that holds this body together.

I did not read anywhere, in any paper, in any place, during the hearings that the Judiciary Committee conducted where anyone questioned the depth of the debate. It seems to me that there are very good reasons for some to be for Judge Bork. Those

in this body who subscribe to his philosophy and his interpretation of the Constitution should make that case. It is a case that deserves to be made, and it should be engaged by those of us who have strongly held, principled views as to how the Constitution should be interpreted differently from the way Judge Bork sees it.

I think we will be denying this body the historical record and our fellow citizens the benefit of a debate that hopefully could enlighten us all on what our Constitution is all about and what it should be and how it will be interpreted in the future or how it should be interpreted in the future. But I fear, in light of what has been discussed the last week or so, that the merits will be the last thing we are likely to discuss here.

Let us be fair about one other thing. Independence of the judiciary is not at stake in the process of advice and consent. I hear this drivel about, "Well, you can no longer have a debate on whether or not someone should be sent to the Supreme Court. The Senate cannot somehow exercise its constitutional responsibility in giving advice and withholding its consent under present circumstances." There are those who now suggest that the independence of the Court is at stake because of the constitutional requirement of advice and consent. The Constitution assures sitting Federal judges lifetime tenure and so assures them of independence from political reprisals for their decisions, and that is how it should be. But it appears that some of those who are advocating the voicing of concern for judicial independence here really mean a judicial appointment process that is independence of the Senate. They seem to suggest that the Senate should play no role in determining who sits on the Court. That advice and consent, they seem to be saying, is fine so long as the Senate always agrees and consents to the President's first choice.

Mr. President, that is not our Constitution, and that is not our history. Over 25 judges who have been nominated by previous President have been rejected by this body. More Supreme Court nominees have been rejected by this body over our history than any other high-ranking office in the Government that the Senate is required to advise and consent to. This is nothing new. We are doing our job.

Of course, the President does not have to make judicial nominations that please Congress. He does not even have to meet us halfway, though at this point that would be prudent.

But he may not treat the Senate as a body whose substantive views are an illegitimate part of the confirmation process. He may not ignore the reality that a majority of Senators were elected to expound views that may sometimes differ greatly from his own.

And that is the essential thing for all Senators to remember as we begin this debate. Citizens of each State elected their Senators to bring thought, discretion, and judgment to bear on the great issues of this country and this day and on who should sit on the Supreme Court of the United States.

Let us keep in view the wise reminder that Oliver Wendell Holmes gave to the Supreme Court over 80 years ago: that our "Constitution is made for people of fundamentally differing views." So too, this Senate was conceived to represent a nation of diverse opinions.

And unless we respect the good faith and the sincerity and the integrity of our colleagues' judgments, the harmony of this body and the effective representation we owe to the people are in grave peril.

By all means, let us air our differences and debate the merits of this nomination fully. Let us debate without rancor, so we can return thereafter to the urgent business of the Nation not as enemies, but as colleagues, so that we can join in deciding who will fill the next vacancy in the Supreme Court.

There is a great deal more to say, Mr. President, and I am prepared, like others on this floor, to speak to all the issues raised today in as much detail as people would like. But I sincerely hope that we do not deny our colleagues or the Nation the benefit of a great debate on the principles involved in this nomination and whether or not the views which Judge Bork has expounded for many years, and reaffirmed before our committee, are the views that should be represented on the Court.

Reasonable men and women can differ; and there are some very bright, respected, honorable Members of this body, and people outside this body, who strongly believe that Judge Bork's judicial philosophy should be represented on the Court. There are others of us who believe that it should not be.

We should debate that issue. The Nation will be better for it. The Court will be better for it and this body will be better for it.

I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina [Mr. THURMOND] is recognized.

Mr. THURMOND. Mr. President, I rise in support of President Reagan's nomination of Robert H. Bork to be an Associate Justice of the Supreme Court.

Judge Bork is one of the most eminently qualified individuals to be nominated to the Supreme Court in recent history. Mr. President, let me take just a moment to review those qualifications. Robert Bork distinguished himself in both his undergraduate studies and in law school. He received a bachelor of arts degree from the University of Chicago in 1948. He was elected to Phi Beta Kappa. He graduated from the University of Chicago Law School in 1953, receiving a J.D. Degree. While attending law school he was the managing editor of the Law Review and was elected to Order of the Coif, a national law honor society.

He volunteered for military service in the U.S. Marine Corps in 1945 and served until 1946. He served another tour of duty with the Marine Corps from 1950 to 1952, and was then honorably discharged.

Following his education and service in the Marine Corps, he was employed as a research associate with the Law and Economics project of the University of Chicago. Subsequently, he joined the New York law firm of Willkie, Owen, Farr, Gallagher & Walton. In 1955, he became associated with the firm of Kirkland, Ellis, Hodson, Chaffety & Masters. In 1962 shortly, after becoming a partner, he left that firm to teach at Yale Law School. He was nominated to be Solicitor General of the United States in 1973 and served in that position until 1977, when he again returned to teach at Yale. In 1981, he again practiced law as a partner with the firm of Kirkland & Ellis. He was nominated to the U.S. Court of Appeals for the District of Columbia Circuit in 1982, and was unanimously confirmed by the Senate. Judge Bork has rendered distinguished service on the court of appeals since that time.

Judge Bork was nominated on July 7, 1987 to be an Associate Justice of the Supreme Court. After a 70-day delay, hearings began on September 15, 1987 and the Judiciary Committee held 12 days of hearings on his nomination. These hearings were the most exhaustive and comprehensive into a judicial nominee's qualifications that I can remember in my 35 years in the Senate.

However, Mr. President, I have been disturbed over the methods used by some of Judge Bork's opponents. Adverse publicity about the nominee has been unsurpassed. Advertising on radio, television, and in the press has distorted the true character and the exceptional qualities of Judge Bork. There were those, however, who felt compelled to counter this lobbying campaign against Judge Bork. Gerald Ford, former President of the United States introduced Judge Bork and urged favorable action by the committee and confirmation by the full Senate. During the hearings we also heard testimony from former Chief Justice Warren Burger who stated:

> I was so concerned about the disinformation in some of these full-page ads—that I felt as a member of the Bar, as a citizen, I had an obligation really to say what I believe.

There never was a nominee that I thought had better qualifications—if Judge Bork is not in the mainstream, neither am I, neither have I been.

Chief Justice Burger also stated:

It would astonish me to think that he is an extremist any more than I am an extremist.

Mr. President, this is a former Chief Justice of the United States talking. He says if Judge Bork is an extremist he is an extremist. Everybody knows that Chief Justice Burger was no extremist. Why would he make that statement? He has no personal interest in this matter. He said it for the good of the Nation. He said it because it is the truth. He said it because he thought he ought to help set the record straight.

In this same vein, former Attorney General William French Smith in commenting about some adverse advertising said:

The thing that is distressing to me is that it really is not just propaganda. Propaganda, you can understand. That is part of the way we do things. But in this case, I have never seen such misrepresentation, such distortion, and such outright lying. I mean, there are people in very important positions in the Government who are lying to the American public.

Who said that? Former Attorney General William French Smith, a man who no one has ever questioned his integrity, honesty, or truthfulness, and that was his statement.

Former Attorney General Smith was joined by five other former Attorneys General. Edward Levi dean of the law school, University of Chicago; Griffin Bell, from the State of Georgia, a great lawyer, a great Attorney General, appointed by President Carter, came in and testified; Elliot Richardson, another former Attorney General; William Rogers, Attorney General under President Eisenhower; and Herbert Brownell, also Attorney General under President Eisenhower. They all voiced their support for Judge Bork.

These people are just not ordinary people. They have been Attorneys General of the United States. They have been the top law enforcement officers in the whole Nation.

The former Secretary of HUD Carla Hills, fully supports Judge Bork's nomination as well as Lloyd Cutler, former counselor to President Jimmy Carter.

Nobody would accuse Carla Hills of being an ultraconservative or probably even being a conservative. She came in and testified she thought he was fair, he would make a great judge, he is not an extremist and he ought to be confirmed. That is Carla Hills.

The list of supporters does not stop there. Governor Jim Thompson of Illinois and former Governor Richard Thornburgh of Pennsylvania, former Deputy Solicitor Generals, former Assistant Attorneys General for the Antitrust Division of the Department of Justice, distinguished law school deans and representatives of eight national law enforcement organizations with a membership of over 400,000 members, all supported Judge Bork.

Mr. President, who were these organizations, the National Sheriff's Association, the National Chiefs of Police Association, and other organizations of the same caliber constituting a membership of 400,000 members in the United States? Why were they interested? Because they want a man who believes in law and order. Judge Bork believes in law and order. And they want a Supreme Court who will not reverse convictions on technicalities and allow criminals to walk the streets and again attack other innocent people.

In addition, eight former presidents of the American Bar Association as well as many other respected people came forward to support Judge Bork's nomination. These are truly impressive and respected individuals who have a great knowledge of our system of government and particularly our judicial system. I believe these people provide a strong endorsement for the President's nomination of Judge Bork to be an Associate Justice of the Supreme Court.

The American Bar Association's Standing Committee on the Federal Judiciary rated Judge Bork "exceptionally well qualified" when he was nominated to the circuit court. Mr. President, this is the American Bar Association's highest rating. This is the biggest organization of lawyers in the whole Nation, the American Bar Association, and that committee studied him. They talked to the Supreme Court Justices. They talked to other judges. They talked to law professors. They talked to law deans. They talked to practicing attorneys. They talked to every segment of justice and the bar. And they gave him the highest rating that they could give anyone.

Is that not worth something?

This is the ABA's highest rating, as I said. The ABA also gave Judge Bork its highest rating of "well qualified" on his nomination to the Supreme Court. Although a substantial majority of the committee voted "well qualified," four members voted that he was "not qualified." However, there is some evidence which suggests that these members did not evaluate the nominee on the basis of the ABA committee's own criteria which is competency, integrity, and judicial temperament. Rather, indications are that their vote may have been influenced by political and ideological considerations.

In the ABA committee report it was noted that a minority of that committee found him "not qualified", "not because of doubts as to his professional competence and integrity, but because of its concerns as to his judicial temperament, his compassion, open-mindedness, his sensitivity to the rights of women and minority persons or groups and comparatively extreme views respecting constitutional principles or their application particularly within the ambit of the 14th amendment."

Mr. President, I told the chairman of the ABA committee that this sounded like ideology to me. I then asked if he could provide any examples to support these charges. He was unable to do so. Instead, he read to me a definition from the ABA committee's booklet and indicated that this minority of the committee thought they were applying the definition of judicial temperament. It seems apparent to me that they were in fact dealing with ideological consideration. I think it was clearly established in the 12 days of hearings that there were no objections to Judge Bork's competence, integrity, or judicial temperament, although there was consideration comment on his ideology and philosophy.

Mr. President, I would like now to address some of the false and misleading statements and half-truths that have been used to detract from Judge Bork's character and record.

I will not take up all of these at this time. I will speak again later and complete the list.

I wish first to take up the allegation that it has been alleged that Judge Bork would like to turn back the clock on civil rights.

Now, what are the facts on that?

Mr. President, nothing could be further from the truth. As both Solicitor General and a judge on the appeals court, Judge Bork's civil rights record is superb. As Solicitor General he represented the United States in 19 substantive civil rights cases that did not require him to defend the Federal Government. In 17 of the 19 cases, Solicitor General Bork's argument supported the civil rights plaintiff or minority interest. The NAACP Legal Defense Fund sided with Solicitor General Bork in 9 out of the 10 civil rights cases where they both filed briefs. He argued cases such as Runyon versus McCrary which affirmed that civil rights laws applied to racially discriminatory private contracts. United Jewish Organizations versus Carey, is another case where Solicitor General Bork argued that race-conscious electoral redistricting to enhance minority voting strength was permissible under the 14th and 15th amendments. As Solicitor General, he argued many such cases supporting the civil rights of individuals.

On the circuit court, Judge Bork has always ensured full protection of the civil rights laws. He has joined or authored many opinions upholding these laws. In Emory versus Secretary of the Navy, Judge Bork reversed a district

court's decision to dismiss a claim of racial discrimination against the U.S. Navy. The district court had held that the Navy's decisions on promotion were immune from judicial review. In rejecting the district court's theory Judge Bork held:

Where it is alleged, as 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 had not been exempt 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.

In Palmer versus Schultz, he held in favor of women foreign service officers alleging discrimination by the State Department in assignment and promotion. In another case, Laffey versus Northwest Airlines, Judge Bork voted for women who were discriminated against in pay matters where the only basis was nominal difference in duties. Mr. President, there are other cases which I will not go into here.

It should be noted however that, Judge Bork has always praised the Supreme Courts decision in Brown versus Board of Education. He has stated with regard to this case: "If the social change is mandated by a principle in the Constitution or in a statute, then the Court should go ahead and bring about social change. Brown versus Board of Education brought about enormous social change and quite properly."

Mr. President, Judge Bork's record in the area of civil rights is excellent. The allegation against him is just not true. An objective review of his comments and decisions will show that there is not even a hint—and I repeat, not even a hint—of discrimination in Judge Bork's makeup.

Mr. President, another allegation. The allegation is that Judge Bork favors discriminatory literacy tests.

Now, what are the facts?

This charge stems for Judge Bork's criticism of the case of Katzenbach versus Morgan. Judge Bork's criticism of this case actually had nothing to do with literacy tests. His objection to the case turned on the fact the Court said that Congress can define the equal protection clause. This was why Justices Harlan and Stewart dissented in Katzenbach versus Morgan.

So he was not alone in that. Justice Harlan and Justice Stewart took the same position. Nobody could accuse them of being extremists. Nobody could accuse them of being biased. Why would they accuse Judge Bork of being biased?

The Supreme Court had held that nondiscriminatory literacy tests were constitutional. Congress then passed a statute which in certain circumstances said they were outlawed.

Judge Bork's only criticism of this case is that he does not think that Congress can change the Constitution.

Well, of course, Congress cannot change the Constitution, except in the proper way, where an amendment is passed by both bodies of Congress by two-thirds vote and submitted to the States and three-fourths of the States vote for it. Every lawyer knows that.

This is precisely why he testified against the human rights bill, which would have changed the Supreme Court's rule in Roe versus Wade.

Judge Bork in testifying about literacy tests said that he had "never looked at how they operate . . . I have no view of how they operate and none of my criticisms of any of these cases implies agreement with the statute which was being discussed. None of them. That is only for a result-oriented judge, a judge who wants results."

Judge Bork also testified that, "No literacy test that is used to discriminate can stand scrutiny under the equal protection clause of the 14th amendment."

Thus Mr. President, this charge is a totally false and misleading statement. Judge Bork was merely criticizing the position that Congress should not amend the Constitution as interpreted by the Supreme Court. And everyone should agree to that position.

Mr. President, I find it extremely ironic that the same people who level this charge at Judge Bork would be very supportive of his position on the human rights bill that would overrule Roe versus Wade. This is the classic case of result-oriented reasoning rather than applying a consistent rule of law, a neutral principle.

Mr. President, another allegation against Judge Bork is that he opposes racially integrated lunch counters.

Now, what are the facts?

Mr. President, notwithstanding Judge Bork's record of expanding and enforcing civil rights statutes, much attention has focused on a 3-page article he wrote some 25 years ago. In that article, Professor Bork prefaced his remarks on the proposed Civil Rights Act of 1984 by stating, "Of the ugliness of racial discrimination there need be no argument." He went on to question the principle of Government coercion of private associational decisions. The Congress which passed the Civil Rights Act recognized the validity of Professor Bork's concerns when it exempted certain quasiprivate establishments—the so-called Mrs. Murphy's boarding houses—from coverage under the act.

Professor Bork publicly disavowed his opposition to Public Accommodations Act both in the classroom at Yale and before the Senate Judiciary Committee in 1973 during his confirmation hearing for Solicitor General. The committee heard testimony from members of Judge Bork's staff at the Solicitor General's office including that of Ms. Jewel LaFontant, the first black woman to hold the post of Deputy Solicitor General. Ms. LaFontant was unequivocal in confirming Solicitor Bork's personal commitment to vigorous enforcement of the civil rights laws. In fact, Ms. LaFontant stated:

All of my life I have been involved in civil rights organizations having served for many years as secretary of the Chicago branch of the NAACP, on the board of directors of the American Civil Liberties Union and its legal redress committee, and as chairman of the Illinois Advisory Committee of the United States Civil Rights Commission, as well as being a commissioner of the Martin Luther King Holiday Commission. I have no hesitancy in supporting Judge Bork's nomination to the Supreme Court.

Now, here is this lady, a black lady engaged in all the civil rights fights throughout the Nation. She has been engaged in all of them. Here is what she said:

Not only is he a supporter of equal treatment of women. I sincerely believe that he is devoid of racial prejudice, or else I would not be here.

In other words, she would not have come and testified if she would not have felt he would have been fair and just.

Moreover, Judge Bork himself stated before the committee:

I think the 1964 Act really did an enormous amount to bring the country together and bring blacks into the mainstream.

With Judge Bork's record as appellate judge and Solicitor General, as well as the testimony of Ms. LaFontant there can be no doubt that he has a strong commitment to enforcement of civil rights legislation which should not be impugned.

Mr. President, I do not think it is fair to dredge up statements made 25 years ago, when they have been corrected many times over the years.

Another allegation that is brought against Judge Bork, and that is that he is in favor of racially biased poll taxes. What are the facts?

Mr. President again an allegation that is totally without merit, where nothing could be further from the truth. This criticism is directed at Judge Bork's comments on Harper versus Virginia Board of Elections. In Harper, the Supreme Court invalidated Virginia's $1.50 poll tax. There was no claim that the poll tax had a discriminatory purpose or effect, and the decisions expressly stated that this issue was irrelevant. Rather, the Court established a per se ban against all poll taxes in every State regardless of whether they were being used, or had been used previously, as a pretext for racial discrimination. Thus, the decision itself makes plain that the case involved classifications based on wealth, not classifications based on race.

Judge Bork's analysis of the Harper decision in 1973 and again at these recent hearings does not in any way

suggest a weakened support for the voting rights of minorities. He criticized the case from the standpoint that the Court did not provide adequate reasoning for its decision. Judge Bork testified before the committee that if the tax had been "applied in a discriminatory fashion, it would have clearly been unconstitutional." But, as Judge Bork pointed out, the Harper Court simply ignored this issue. Justices Black, Stewart, and Harlan made much the same point in their dissents.

Now, why do we want to accuse this man of racial bias when Justices Black, Stewart, and Harlan, whom no one would have thought would be prejudiced, took the same position?

A number of respected commentators concurred with Judge Bork's analysis of Harper: Professors Bickel, Cox, and Kurland.

Thus, again we have an unfair comment directed at Judge Bork, since many people equate poll taxes with racial discrimination. The truth of the matter is that the Harper case had nothing to do whatsoever with racial discrimination. Mr. President, I remember when I became Governor of South Carolina. We had a poll tax of $3. It was not very much and most people felt it would not keep anybody from voting. But, as Governor I took the position we should have no impediment and I recommended to the State legislature that they repeal that poll tax. That was in 1947. And they did repeal it at the next general election in 1948.

It was years later, 10 years after I came to the Senate, that the Federal Government repealed the poll tax on a national basis. And here Judge Bork is being accused of being racially biased about the poll tax. It is perfectly ridiculous. There is no merit in it; none whatsoever.

Another allegation. Judge Bork favors racially restrictive covenants. Well, now, the facts have not been stated. You would be amazed how many untruths have been told and that is the reason there is so much misunderstanding in this matter.

This stems from Judge Bork's comments in 1971 on the case, Shelley versus Kramer. Shelley held that private racially restrictive covenants, no matter how "discriminatory or wrongful," did not themselves violate the Constitution, but that enforcement of the covenants in State court satisfied the State action requirement of the 14th amendment. It is now widely acknowledged that the case did not state a neutral principle capable of explaining when private conduct is transformed into State action.

The concept of neutral principles is designed to test whether a court will take the ruling announced in one case and apply it to future cases that cannot in good faith be distinguished. As Judge Bork explained in his 1971 article and explained again in his testimony, Shelley versus Kramer does not pass this test: "The difficulty with Shelley was not that it struck down a racial covenant, which I would be delighted to see happen, but that it adopted a principle, which if generally applied, would turn almost all private action into action to be judged by the Constitution."

This analysis is now conventional thought in this area. Judge Bork's accurate and now accepted critique of Shelley in no way endorsed racially restrictive covenants. This criticism is misplaced because Judge Bork, like Profs. Herbert Wechsler and Louis Henkin before him, criticized this application of the doctrine of State action, not the underlying decision on the merits. Such a distinction has no particular effect today, because Congress in 1968 foreclosed the use of racial covenants in the Fair Housing Act. Any criticism of Judge Bork's analysis ignores the virtual isolation of Shelley in subsequent Supreme Court case law.

Again, we have a statement designed to disparage Judge Bork. This statement is just not true. His comments on Shelley had nothing to do with his favoring racially restrictive covenants.

Mr. President, although allegations have been brought up against Judge Bork that he favors the sterilization of women, what are the facts? Can you imagine Judge Bork takes such a position? I do not believe anybody any place really believes that. It was just used to try to defeat him.

Mr. President, Judge Bork's opponents have made much of his opinion in Oil, Chemical and Atomic Workers versus America Cyanamid Co., because it is an easy case to sensationalize. This was a unanimous decision which was joined by then—Judge Scalia and Senior District Judge Williams. His opponents imply or even claim that this opinion shows that he is hostile to the protection of women, and specifically that he endorsed an employer's policy requiring women to undergo sterilization as a condition of employment. Judge Bork's testimony and his opinion fully rebut this.

In 1978, American Cyanamid determined that it could not reduce the lead levels in the lead pigment department of one of its plants to a level that would be safe for the fetuses of pregnant workers. The Occupational Safety and Health Administration had taken the position that the Occupational Safety and Health Act required employers to protect employees from harm to their fetuses, and the Court of Appeals for the District of Columbia Circuit had said that OSHA had the authority to impose this requirement. Accordingly, the employer adopted a policy that only sterile women—or women past childbearing age—would be employed in this department. The employer informed the women who worked in the department of this policy, and of the availability of surgical sterilization as a way of complying with that policy. Faced with loss of their jobs or with transfer to lower-paying jobs, five of the women in 1978 elected surgical sterilization. The employer closed the department in 1980.

Subsequently, the women and their union brought a title VII suit alleging that the sterilization policy constituted sex discrimination, and raising State law claims for intentional infliction of emotional harm and invasion of privacy. A Federal district court dismissed the State law claims as barred by the State statute of limitations and the employer eventually settled the title VII suit with the women and their union.

Prior to this litigation, OSHA issued the employer a citation seeking a fine of $10,000 on the grounds that the employer's policy exposed the women to "recognized hazards" in violation of the act. The Occupational Safety and Health Review Commission rejected OSHA's contention that the employer's policy constituted a hazard within the meaning of this particular statute. The appeal was brought by the union as an intervenor. The Secretary of Labor did not file a brief.

When the case came before Judge Bork and his colleagues in 1983, the situation was this: the women had undergone sterilization some 5 years before, and there was no prospect that any other women would be subjected to that policy. The sterilized women had obtained a settlement of their title VII suit, thus obtaining some relief for the harm they had suffered. All that was at issue, from a practical standpoint, was whether the employer would have to pay a $10,000 fine to the Federal Government. All that was at issue from a legal standpoint was whether that policy violated the OSHA Act not whether it violated other Federal or State law.

Judge Bork made plain at the outset of his unanimous opinion that the women were "faced with a distressing choice" between surgical sterilization and loss of their jobs or reduced pay. Judge Bork noted that the "option of sterilization" was "one that the women might ultimately regret choosing," and observed that the employer's policy raised "moral issues of no small complexity." But, Judge Bork explained, the court was not "free to make a legislative judgement." The issue was whether, under the circumstances presented, the employer's policy constituted a hazard within the meaning of the act, and the Court held that it did not.

In reaching that conclusion, Judge Bork acknowledged that the employer's "policy may be characterized as a

hazard to female employees who opted for sterilization in order to remain in the Inorganic Pigments Department, though it requires some stretching to call the offering of a choice a hazard to the person who is given the choice." To see whether this stretching of the statutory language was consistent with congressional intent, Judge Bork looked to analogous cases interpreting similar language, and to the legislative history of the act, which indicated that Congress was concerned with protecting employees from air pollutants, industrial poisons, unsafe working conditions, and the like. Accordingly he concluded, as had the commission, that "recognized hazards" did not ordinarily include "a policy as contrasted with a physical condition of the workplace."

Judge Bork could have rested the decision solely on this basis, but instead he narrowed the employer's victory considerably. He took judicial notice of the fact that an administrative law judge had found that in a related proceeding that it was not economically feasible for the employer to lower the lead level to a certain point—a point that was well above the level that would endanger fetuses. Therefore, it was apparent that the employer could not have reduced the lead levels in the department to remove the threat to fetuses. On that basis, Judge Bork narrowed the court's ruling by stating that "This case might be different if American Cyanamid had offered the choice of sterilization in an attempt to pass on to its employees the cost of maintaining a circumambient lead concentration higher than that permitted by law."

It should be noted that the union made an important concession that reveals how narrow the dispute really was by acknowledging the fact that "there would have been no violation if the company had simply stated that only sterile women would be employed in the department because there would then have been no requirement of sterilization." As Judge Bork pointed out, this statement would have given the women the option of sterilization, but without informing them that that option existed or how to pursue it. Thus, the union's concession supplied additional support for the Court's decision, because "it cannot be that the employer is better shielded from the liability the less information it provides."

In sum, it is indisputable that Judge Bork's unanimous opinion reflects sympathy for these women rather than hostility to them. As he wrote, "The women involved in this matter were put to a most unhappy choice." As he also noted, the employer's policy might violate Federal labor law or title VII. In the case before the Court, however, OSHA and the union had used the wrong law—seeking to expand the scope of a worker safety law to encompass employer policies rather than workplace hazards.

An attempt was made to treat Judge Borks' testimony on the case as proof of a malevolent hostility to women. One of the sterilized women, Ms. Betty Riggs, was solicited by her attorney in the American Cyanamid case to send a telegram dictated by her attorney. When this telegram—in which Ms. Riggs expressed her disbelief that "Judge Bork thinks we were glad to have the choice of getting sterilized or getting fired"—was read to Judge Bork, he made it unmistakably plain that he thought no such thing:

> That was certainly a terrible thing for that lady, and it was certainly a terrible choice to have to make. Of course the only alternative was that she would have been discharged and had no choice.
>
> I think it was a wrenching case, a wrenching decision for her, a wrenching decision for us, but the entire panel agreed—the OSHA review commission agreed with us, agreed that it was not a violation of the hazardous conditions provision of the Statute.
>
> There is some thought that was approved a policy. We did not.

Mr. President, I am appalled that Judge Bork would be accused in this case of favoring the sterilization of women. I simply cannot see how anybody who took the time to find out about this case could make such a statement.

Mr. President, another allegation against Judge Bork is that he would construe the equal protection clause so as to deny the rights of women.

What are the facts?

This is just not so. I believe this allegation was made for the sole purpose of attempting to turn the women of America against Judge Bork. The charge apparently arises from Judge Bork's writings on the Supreme Court's approach to the equal protection clause.

For Judge Bork, the equal protection clause prohibits unreasonable distinctions among all persons; it does not afford special protection to certain groups. In every instance, he would ask whether the trait being used to distinguish among citizens is in fact relevant because it actually tells the legislature something about a person's needs, abilities, or merit. If it is not a relevant trait to which a reasonable legislature would attach significance, then it is invidious discrimination and would be struck down.

Judge Bork believes this method of equal protection analysis is both more objective and more faithful to the language and the intent of the equal protection clause. A judge who claims adherence to the framers' intent and to neutral principles must search for a single standard which can be applied to all laws that distinguish between individuals on any basis. The search must begin with the core concern of those who drafted the 14th amendment which is, of course, racial classifications.

The central tenet of the 14th amendment is that race is an unreasonable basis upon which to judge an individual's worth or status in the community. As Justice Stevens had indicated that race is an attribute over which the individual has no control, which cannot be altered, and which tells society nothing about the individual's moral worth or ability, it is per se unreasonable for a legislature to make distinctions between individuals based on a trait which is so utterly irrelevant to any valid legislative goal. In applying the equal protection clause to gender classifications, Judge Bork would refer to the framers' concern with race for guidance. Gender, like race, is an immutable trait. It is a status over which the individual exercises no control, and it indicates nothing about a person's moral or intellectual stature. Since gender is irrelevant to almost all human activities, virtually any statute, which limits the opportunities open to women because of their sex, would not have a reasonable basis in fact.

In a discussion, with Judiciary Committee members concerning the Goeseart case, Judge Bork indicated that there was no reasonable basis in fact for distinguishing men from women in determining who could obtain a bartender's license. The physical differences between men and women had no bearing on their relative abilities in that field. Judge Bork indicated that this test would operate to strike down any law which limited the employment opportunities open to women based on outmoded stereotypes. Since gender is irrelevant to one's ability to be a doctor, lawyer, or accountant, any restriction on women in any of these fields would, in Judge Bork's view, be as unreasonable as a law which disfavored people with blue eyes.

Mr. President, this is just another example of a misleading statement against Judge Bork which in fact has no creditable basis.

Mr. President, at a later time I will take up some other allegations. I will state the charges and then I will attempt to answer and give the facts on them. But in closing at this time, as I stated earlier, Judge Bork is one of the most eminently qualified nominees for the Supreme Court in recent history. I think Judge Bork's positions have been blatantly mischaracterized with a total disregard for the truth. We in the Senate are charged with an awesome responsibility in our advise-and-consent role. To fairly approach this responsibility we should take the time to completely analyze Judge Bork's positions rather than listen to a strident few. To do otherwise does a disservice to our form of government.

I urge my colleagues to listen to the debate on the floor and make an independent judgment as to Robert Bork's qualifications to serve as an Associate Justice on the Supreme Court. I fully support this nomination and I urge my colleagues to vote for his confirmation to the Supreme Court of the United States.

Mr. President, I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER (Mr. CONRAD). The Senator from Pennsylvania I think was the first to seek recognition.

Mr. SPECTER. Mr. President, we all have time problems but I have agreed with Senator HATCH to yield because of some special problems he has, saying that he would take less than 30 minutes, and I will then seek recognition at the conclusion of Mr. HATCH's presentation.

Mr. EXON. Mr. President, I object.

Mr. HATCH. Mr. President, I think I did seek recognition first and I appreciate the deferral.

Mr. EXON addressed the Chair.

The PRESIDING OFFICER. Just one moment. The Chair will consult with the Parliamentarian.

In this case, the Senator from Pennsylvania, in the judgment of the Chair, was the first to seek recognition. If he yields the floor, it is then a question of who is the next to seek recognition. He cannot yield to another Senator for that purpose. And the Chair therefore, recognizes the Senator from——

Mr. HATCH. Mr. President, parliamentary inquiry. I think I was first up before the Senator from Pennsylvania.

Now, I am familiar with how the Chair is operated and I know what was told to it. I will defer to the Senator from Pennsylvania because the Chair said it recognized him first.

Now, I will be happy to do that and he can take his time now so he can catch his train. But, Mr. President, let me make a parliamentary inquiry.

Is it not true that the first one up on the floor has a right to the floor?

The PRESIDING OFFICER. That is absolutely correct.

Mr. HATCH. Then I want the right when I am first up. Let me just say this. I have seen it time after time——

The PRESIDING OFFICER. It is in the discretion of the Chair to determine who was first up.

Mr. HATCH. Mr. President, may I state my inquiry?

The PRESIDING OFFICER. The Senator certainly may state his inquiry.

Mr. HATCH. I am going to state it. I have watched this floor for a long time and I have to admit when we controlled the floor, there were some discrepanicies over the 6 years that we retained the chair. But I have seen it time after time since the Democrats have taken control of the Senate where the Chair has recognized either Democrats or somebody who has made a deal to get recognized even if they are not the first ones up.

The PRESIDING OFFICER. Does the Senator have a parliamentary inquiry?

Mr. HATCH. My question is, Is it not true that the one who seeks recognition first, and so states it, is the one entitled to be recognized by the Chair?

The PRESIDING OFFICER. That is correct.

Mr. HATCH. Then I suggest to the Chair that Senator SPECTER, since the Chair recognized him first, can proceed and I will defer. And I will defer after the Senator from Nebraska. I will do that out of strict courtesy to my colleagues. But next time I seek recognition, and I am first, I do not care what deal has been made with the Chair; I want to be recognized. I know I was first because I know whose voice was first. But I am going to do it on that basis.

The PRESIDING OFFICER. The Chair will take this opportunity to respond. No. 1, there was no deal made with this Presiding Officer. I was informed that there was a gentlemen's agreement that we would attempt to rotate between those who are in favor of the Bork nomination and those opposed. It is not outside the normal business of the Senate to have a gentlemen's agreement to go back and forth between those in favor and those opposed.

Mr. HATCH. Is that the case? I do not know that that is correct.

The PRESIDING OFFICER. In the observation of the Chair, three Members sought recognition. Frankly, it would be very hard for the Chair to say which one was first. Out of deference to the gentlemen's agreement to go back and forth between those in favor and those opposed, the Chair was attempting to abide by that gentlemen's agreement. That states the case as far as the Chair is concerned.

Now, the Parliamentarian further informed the Chair that the Senator from Pennsylvania, who received recognition, was not in a position to then pass on to another Member that recognition.

Mr. HATCH. Parliamentary inquiry again. I am going to just say it one more time. I will accept the Chair's ruling but I happen to know who was up first.

I do not know of any gentleman's agreement, but I will be happy as a matter of courtesy to defer not only to the distinguished Senator from Pennsylvania, who has a lot to say on this matter, but I will wait until after the distinguished Senator from Nebraska finishes. But I expect to be up after the distinguished Senator from Nebraska. I will try to rise first at that time, I guess just like anybody else will have to do. But I happen to know who rose first on this one because I made sure that I did. I am a little disappointed when I rise first and I am not recognized in accordance with the rules of this body.

That is OK. Mistakes can happen and I am just as happy to yield to the distinguished Senator from Pennsylvania.

Mr. EXON addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. EXON. Mr. President, I have not been surprised at the general actions by those who see the Bork nomination differently than this Senator, but I am surprised at the outburst by the Senator from Utah. The facts are that this Senator was on the floor at 12:30 when we were originally scheduled to start this debate. I was here when the debate actually started. At that time I inquired of the manager of the bill if there was any order for debate, trying to be courteous to others. Senator BIDEN indicated to me the Senator from Pennsylvania had asked to speak first, and I agreed that that was in order. Since that agreement was made, I did not want to interfere with it. I was courteous enough to go to the Senator from Pennsylvania, tell him that I had a conference with the House of Representatives on the defense authorization bill that I had to go to in 10 minutes, and could I precede him.

The Senator from Pennsylvania indicated that he wished that he could help me, but that he could not because he had pressing business of his own. I understood that. I went and disposed of that matter, Mr. President. I came back to the floor. I have patiently waited through the opening remarks of the chairman and the ranking member. Then I visited with the Senator from Pennsylvania, and the Senator from Pennsylvania told me that he was supposed to talk next, but he had decided to yield to the Senator from Utah. I thought that was not fair. I thought that is not what we generally do in this body.

There was no unfairness on the part of the Chair as far as this Senator is concerned. I believe in the matter of fairness that the Senator from Pennsylvania should be recognized next. I have no objection to that whatsoever. The reason I objected earlier was the fact that when you talk about controlling the chair against the rules of this body to the placement of the Senator from Pennsylvania, who I thought should have been recognized next, tried to yield, and put the Senator from Utah ahead of the position in which the Senator from Nebraska thought he was at least entitled to seek recognition. I objected.

I think the Chair did the right thing. I do not care to take advantage

of the Senator from Pennsylvania, and I will wait until a later date to make the statement that I would like to make.

Mr. President, I yield the floor.

Mr. SPECTER addressed the Chair.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I thank the distinguished Senator from Nebraska. I thank the distinguished Senator from Utah, I thank the chairman of the committee. I think enough has been said on this subject. I shall not say further except to proceed to the issue of the nomination of Judge Bork.

Mr. BIDEN. Before the Senator from Pennsylvania proceeds, will he yield to me for 30 seconds? I ask unanimous consent that he yield 30 seconds.

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

Mr. SPECTER. Without losing my right to the floor, Mr. President.

Mr. BIDEN. Mr. President, I will cease attempting to allocate, not allocate time, but see to it there is some sense of comity. I want the Chair and my colleagues to understand. The Senator from South Carolina and I, at the request of the majority and minority leaders several days ago, and again today, agreed that we would try to see to it that there is an evenness to this debate. That is all we are trying to do.

I think alternating is a useful thing, but if we do not want to do that, fine, whoever seeks recognition, fine. We will go from there. But that was the intent of both the ranking member and the chairman of the committee. That is what we were attempting to do. I thank the Chair. I think he ruled correctly. My time is up.

The PRESIDING OFFICER. If the Senator will withhold for 1 minute, the Chair makes one other observation because I think it is important that the RECORD be clear. There was clearly no partisanship involved here. The Chair came to the chair with the ranking member of the committee speaking. The Chair was informed that there was a gentleman's agreement to trade off between those who favor and oppose the nomination of Judge Bork. The Chair was further informed that the Senator from Pennsylvania had been here the longest. We then had three Members seeking recognition simultaneously. Frankly, one Member asserts he was first. I find it very difficult, if not impossible, to judge when you have Members calling out from different ends of the Chamber who is first. In the interest of following the gentleman's agreement, the Chair then recognized the Senator from Pennsylvania who is of the same party, I might add, as the ranking member. So clearly no partisanship was involved.

Number 2, the Chair was attempting to keep faith with a gentleman's agreement to go back and forth between those who favor and oppose.

Again, the Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, I thank the Chair.

On these matters, there is an obvious effort on the part of all Senators to accommodate other Senators to the extent that we can. That was part of my thinking and I do believe at this juncture adequate time has been spent along the recognition issue. I shall proceed now on my floor statement regarding the nomination of Judge Bork.

There is something almost surreal about the debate we are taking up today. We, the greatest deliberative body in the world, finally are moving to take up Judge Bork's nomination at a time when the nominee has conceded defeat and the principal involvement of the White House appears to be the consideration of whom to nominate next. Nevertheless, aside from the substantive basis for the Senate's decision to consent or not, there are issues of real importance to be considered at this time on the procedures which the Senate has followed.

This nomination has been unique in several respects: First, Senators asked and the nominee answered significant questions on his judicial philosophy; second, Senators announced their intended votes in advance of floor action virtually nullifying the Senate's traditional deliberative function; and third, unprecedented public relations/media campaigns were undertaken. This debate presents a valuable opportunity to deal with these important potential precedents for future Supreme Court nominations.

In my judgment, Judge Bork's hearings established a proper precedent for a meaningful evaluation of a nominee's views unlike, for example, Justice Scalia's confirmation where virtually no questions were answered. At the same time, the informal, rolling, off-the-record 51-vote total should be rejected as the way for selecting future Supreme Court Justices. The Senate's examination of the public relations/media tactics may discourage such activities for the future, recognizing such restraint must be voluntary since such activities are within first amendment rights.

THE IMPORTANCE OF "PROCESS"

Notwithstanding 200 years of confirmation experience, clear precedents have not been established on many such important procedural questions. Many are surprised to learn that Supreme Court nominees have been appearing at Judiciary Committee hearings for less than 50 years. Accordingly, this floor debate on process could have significance far beyond even the importance of the pending nomination.

Process has always had special significance in our system. "Due process of law" is the cornerstone of American justice. It is embodied in the 5th and 14th amendments of the U.S. Constitution. The phrase "the end does not justify the mean" expresses our ideal for fairness in the way we deal with issues and proceed to our decisions. Whatever the ultimate merits, everyone is entitled to procedural fairness and "a day in court."

The Senate of the United States has no more important duty than its constitutional responsibility for "advise and consent." On that role, no nomination is of greater importance than a lifetime appointment to the highest Court in our judicial system.

There are obviously important reasons why we should move with dispatch on Judge Bork's nomination because the Supreme Court is short one member and a full Court is indispensable to resolve many complex issues which will doubtless find the eight members evenly divided. This debate has started just 2 weeks after the Judiciary Committee's vote following the expedited filing of the committee's report and the brief waiting period mandated by the Senate rules.

For a few extra hours or even days, the Senate should give this nomination the process which it is due. We can conclude the Senate deliberation and vote on this nomination; and, if necessary, proceed to another nominee with committee hearings and floor action during this congressional session before the end of the year. We may miss our targeted adjournment date or be compelled to work overtime, but this important item of the Nation's business comes first and should get appropriate attention.

THE ROLLING, OFF-THE-RECORD VOTE

Meaningful floor debate on the substantive merits realistically is precluded when a majority of Senators already has announced opposition to a nominee. The sound and fury emanating from the Senate this week may be subject to many characterizations; but deliberation it is not. Our handling of Judge Bork's nomination hardly conforms to the Senate's reputation as the world's greatest deliberative body.

Every Senator obviously has the right to announce his or her views at any time in the confirmation process; I cannot and would not change that. I encourage my colleagues, however, to consider whether it would not be much wiser and fairer for Senators on the Judiciary Committee to refrain from pronouncing judgment until after the hearings have concluded, and for the other Senators to wait until the merits of the nomination have been debated on the Senate floor.

I have concluded that this would be a great improvement on the current process. Our departure from it raises questions about the relevance and significance of our most hallowed tradition: full and open debate on the floor, in which Senators listen to each other's considered arguments, ask and respond to questions, and make decisions based on the power and persuasiveness of each other's logic. Now I well recognize that the Senate often fails to conform to this ideal. On many or even most issues, there is little debate. On many days, few Senators are in the Chamber other than during rollcalls. We frequently are called upon to vote on amendments on which we have virtually no advance notice.

But this is not how we treat major issues, and the confirmation of a Supreme Court Justice is, after the declaration of war, perhaps our most significant institutional function.

In our rush to conclude, we may be oblivious to setting a new, dangerous precedent that Supreme Court nominations may be decided by a rolling, off-the-record vote which reaches 51 rather than through our traditional deliberative process. Judge Bork will receive a record vote only because of his personal and proper insistence. Calls for withdrawal, abbreviated debate, short time limits, and a tabling motion have probably already consumed more floor time than the ultimate debate. For many reasons, the pending issues, as well as the pending nomination require time for thoughtful deliberation.

While there was extensive media coverage of the Judiciary Committee hearings, it is obvious that Members could have benefited from consideration of the committee report and floor debate. Neither was available by the time that more than 50 Senators had announced their intentions to vote against Judge Bork. The history of the Senate shows that wiser, more informed decisions are made when there is an opportunity for the type of passionate, yet collegial and reasoned, dialog which floor debates provide.

While recognizing and respecting the right of each Senator to decide when to decide, I believe it is the preferable practice for individual Senators, at least those not on the Judiciary Committee, to refrain from formally declaring an intention on the vote in advance of the floor debate. At a minimum, the practice of the rolling vote should be scrutinized at this time. When Senators made their declarations, many doubtless did not focus that the cumulative effect would short-circuit the system. Senators may wish to repeat this practice which is each individual Senator's right, but at least its consequences should be understood and evaluated.

The substantive issues on Judge Bork's nomination are numerous and complex. They involve due process, privacy, equal protection of the law, civil rights, freedom of speech, executive/legislative powers, original intent, Supreme Court jurisdiction, the incorporation doctrine and many other constitutional issues plus Judge Bork's positions expressed in numerous speeches, law review articles and court opinions. Obviously, floor debate would provide helpful insights on these complex questions.

Is it fair to Judge Bork as the nominee or his supporters for individual Senators to make up their minds and state positions with finality without allowing the process to run its due course? Is it best for the institution of the Senate to decide or appear to be deciding such important issues without the traditional deliberative process and floor debate? While not necessarily free from some doubt, my sense is that these questions should receive "no" answers; but I have no doubt that these questions are worthy of our serious consideration at this time.

THE COMMITTEE VOTE

The situation is different for Judiciary Committee members who are required to vote in committee in advance of floor action. The suggestion has been made that even a committee member should announce his vote with the express qualification that it is subject to change in the light of floor debate.

Perhaps this is too much to ask in a political cauldron which rarely understands let alone rewards subtleties of judgment, even when well justified. While there may be some theoretical merit to such an express reservation, it is unrealistic to invite additional inputs and contacts after a decision made in the Judiciary Committee based on extensive deliberation following days of testimony and consideration of volumes of written materials. Under some other circumstances, however, such an express reservation might be appropriate.

It is also worth raising the issue of the desirability of Senators, especially committee members, announcing their positions in advance of the hearing although I respect the right of Senators to decide what and when to decide. With a nominee like Judge Bork, some Senators may have fixed positions which have been formulated over the years because of his public record and his involvement on matters like discharging Special Prosecutor Archibald Cox.

In general, my preference is for Senators on the Judiciary Committee not to take positions before the hearings although I recognize the legitimacy of early advocacy and the value of openness. Perhaps this matter is so clearly within the discretion and conscience of each individual Senator, that it would be better left unmentioned. At a minimum, however, the rolling vote and early declarations are worth the Senate's attention. No minds may be changed today, but longer-term evaluation may affect some Senators' future conduct.

JUDICIAL PHILOSOPHY IS RELEVANT

This floor debate on Judge Bork's nomination provides an excellent opportunity to explore the relevancy of judicial philosophy and the appropriate scope of questions for a nominee at Judiciary Committee hearings. When Judge Bork visited me in mid-July for a courtesy call, my first question was whether Judge Bork thought judicial ideology was appropriate for our discussion since I did not want to raise any subject without obtaining his preliminary thinking. Judge Bork's immediate response was that he did not like the term ideology because it had political implications, but that he did think that "judicial philosophy" was appropriate for consideration.

The precedents suggest that a nominee's philosophy and approach to legal issues are indeed germane to the confirmation process. John Rutledge, the first nominee to the Supreme Court to be rejected by the Senate, was rejected because of his views. Rutledge, who was nominated to be Chief Justice by President Washington, had served as a delegate to the Constitutional Convention, as an Associate Justice of the Supreme Court, as chief justice of the South Carolina Supreme Court, and, pursuant to a recess appointment, as Chief Justice of the United States. He was a man of acknowledged professional ability and his integrity and judicial temperament were not at issue. Nevertheless, his nomination to serve as Chief Justice of the United States was rejected by the Senate.

John Rutledge's nomination to be Chief Justice of the United States was rejected because Members of his own party strongly disagreed with the position he had taken, shortly after his nomination, in opposition to the Jay Treaty. The Jay Treaty had been negotiated by Washington to ease tensions with the British and resolve a number of trade issues. It was stongly opposed by many anti-British elements and support for the treaty was viewed by others as the litmus test of support for a strong national government. Rutledge spoke out against the treaty, and that single political position led to the rejection of his nomination after a long and acrimonious debate.

The vote to reject the Rutledge nomination was 14 to 10, and it is of particular note as we consider the constitutional advise and consent role of the Senate that among the Senators voting against the nomination were some who, like Rutledge, signed the Constitution.

Chief Justice Roger Taney, of Dred Scott infamy, originally was nominat-

ed to be an Associate Justice of the Supreme Court. Taney was not confirmed by the Senate because, as a member of the Jackson Cabinet, he had taken actions at the President's direction, that were very unpopular with certain Members of the Senate.

In particular, as part of President Jackson's crusade against the Bank of the United States, Jackson ordered his Secretary of the Treasury, Louis McLane, to remove all Federal funds from the Bank—by law, only the Secretary of the Treasury could take this action. McLane refused and was fired. Jackson's next appointee as Secretary of the Treasury, William Duane, also refused to withdraw the funds and he too was fired. Jackson then turned to Attorney General Roger Taney, Taney was appointed Secretary of the Treasury and he promptly carried out the Presidential order which his predecessor had refused.

Taney's actions so enraged many of the leaders of the Senate that they defeated his first nomination to the Supreme Court by delaying its consideration until the session of Congress was almost finished.

In this century, ideology has continued to play a role in opposition to some Supreme Court nominations. There was considerable—although ultimately unsuccessful—opposition to the nomination of Justice Brandeis. The opposition was based in substantial part on objection to Brandeis' progressive political philosophy. Similarly, the nomination of Judge John Parker to the Supreme Court was rejected in large part because of the antiunion views evidenced in his judicial decisions and his statements on race issues.

Judge Parker was nominated by President Hoover in 1930. Although his credentials and abilities were not questioned, the Senate rejected his nomination by a vote of 41 to 39. The principal issues during the debate were Judge Parker's opinion as a court of appeals judge upholding the legitimacy of a "yellow dog" contract—a contract in which, as a condition of employment, an employee promises never to join a union—and his statements that "the negro * * * does not desire to enter politics" and characterizing black participation in Government as "evil."

More recently, ideological considerations played a determining role in the Senate's failure to confirm President Johnson's nomination of Justice Abe Fortas to be Chief Justice. Many of my colleagues participated in that debate, and will recall that opposition to Justice Fortas was based in large part on his judicial philosophy as a member of the Warren Court. Nor can there be any doubt that ideology played an important part in the Senate's rejection of President Nixon's nominations of Clement Haynesworth and Harold Carswell to the Supreme Court.

Most recently it is clear, notwithstanding some protestations to the contrary at the time, that much of the opposition to Chief Justice Rehnquist's nomination last year was motivated by many of my colleagues' disapproval of his judicial philosophy.

NOMINEES SHOULD ANSWER, AT LEAST, BASIC QUESTIONS

Judge Bork's hearings established a proper precedent for a meaningful evaluation of a nominee's judicial philosophy contrasted with other hearings where virtually no questions were answered. In order for Senators to make an informed judgment, it is necessary to have some insights through the nominee's answers on, at least, some basic judicial views.

The hearing for Justice Scalia provides an example of a nominee refusing to answer even the most basic questions. For example, when asked whether he agreed with the bedrock decision in Marbury versus Madison that established the supremacy of judicial review of questions of constitutionality, Justice Scalia, while acknowledging that the decision was indeed a pillar of our jurisprudence, said: "I do not want to be in a position of saying as to any case that I would not overrule it." And this, despite his having just agreed that "I would not want to confirm anybody that I believed would destory certain decisions." What decision could be more important as a basis for not confirming?

Justice Rehnquist—now Chief Justice—was also very reluctant in his confirmation hearing for Chief Justice to state views on whether he agreed with landmark Supreme Court decisions. When asked about Marbury versus Madison, he sought to justify his refusal, saying:

> * * * the fact that the issue is fundamental, and important, does not make it any less one that could well come before the Court. And I think the approach I have to take is, in a case like that, I ought not to attempt to predict how I would vote in a situation like that.

Justice Rehnquist's position represented a reversal of his own conclusion stated in a 1959 article in the Harvard Law Record. There he had criticized the Senate for failing to obtain Justice Whitaker's views during confirmation hearings on fundamental issues, including school segregation and Communists' rights and constitutional doctrines such as equal protection and due process. Indeed, he concluded his article, saying: "The only way for the Senate to learn of these sympathies is to inquire of men on their way to the Supreme Court something of their views on these questions."

In his own hearing, however, Justice Rehnquist retreated from answering many such questions indicating that when he wrote the article, "I had no idea of the extraordinary difficulties that that approach put a nominee in."

I believe the better view, for the Court, the Senate and the country, is that expressed in Chief Justice Rehnquist's article entitled "The Making of a Supreme Court Justice," that nominees should answer questions on fundamental issues. Justice Rehnquist finally did answer on important substantive issues saying that the Supreme Court's jurisdiction could not be undercut on first amendment issues such as freedom of speech, press and assembly and that the due process clause of the 14th amendment incorporated basic rights from the Bill of Rights such as freedom of religion.

In my judgment, the Senate should be reluctant, if not unwilling, to confirm Supreme Court nominees who refuse to answer basic questions such as the supremacy of judicial review upholding the basic principle of Marbury versus Madison, the incorporation doctrine making the Bill of Rights applicable to States via the due process clause of the 14th amendment, and the unconditional jurisdiction of Federal courts on constitutional issues.

THE PUBLIC RELATIONS/MEDIA CAMPAIGNS

Amid controversy in the media and on the Senate floor over whether opponents of Judge Bork's confirmation distorted his views and his record, let us remember that the best cure for any distortions is to have the nominee's views explained by the nominee himself—in great detail and on the record, for all Senators and all citizens to see. Judge Bork's extensive testimony was a great improvement over past practices and both he and the Senate benefited by it.

Judge Bork's approach, not Justice Scalia's, should become the precedent followed in the future. The decision of each Senator whether to confirm a Supreme Court nominee should not be a gamble based on guesses, but a judgment based on answers on a nominee's views of the law. The Bork hearings permitted that, and how this Senator or another decided the ultimate issue on confirmation should not obscure the fact that full and open testimony serves everyone in the confirmation process.

Obviously, Judge Bork is not a racist, and does not favor sterilization. Equally obvious is that those Senators who oppose him do not favor criminals over victims, and are not part of a lynch mob. The responsibility of Senators is to receive all of the various inputs, exaggerated as many of them surely will be, and to distill from them our own conclusions. We do that every day, on all sorts of controversial issues; we belittle ourselves and our institution by suggesting, in the heat of battle, that we are incapable of evaluating and according proper weight to

the various inputs. For my part, I gave enormous weight to Judge Bork's testimony, some weight to the outside witnesses, and none to the public relations/media campaigns.

CONSTITUENT CONTACTS

To be sure, these were not the only inputs. I received over 140,000 letters, cards and calls, and met with many groups and individuals. While constituent contacts always are relevant, their proper weight depends on the type of issue involved. It is impossible to know how many of the calls my office received were repeat calls by the same people. Many were from other States. It may be appropriate to give somewhat different weight to postcards orchestrated by groups than to individual letters.

At bottom, the issue is how, in our representative system of Government, a Senator balances the need to weigh constituent views with the obligation to make an independent judgment. In my opinion, there has not been a better analysis on this issue than Edmund Burke in 1774. Like Burke, I believe that a legislator must weigh and consider a variety of factors, including his or her constituents' opinions, but ultimately has to make an independent judgment. Were it otherwise—if constituent opinions controlled—then we would not need Senators; it would only be necessary to tabulate the letters or calls, or look to the most recent public opinion poll. We Senators have the time, perspective and means to filter all the inputs; many of our constituents do not, and may be more susceptible to being swayed by the slanted TV ads and newsletters we have heard so much about. Constituents frequently change their views after hearing more of the facts and arguments about an issue.

Since Judge Bork was nominated on July 1, I have had 11 open-house town meetings in Pennsylvania where I have heard constituent opinions on the nomination. Frequently, after discussing the matter, a constituent will change his or her opinion or decide to leave the final judgment to me after hearing some of the complex factual and legal questions involved. Constituent views are relevant and important, but when the issues are a Supreme Court nomination, I think the Constitution requires us to give greater weight to the constitutional doctrines at issue and the nominee's position on them.

Mr. President, it would appear to be too late for much good to come to Judge Bork from this floor debate. Soon the process will begin anew, with the nomination of another individual. I hope that while we are focused on the Supreme Court and this particular nominee, we will find time to discuss the process issues I have raised today. By working toward a consensus on the way we should conduct our advise and consent responsibility, perhaps we can handle the next nomination with more focus on the merits, less distraction by atmospherics, and a renewed commitment to the principle of careful, deliberative decisionmaking that is the Senate's hallmark.

Mr. President, I ask unanimous consent that the text of my floor statement on October 1 be inserted in the RECORD, and an article of mine in the New York Times on October 9 be inserted in the RECORD.

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

JUDGE ROBERT BORK

Mr. SPECTER. Mr. President, I shall vote against Judge Bork on confirmation to the U.S. Supreme Court because I believe there is substantial doubt as to how he would apply fundamental principles of constitutional law. This is a difficult vote since I will be opposing my President, my party, and a man of powerful intellect whom I respect and like. I have spent hours discussing my concerns with Judge Bork both publicly at the hearings and privately in my office, with the last meeting for more than an hour yesterday afternoon.

This vote is especially hard since I know I will be disappointing many constituents who feel so strongly in favor of Judge Bork although there are about as many with equally strong feelings in opposition. At the end, politics and personalities must give way, for me, to my own judgment on the history and the future of the Constitution.

Constitutional separation of power is at its apex when the President nominates and the Senate consents or not for Supreme Court appointees who have the final word. The Constitution mandates that a Senator's judgment be separate and independent.

My judgment on Judge Bork is based on the totality of his record with emphasis on how he would be likely to apply traditional constitutional principles on equal protection of the law and freedom of speech.

I am troubled by his writings that unless there is adherence to original intent, there is no judicial legitimacy; and without such legitimacy, there can be no judicial review. This approach could jeopardize the most fundamental principle of U.S. constitutional law—the supremacy of judicial review—when Judge Bork concedes original intent is so hard to find and major public figures contend that the Supreme Court does not have the last word on the Constitution.

I am further concerned by his insistence on Madisonian majoritarianism in the absence of an explicit constitutional right to limit legislative action. Conservative Justices have traditionally protected individual and minority rights without a specifically enumerated right or proof of original intent when there are fundamental values rooted in the tradition of our people.

Thirty-three years after the fact, there is still not acceptable rationale for the desegregation of the schools in the District of Columbia according to Judge Bork's doctrine of original intent. It is not only that the majority in a democracy can take care of itself while individuals and minorities often cannot, but rather that our history has demonstrated the majority benefits when equality enables minorities to become a part of the ever-expanding majority.

These conceptual concerns might be brushed aside if it were not for his repeated and recent rejection of fundamental constitutional doctrines. Over the years, Judge Bork has insisted that equal protection applies only to race as originally intended by the framers. As recently as 1 month before his nomination, he said equal protection should have been kept to things like race and ethnicity. His view of the law is at sharp variance with more than a century of Supreme Court decisions which have applied equal protection to women, aliens, illegitimates, indigents, and others.

For the first time at his confirmation hearings, Judge Bork said he would apply equal protection broadly in accordance with the Court's settled doctrine under Justice Steven's reasonable basis standard. Without commenting on the various technical levels of scrutiny, I have substantial doubt about Judge Bork's application of this fundamental legal principle where he has over the years disagreed with the scope of coverage and has a settled philosophy that constitutional rights do not exist unless specified or are within original intent.

Similarly, Judge Bork had, prior to his hearings, consistently rejected the "clear and present danger" test for freedom of speech even though a unanimous Supreme Court had accepted it as an ingrained American value for years. Justice Holmes' famous dictum that "time has upset many fighting faiths," expressed the core American value to listen to others and permit the best ideas to triumph in the marketplace of free speech, short of a clear and present danger of imminent violence.

At the hearings, I asked Judge Bork about his position that Justice Holmes had a "fundamentally wrong interpretation of the First Amendment." After extended discussion, Judge Bork said for the first time he would accept the doctrine as settled and apply it although he still disagreed with the underlying philosophy. I have substantial doubt about Judge Bork's application of that standard to future cases involving different fact situations where he retains his deep-seated philosophical objections.

In raising these doubts about Judge Bork's application of settled law on equal protection and freedom of speech, it is not a matter of questioning his credibility or integrity, which I unhesitatingly accept, or his sincerity in insisting that he will not be disgraced in history by acting contrary to his sworn testimony, but rather the doubts persist as to his judicial disposition in applying principles of law which he has so long decried.

These concerns and doubts lead me, albeit with great reluctance, to vote against Judge Bork.

I thank the Chair, and I yield the floor.

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[From the New York Times, Oct. 9, 1987]

WHY I VOTED AGAINST BORK

(By Arlen Specter)

WASHINGTON—From the day in mid-July when Judge Robert H. Bork stopped by for a courtesy call until I telephoned him last week to say I would oppose his nomination, my goal was to figure out what impact Judge Bork would have on the people who came to the Supreme Court in search of their constitutional rights. At the end, having come to like and respect Judge Bork, I reluctantly decided to vote against him, because I had substantial doubts about what he would do with fundamental minority rights, about equal protection of the law and freedom of speech.

From the beginning, it was evident that this nomination process would be different from most. The traditional courtesy call turned out to be much more because Judge Bork was willing—really anxious—to discuss his judicial philosophy. Unlike other nominees who had barely given name, rank and serial number, he enjoyed the exchange and doubtless figured that his extensive writings were so unusual that he would have to talk if he were to have any chance at confirmation.

Our first hour and a half meeting was interrupted by a Senate vote, so he returned a few weeks later for a similar session. In those discussions, I found a man of intellect and charm, who said, in essence, that his writings were academic and professorial and not necessarily indicative of what he would do on the Court.

During the August recess, when I had a chance to read many of his approximately 80 speeches, 30 law review articles and 145 circuit court opinions, I found a scholar and jurist whose views and opinions were vast and complex. In voting to confirm Chief Justice William H. Rehnquist and Justice Antonin Scalia last year, I had already decided that a nominee's judicial philosophy need not agree with mine. But I also believed that a nominee's views should be within the tradition of our constitutional jurisprudence. With that in mind, I compared Judge Bork's views with those of other conservative justices.

On freedom of speech, I was surprised to find that Judge Bork in his writings rejected Justice Oliver Wendell Holmes' standard of a "clear and present danger," Chief Justice Warren Burger's notion of constitutional protection for commercial speech and Justice (now Chief Justice); Rehnquist's Court opinion protecting a sexually explicit (as distinguished from an obscene) movie from censorship.

In Judge Bork's earliest views, only political speech was to be protected. He later modified that to include literature and art that involved political discussion. In the confirmation hearings, I was even more surprised to find him change his position and commit himself to apply the Holmes test even though he continued his strong philosophical disagreement.

Judge Bork's views on equal protection of the law also underwent a major change at the hearings. He committed himself to apply current case law after having long insisted that equal protection applied only to race and, more recently, to ethnicity. His narrow position had put him at odds with Chief Justice Rehnquist and Justices Sandra Day O'Connor and Scalia, as well as 101 years of Supreme Court decisions that had applied equal protection to women, aliens, indigents, illegitimates and others.

These significant shifts raised questions about Judge Bork's motives and the depth of his convictions. But I felt he should have a full opportunity to explain his new positions because a person is entitled to change.

During a long Saturday session, I had an unusual opportunity to explore at length some troubling aspects of Judge Bork's jurisprudence. I was particularly concerned with his writings on "original intent." He had maintained that judges had to base their opinions on the Framers' original intentions. Without adherence to original intent, he said, there was no legitimacy for judicial decisions. And without such legitimacy, there could be no judicial review.

But Judge Bork conceded during the hearings that original intent was often difficult, perhaps impossible, to discern. I feared that this approach could jeopardize the fundamental principle of constitutional law—the supremacy of judicial review. Although Judge Bork himself never went so far, some prominent political figures have suggested that the Supreme Court should not be the ultimate arbiter of constitutionality. Their cause—with which I deeply disagree—could be aided by a Justice who questioned the legitimacy of judicial review.

I had also been concerned by Judge Bork's insistence on "Madisonian majoritarianism," the idea that, in the absence of explicit constitutional limits, legislatures should be free to act as they please, conservative justices had traditionally protected individual and minority rights even without a specifically enumerated right or proof of original intent where there were fundamental values rooted in the tradition of our people.

Just this year, for example, Chief Justice Rehnquist and Justices O'Connor and Scalia had found a right in the Constitution for a prisoner to marry. But Judge Bork, at his confirmation hearing, could still find no acceptable rationale for the decision desegregating the District of Columbia schools 33 years ago.

I was further troubled by his writings and testimony that expanding rights to minorities reduced the rights of majorities. While perhaps arithmetically sound, it seemed morally wrong. The majority in a democracy can take care of itself, while individuals and minorities often cannot. Moreover, our history has demonstrated that the majority benefits when equality helps minorities become a part of the majority.

Despite these concerns, I was genuinely undecided—perhaps leaning a little toward Judge Bork—when he finished his impressive testimony at the end of the first week. He had conceded that there was a "powerful argument from a strong tradition" to find rights rooted in the conscience of the people, although not specified in the Constitution. He had also yielded to the "needs of the nation" on some constitutional matters that did not fall within the Framer's original intent. Perhaps his writings were only professional theorizing.

As I listened to the other witnesses during the second and third weeks, and considered the implications of Judge Bork's total approach, my doubts grew about the application of his changed positions. For example, in Judge Bork's former view, which he last expressed 20 days before his nomination, equal protection should have been kept to concerns like race and ethnicity. Considering the many subtle and discretionary judgments involved, I felt it would be unfair to people who sought equal protection in the Supreme Court to have their cases decided by someone who had so long thought their claims unprotected by the Constitution under standards that were so elusive to apply.

Similarly, the hearings showed the great difficulty, if not impossibility, of Judge Bork's applying the "clear and present danger" standard to free speech cases. If there was a critical turning point, it was Judge Bork's responses regarding two cases.

The "clear and present danger" standard was restated by the Court in 1969, in Brandenburg v. Ohio, and again in 1973, in Hess v. Indiana. When Judge Bork committed himself to accepting *Brandenburg*, I pressed as to how we could be confident that he would apply that test to the next case, which obviously would be different on the facts. He promised he would, but then promptly insisted that he was not committed to *Hess* because it was an "obscenity" case.

Judge Bork's disagreement on *Hess*, a "clear and present danger" case, cast substantial doubt on his ability to apply cases he philosophically opposed and had long decried.

The hearings brought a record 140,000 calls and letters to my office. Wherever I went, it seemed that everyone had a strong opinion. The pressure was pervasive. On the afternoon the hearings ended, I talked again with Judge Bork for more than an hour, and met later that evening with Lloyd Cutler, the former adviser to Jimmy Carter, who had been a principal supporter. My substantial doubts persisted, so I decided to vote no.

Mr. SPECTER. Mr. President, on those occasions I have spoken about the merits of the issue. Mr. President, I wonder if we might have order in the Senate.

Mr. President, as I have said, I have spoken on the substance of merits. Today, I shall speak, and I hope relatively briefly because I know others await a turn, on certain varied issues of process. In the last few minutes we have all seen an illustration of how important process is, and sometimes how process can totally consume the merits of the matter which we are looking toward.

Mr. President, there are very vital procedural issues involved in the nomination of Judge Bork which I think should be addressed in this debate. The speeches made by the distinguished chairman, Mr. BIDEN, of Delaware, and the ranking member, Mr. THURMOND, of South Carolina, have gone to the merits as to Judge Bork's qualifications for the Supreme Court in opposition thereto. But at this time, those arguments are falling pretty much on deaf ears because Senators have already made up their minds, and as of the latest count, the tabulation showed a conclusion as to 99 of the 100 U.S. Senators although not all 99 have made public announcements. I think the number is 95.

Mr. President, I submit that there is a real problem on what has occurred in this proceeding as to Judge Bork on the informal rolling total which once it reached 51 has really eliminated the traditional deliberative process of the U.S. Senate.

We have a process where we meet on this floor, we debate the issues, we exchange ideas, and formulate our judgments. And the Senate, I think, has earned its reputation, not always, but as a generalization, as the world's greatest deliberative body. But when the process occurs where there are individual announcements and the rolling total then reaches 51, it no longer becomes a matter for the deliberative process because it then becomes a foregone conclusion. And we have seen following the vote total reaching 51 requests for withdrawal requests for

short time limits, requests for abbreviated—Mr. President, may we have order in the Senate, please?

That process, Mr. President, I think has short circuited the traditional approach of the Senate very much to the detriment of our tradition. There are in this nomination many, many complex issues. We have considerations of due process of law.

Mr. President, may we have order, please?

The PRESIDING OFFICER. Please. We have a Senator speaking. Can we please maintain order in the Chamber?

Mr. SPECTER. We have complex issues of due process of law, equal protection of the law, the executive, legislative conflict, the incorporation doctrine, and judicial review. We have Judge Bork's numerous articles, his speeches, his court opinions, and all of that. Those issues were so complex that obviously this body would have benefited from the committee report, and would have benefited from the floor debate. And 53 U.S. Senators had announced their positions in opposition to Judge Bork prior to the time that the committee report was prepared, and, of course, prior to the time that there could be any debate.

With respect to declarations of positions by committee members, that, of course, is a different matter because we are called upon to vote in committee.

One member of the Judiciary Committee made the expressed announcement that his vote was for the committee purposes only, and might be subject to change during the course of floor debate. While there is something to be said for that as a theoretical proposition, Mr. President, I think that the realities are that once we have gone through 12 days of hearings and examined the numerous records, and in the case of this Senator having met with Judge Bork for many hours, having reached the decision in the committee process, it is really a resolution of the issue. I respect, of course, the right of every U.S. Senator to decide when he or she will decide, as each Senator has the right to decide what he or she will decide.

I think when the individual announcements were made that there was not a real recognition of what the impact would be in this nomination process.

We have the experience now of having had a total of 51, and we have seen it eliminate the deliberative process. To the extent that arguments will be made on the merits of Judge Bork, pro or con, they really fall upon deaf ears, because we have reached the point where the debate is more pro forma than it is substantive, and our deliberative process has not reached fruition, as it should.

The second issue I would like to discuss involves the matter of the appropriateness of the consideration of judicial philosophy, and I submit that this process has established what I consider to be an important precedent.

Many may not realize that it has been less than 50 years since the first nominee for the Supreme Court testified before the Judiciary Committee. The first nominee was Mr. Justice Frankfurter, who testified in 1939. We have not really resolved many of the important procedural issues.

At the outset, when Judge Bork was nominated, there was a question as to whether ideology would be appropriate. The first time I met with Judge Bork on the so-called courtesy call, the first question I asked was whether Judge Bork thought that ideology was appropriate for consideration. I did not want to approach the subject until I had the benefit of his initial thinking on the subject.

Judge Bork said he disagreed with the term "ideology" because it had an indication of some political overtones, but he thought judicial philosophy was pertinent. In our discussions, we talked at length about Judge Bork's judicial philosophy.

Mr. President, I think that the precedents on Supreme Court nominees demonstrate that judicial philosophy is appropriate in terms of the tradition of this body.

John Rutledge was the first nominee turned down for Justice of the Supreme Court, and he was turned down because of his substantive views on the Jay Treaty. Some of those Senators who rejected John Rutledge by a vote of 14 to 10, shortly after the turn of the 19th century, were among those who signed the Constitution, showing that a person's views on substantive matters were appropriate for consideration for nomination to the Supreme Court.

The nomination of Roger Taney and the nomination of Louis Brandeis were also matters involving philosophy, as was the situation with Justice Abe Fortas when he was considered for Justice, and I have spelled that out in greater detail in the course of my statement.

Mr. President, if we contrast the proceedings on Judge Bork with the ones we had last year with Judge Scalia on his confirmation as Justice of the Supreme Court or on the confirmation proceeding of Justice Rehnquist for Chief Justice, it is apparent that the issue of philosophy and the approach of the Judge is a very relevant matter, and the precedent involving Judge Bork ought to be followed.

During the course of the confirmation proceeding of Justice Rehnquist, I had occasion to question Justice Rehnquist on a very interesting article he had written back in 1959, when he was a practicing lawyer.

For purposes of my presentation, I referred to him at that time as Mr. Rehnquist, to delineate a position he took before he was on the Supreme Court. This article was published in the Harvard Law Record, and I ask unanimous consent that the article be printed in the RECORD.

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

THE MAKING OF A SUPREME COURT JUSTICE

(William H. Rehnquist possesses B.A. and LL.B degrees from Stanford University, and an M.A. from the Harvard Graduate School of Arts & Sciences (1949). He was a law clerk to the late Justice Robert H. Jackson of the United States Supreme Court in 1952 and 1953.)

(This article was written shortly before Mr. Justice Stewart was named to the Supreme Court. If was delayed by the editors, pending his confirmation by the Senate.)

(By William H. Rehnquist)

The Supreme Court of the United States is now in the midst of one of the storms of criticism which have periodically assailed it. Bills have been introduced in Congress to limit the jurisdiction of the high court, to overrule some of its controversial non-constitutional decisions, and to declare the sentiment of the Senate as to the necessity of judicial background on the part of a nominee to the Court. It has been urged that the "advice" of Senate be sought by the President before any nomination to the Court is made.

Criticism of the Supreme Court can easily become frustrating to the critics, because the individual justices are not accountable in any formal sense to even the strongest current of public opinion. Nonetheless, it ill behooves the critics of the present Court to seek imposition of new curbs on it until such controls as now exist are fully tested and found wanting. Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

If any interest in the views of Mr. Justice Whittaker on these cases was manifested by the members of the Senate, it was done either in the cloakroom or in the meeting of the Judiciary Committee. The discussion of the new Justice on the floor of the Senate succeeded in adducing ony the following facts: (a) proceeds from skunk trapping in rural Kanasas assisted him in obtaining his early education; (b) he was both fair and able in his decisions as a judge of the lower federal courts; (c) he was the first Missourian ever appointed to the Supreme Court; (d) since he had been born in Kansas but now resided in Missouri, his nomination honored two states.

Given in addition the fact that Mr. Justice Whittaker had been an eminently successful courtroom lawyer, the fact that he had been a leader in the activities of the organized bar, and the fact that he had been very highly regarded as a judge of the lower federal courts—all of which he was—the Senators could still have no indication of what Mr. Justice Whittaker thought about the Supreme Court and segregation or about the Supreme Court and Communism.

Less than thirty years before, the Senate had made no bones about its concern with the judicial philosophy of a Supreme Court nominee. Then, too, the Supreme court was nearing the vortex of a storm—but it was a storm raised by the very groups who are claimed to be the special wards of the Warren court. State and federal laws regulating minimum wages, maximum hours, and other business practices were being struck down by the Court as violative of "freedom of contract;" a freedom which, the Court said, was embodied in the phrase "due process of law." The labor injunction, the strike as a conspiracy, and the "yellow-dog" contract were in their heyday. When, in February, 1930, President Hoover sent to the Senate the name of Circuit Judge John J. Parker to be Associate Justice of the Supreme Court, he sparked one of the most remarkable battles over a judicial nomination in the history of the upper chamber.

Objections to Parker's confirmation were at once voiced by two groups: organized labor, and the National Association for the Advancement of Colored People. Labor's objection was based on Parker's opinion, as a judge of the Circuit Court of Appeals for the Fourth Circuit, in the so-called "Red-Jacket" case. His opinion for that court had upheld an injunction forbidding certain union organizers from attempting to organize a mine, and thereby induce the employees of the mine to breach their "yellow-dog" contracts. The objection of the NAACP stemmed from a campaign speech made by Parker in 1920, while running for governor of North Carolina on the Republican ticket. In this speech he had said:

The Negro, as a class, does not desire to enter into politics. The Republican party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached the stage in his development where he can share in the burdens and responsibilities of government. This being true, and every intelligent man in North Carolina knows that it is true . . . the participation of the Negro in politics is a source of danger to both races.

No very definite issue developed as to the campaign speech. It seemed agreed by most of the participants in the debate that the statements were understandable in the context of North Carolina politics, but that from a hindsight born with Parker's nomination for national office they would much better have been left unsaid.

As to the labor injunction, though, precise battle lines were drawn and the issue was debated in editorial columns, in masses of letters and telegrams to the Senate Judiciary Committee, and finally on the floor of the Senate. The most surprising fact about this great debate of 1930 was that one of the protagonists on either side doubted that the question should be: What were Parker's views on labor injunctions and yellow dog contracts? The New York World, in opposing Parker's confirmation, probably spoke for both sides when it said editorially on April 23, 1930:

* * * The Senate has every right, if it so chooses, to ask the President to maintain on the Supreme Court bench a balance between liberal and conservative opinion in the country as a whole, and every right on this premise to object that the presence of Judge Parker on the bench would increase, rather than lessen, the top heavily conservative bias of the Supreme Court as now constituted.

Most of the participants further agreed that the result reached by the Court of Appeals in the "Red-Jacket" case was undesirable; Parker's antagonists contended that he approved the result, or at least never batted an eye in reaching it, while his defenders claimed that he was bound by controlling decisions of the Supreme Court on the question, and as a judge of an intermediate appellate court had no choice but to follow them.

A few glittering generalities were hurled by each side, but to a remarkable degree editorial writers, members of the bar, and Senators engaged in a case-by-case analysis of the law as Parker found it when he had written the "Red-Jacket" opinion three years previously. The administration stood squarely behind its nominee, and Attorney General Mitchell even prepared a legal memorandum reaching the conclusion that Parker had no choice in writing the opinion that he did. On the Senate floor, the forces in favor of confirmation were nominally led by Senator Overman from the nominee's home state of North Carolina. But though Overman did a prodigious amount of work behind the scenes, he took little part in the debate on the law. The forces opposing confirmation were led by Senator William E. Borah of Idaho.

Senator Borah's principal speech began in the afternoon of one day and concluded the following day. The first part of it, before any requests to yield were made, occupies nine of the full, closely printed pages of the CONGRESSIONAL RECORD. Borah spoke to a question charged with emotion and public interest, and on which most of the demagogic fireworks were in the armory of his side. Yet his speech is anything but rabble rousing. Instead it is a closely reasoned, masterful exposition of the role of the Supreme Court in our system, coupled with an analysis of the precedents in an attempt to show that Parker must have reached his "Red-Jacket" result by choice, since the controlling cases did not compel it.

Almost any reply to Borah would have been anti-climactic, yet Senator Gillett of Massachusetts gave the Idahoan no quarter. He did not quarrel with the propriety of the inquiry, but he took vigorous issue with Borah's interpretation of the state of the law as Parker found it. In what appears to be an even closer reading of the cases than Borah's, Gillett ably defended the proposition that Parker was doing only what the Supreme Court decisions required him to do. After extended debate, the Senate refused to confirm Parker by a vote of 41-39.

Several times during this debate Senator Borah made clear his views as to the nature and scope of the Senate's inquiry into the philosophy of a Supreme Court nominee. In his principal speech, he mentioned that the case of *Hitchman Coal Co. v. Mitchell*, 245 U.S. 229, upholding the legality of "yellow-dog" contracts, had been decided thirteen years earlier by the Supreme Court. At this point he was interrupted by Senator Carter Glass of Virginia:

Glass: "And we have sat here all these years and permitted that to remain the law?"

Borah: "No; we have tried by an Act of Congress to repudiate that principle, but the Supreme Court of the United States said that our action was null and void. Mr. President, that is what makes this matter so very important. They pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. I say this in great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Court something of their views on these questions."

Again, during the debate on Parker's confirmation, Borah said:

Upon some judicial tribunals it is enough, perhaps, that there be men of integrity and of great learning in the law, but upon this tribunal something more is needed, something more is called for, here the widest, broadest, deepest questions of government and governmental politics are involved.

Surely the first part of this last quotation epitomizes the Senate's attitude, as manifested in discussion on the floor, toward the confirmation of Mr. Justice Whittaker. His integrity, his learning, his success at the bar, would be the only necessary subjects of inquiry in the case of a judge appointed to a lower court. Indeed, perhaps no further inquiry would be proper in the case of a judge of a lower court. He is not there to apply his own judicial philosophy, willy-nilly, to the litigants before him, but rather to decide the case of those litigants by application of the principles laid down by higher courts. Such a process involves the use of the same ability to reason by analogy as lawyers call on constantly, and therefore the legal ability of an appointee to a trial court is of paramount importance.

Similarly, in the case of the judge who actually tries the case, we do not expect a decision between individual litigants strictly in terms of popular sentiment. The people through their legislative representatives enact what laws they will, subject to constitutional limitations. But once a law is written, neither the people nor their representatives are further consulted as to what was meant by it; the written words, together with relevant background material, are interpreted by a presumably impartial judge. Democracy ends at the courthouse door, and Joe Doaks is not to be imprisoned simply because a majority of the people sitting in the jury box or on the courthouse steps think he should be.

These reasons suggest that the primary concern with an appointee to an inferior federal court should be his ability to apply rules laid down by more authoritative sources, rather than his feeling as to whether this material is right or wrong. But in the case of the Supreme Court, the "something more" which Borah spoke of comes into play. I would prefer to interpret this phrase, not as meaning that it takes more ability to be a Justice of the Supreme Court than a judge of the lower federal courts, but rather that there are additional factors which come into play in the exercise of the function of a Supreme Court Justice.

The Supreme Court, in interpreting the constitution, is the highest authority in the land. Nor is the law of the constitution just "there," waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisus in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the constitution which have been most productive of judicial law-making—the "due process of law" and "equal protection of the laws" clauses—are about the vaguest and most general of any in the instrument. The Court in Brown versus Board of Education, supra, held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court thinks the framers thought it.

Given this state of things in March, 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? It is high time that those critical of the present Court recognized with the late Charles Evans Hughes that for one hundred seventy-five years the constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws", then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

Mr. SPECTER. Mr. President, I will read certain extracts from the article. I will call him Chief Justice Rehnquist, because that is his proper title, but this is something he wrote in 1959.

At that time, Chief Justice Rehnquist took the Senate to task for its failure to make inquiries in March 1957, when the Senate considered the nomination of Justice Whittaker, and Chief Justice Rehnquist wrote, "What could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process?"

Chief Justice Rehnquist wrote, further: "If greater judicial self-restraint is desired, or a different interpretation of the phrases 'due process of law' or 'equal protection of the laws,' then men sympathetic to such desires must sit upon the High Court."

Chief Justice Rehnquist had earlier noted that "Equal protection of the laws and due process are about the vaguest and most general of any instrument." Then, Chief Justice Rehnquist concluded, saying, "The only way for the Senate to learn of these sympathies is to inquire of men on their way to the Supreme Court something of their views on these questions."

Earlier, Chief Justice Rehnquist had chastised the Senate, saying:

* * * until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Chief Justice Rehnquist said:

Examination of the Congressional Record for debate relating to his confirmation reveals a startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation.

The approach that Justice Rehnquist made in writing this article, I think, goes to the core of the matter and the heart of the matter.

It would be this Senator's hope that in the future we would have at least some responses on matters which are very basic to the constitutional interpretation. Such a matter is the supremacy of Supreme Court decisions as embodied, for example, in Marbury versus Madison, which in 1803 established the principle that the Supreme Court of the United States was the final arbiter on constitutional matters.

It would seem, after 184 years, that that matter should be at rest; but, unfortunately, it is not. There are those in prominent positions today who say that the Supreme Court does not have the final word, who say that a decision of the Supreme Court binds the parties but does not bind others as a matter of application of general principles. There are those who say that the executive branch and the congressional branch, article 1 and article 2 powers—the Congress, article 1; the executive, article 2—are separate and equal but are not bound by what the Supreme Court of the United States says on constitutional interpretation at that time.

I submit that that is a real problem. When Chief Justice Rehnquist was questioned during his confirmation proceedings, he did agree with that principle. When Justice Scalia was questioned at his confirmation proceedings, Justice Scalia would not agree with that kind of proposition. This Senator had concerns during the confirmation hearings of Judge Bork, because Judge Bork had written that, absent original intent, there can be no judicial legitimacy; and, absent judicial legitimacy, Judge Bork had written, there could be no judicial review.

Judge Bork had written that it would not be unthinkable in this country that we would not have judicial review, and this Senator questioned Judge Bork about that during the course of the hearings, and Judge Bork commented and explained that those were theoretical writings, theoretical speech; and that matter was put to rest and was not among those issues which I considered of substantive concern on which I based my decision to vote against Judge Bork.

The point is, Mr. President, that when we come to matters of baseline interpretation about the supremacy of Supreme Court decisions, or when we come to very important issues about the jurisdiction of the Supreme Court, or when we come to issues about the incorporation doctrine, that the Bill of Rights was incorporated by reference to apply against the States and the due process clause, those issues are rock bound, and the Senate has an obligation to make inquiry and to satisfy itself on those matters.

If Marbury versus Madison does not govern and the Supreme Court does not have the final word, then I suggest that we become a lawless Nation.

If Congress could strip the Court of jurisdiction to decide basic questions of freedom of speech, freedom of the press, freedom of religion, all those rights guaranteed in the Bill of Rights, then, again, we are deprived of a judicial system which has a realistic opportunity to function.

It is not easy to draw a line as to what questions should be answered and what questions should not be answered. I think the realities are that Judge Bork answered more questions because his writings had been so prolific and in his comments and Law Review articles and speeches he has raised many issues which require an explanation.

During the course of the confirmation proceedings on Justice Scalia members of the Judiciary Committee expressed the view that it might be necessary at some point to deny confirmation of a Justice unless there were answers given which had an overall outline of that individual's judicial views.

So, Mr. President, and this is elaborated upon in my written statement which has been made a part of the record, I hope that the process in this nomination will establish that as we look toward future nominations.

With respect to the issue of the media campaigns, Mr. President, I would say that those of us on the Judiciary Committee and those in the Senate think, to steal fact from fiction, we are not unused to having commercials on the radio and television and that it is possible to focus on the real issues and for this Senator and I think for all Senators those issues turn on the meaning of the Constitution and where Judge Bork as a nominee fits into the continuum of the Constitution and whether he had views which were in accordance with the tradition of the U.S. Constitution.

My comments on the substance, Mr. President, are set forth in documents which have been made a part of the record in the prior floor speech, so I shall not take the time of this body. I know other Senators are waiting at this time.

Accordingly, I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I am very happy to have this opportunity, and I appreciate the courtesy to me and wanting to yield to me to begin with of the distinguished Senator from Pennsylvania. It is typical for him. He is a gracious and courteous person.

I am happy to be up at this time. I would be happy to yield to Senator EXON, from Nebraska, because it really is not that important which order we are in, just that when we seek recognition we ought to get it.

Senator EXON told me he had a meeting in his office and to go ahead. So I think that is what I will do.

Mr. President, there is something that is unprecedented that I want to bring to the attention of the U.S. Senate at this time. Of the 70 judges in the courts, I might add, of the second judicial circuit of the United

States, 40 have been contacted who generally agreed in principle with this particular statement; 30 were not contacted because they were either out of town or at the Hersey conference or some other matter, but for the first time in history we have judges of the Second Circuit Court of Appeals putting themselves on record with this following statement.

First, let me go into it this way: these materials have been put together by the Committee for a Fair Confirmation Process. They are directed to the honorable Members of the U.S. Senate. This is what the first page says:

There is enclosed the first of a series of filings by the Committee for a Fair Confirmation Process. It includes:

1. A statement of the general purposes of the members of the Committee, all of whom are attorneys.

2. A Declaration by 23 federal judges of the Second Judicial Circuit.

3. The first of a series of "white papers," brief legal statements in response to the Majority Report of the Senate Judiciary Committee which recently acted on the nomination of Judge Robert H. Bork to the Supreme Court.

4. A copy of the original organizational telegram of the American Civil Liberties Union.

5. A paper, entitled "The Campaign Against Bork: How Far Is Too Far?" which highlights certain features of the advertising campaign against Judge Bork and a few features of the Majority Report, which will be discussed in detail in the seriatim white paper filings.

This is respectfully submitted by a Committee for a Fair Confirmation Process signed by Carla Hills, who, of course, was one of our Cabinet members in a prior administration and one of the impeccable people in this country, one of the nicest people I have ever met.

The second document is a statement by Leonard Garment on behalf of the Committee for a Fair Confirmation Process explaining this.

The third document in this order happens to read as follows:

*To the Honorable Members of the U.S. Senate:*

We submit herewith a Declaration by 21 federal judges of the Second Circuit on the subject of the excessive politicization of the nomination process by the introduction of extraneous forces and pressures. The position of the signatories is neither pro-Bork nor anti-Bork, but addresses what should be a central concern of all persons interested in safeguarding an independent judiciary.

I heard some of our colleagues say that process is not important here, only the issues. Process is what is involved here. I am going to get into that and I am going to get into it in some pretty strong terms before I am through here.

This is what these 23 judges have signed off on. This is unprecedented to have Federal judges so irate that they are willing to sign off on this and they are a large array of judges, appointed by different Presidents, Democrats and Republicans, to the best of my knowledge.

This is New York, October 20, 1987, and I think these words ought to be listened to by everybody in America. I do not know there is a more prestigious judicial circuit than the second judicial circuit and when judges put their names on something like this, sitting Federal judges, I think you can pretty well presume that they feel something is awry with the process. Here is what they say:

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.

Signed by 23 members of the Second Judicial Circuit.

It is a pretty important thing.

I ask unanimous consent that these matters be printed in the RECORD.

There being no objection, the materials were ordered to be printed in the RECORD, as follows:

COMMITTEE FOR A FAIR CONFIRMATION PROCESS

*To the Honorable Members of the U.S. Senate:*

There is enclosed the first of a series of filings by the Committee for a Fair Confirmation Process. It includes:

1. A statement of the general purposes of the members of the Committee, all of whom are attorneys.

2. A Declaration by 23 federal judges of the Second Judicial Circuit.

3. The first of a series of "white papers," brief legal statements in response to the Majority Report of the Senate Judiciary Committee which recently acted on the nomination of Judge Robert H. Bork to the Supreme Court.

4. A copy of the original organizational telegram of the American Civil Liberties Union.

5. A paper, entitled "The Campaign Against Bork: How Far Is Too Far?" which highlights certain features of the advertising campaign against Judge Bork and a few features of the Majority Report, which will be discussed in detail in the *seriatim* white paper filings.

Respectfully submitted,

CARLA HILLS.

(Of Counsel, Griffin Bell, Carla Hills, Michael Armstrong, Leonard Garment.)

COMMITTEE FOR A FAIR CONFIRMATION PROCESS

OCTOBER 20, 1987.

*To the Honorable Members of the U.S. Senate:*

STATEMENT BY LEONARD GARMENT ON BEHALF OF THE COMMITTEE FOR A FAIR CONFIRMATION PROCESS

The Senate Judiciary Committee Majority Report on the Bork nomination, released October 13, 1987, is a truly unfortunate document. Those of us who have deplored the gutter campaign that has been waged against Judge Bork, and were looking forward to a civilized debate on the Senate floor, are dismayed by a report that is incomplete, misleading, and without the slightest effort to give serious consideration to the testimony of Judge Bork or those who spoke on his behalf.

Ninety percent of this Report could have been written before the hearings began. A great deal of it is nothing more than an ideological tract, picking at Judge Bork's philosophy of judicial restraint and pretending that his views are somehow extreme. The arguments are nothing more than the same ones you can hear at any time in any law school—lawyers debating other lawyers over the perennial questions of legal philosophy. All the majority's arguments show is that Judge Bork is not a judicial activist like the Harvard professors upon whom the Majority Report almost exclusively relies. And we have not yet gotten to the point where someone is an extremist if he happens to disagree with whatever philosophy is current among particular factions at Ivy League schools.

When it gets down to facts, the Majority Report is simply unfair. For example, the title of one section in its introduction states, "The Negative Evaluation of Judge Bork by the Academic Community is Unprecedented." In support, the Report relies on a numbers game—pointing to letters generated by a 10 million dollar publicity campaign. The Report does not even mention the testimony of the 24 professors who testified at the hearings in favor of Judge Bork. The Report, in another introductory section, pretends to get support from "professional legal groups." This section relies almost entirely on a small minority of the American Bar Association Committee and falsely states that the Association of the Bar of the City of New York's 17,000 members opposed Judge Bork. The Senators know full well that the testimony of a few members of that Association, including its current President, was given without authorization of the committee charged with responsibility in such matters and without consulting the membership. A furor has arisen in the Association among lawyers vigorously protesting that the testimony did not speak for them.

On specific topics, the Report continues the tired generalities and misstatements about Judge Bork almost as if the hearings had not taken place. For example, in discussing the 1948 Supreme Court case *Shelley* v. *Kraemer*, the Report singles out Judge Bork's criticism of the opinion when the majority Senators known full well by now that his criticisms are no different from those expressed by virtually every scholar who has considered the case, including their own witnesses. Throughout, the majority cynically continues the canard that Judge Bork is somehow to be identified with causes involved in cases that he considered on purely procedural or constitutional grounds.

I have been working with a group named the Committee for a Fair Confirmation Process. The Committee members, in addition to myself, are: Griffin Bell, Carla Hills and Michael Armstrong. Other volunteer attorneys are working with us in an attempt to focus the coming Senate debate on relevant issues and to do what we can to bring the proceedings back to the level that consideration of a Supreme Court Justice deserves. We will now focus our efforts specifically upon this document—the Committee Majority Report. Beginning today, we are issuing, *seriatim*, a series of "White Papers" addressing, topic by topic, the issues which the Majority Report purports to address and some issues, like Judge Bork's veiws on law enforcement, which the Report pointedly ignores. We will, on behalf of Judge Bork, try to help to get this debate back on a professional, responsible level. In the process, we will set the record straight.

Respectfully submitted,

LEONARD GARMENT.

(Of Counsel, Griffin Bell, Carla Hills, Michael Armstrong, and Leonard Garment.)

COMMITTEE FOR A FAIR CONFIRMATION PROCESS

OCTOBER 20, 1987.

*To the Honorable Members of the U.S. Senate:*

We submit herewith a Declaration by 23 federal judges of the Second Circuit on the subject of the excessive politicization of the nomination process by the introduction of extraneous forces and pressures. The position of the signatories is neither pro-Bork nor anti-Bork, but addresses what should be a central concern of all persons interested in safeguarding an independent judiciary.

MICHAEL ARMSTRONG.

(Of Counsel, Griffin Bell, Carla Hills, Michael Armstrong, and Leonard Garment.)

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.

JUDGE ROBERT H. BORK AND FREE SPEECH

(Response to pages 50-57 of the Majority Report)

INTRODUCTORY MEMORANDUM FOR RELEASE WITH WHITE PAPER

The accompanying paper, "Judge Robert H. Bork and Free Speech," is the first of a series of "White Papers" to be issued under the direction of our Committee dealing with the major points at issue in the nomination of Robert H. Bork to the Supreme Court. These papers are intended to answer, in specific terms, the points raised by the majority report of the Senate Judiciary Committee regarding the Bork nomination.

The recommendation of the majority report that the nomination of Judge Bork be rejected is explicitly and exclusively based on his "judicial philosophy and approach" (Report at vii). The majority can find no fault with Judge Bork's competence, integrity or temperament. Instead, over 90 of the report's 100 pages are devoted to unfavorably comparing what the majority presents as Judge Bork's alleged philosophy with its own analysis of various legal issues.

We will not address the debate over the propriety of considering a nominee's philosophy and ideology or focus upon the obvious dangers posed by such considerations. It has been the modern consensus of the Senate—as unambiguously professed on prior occasions by Senators Kennedy, Biden and Metzenbaum—that such considerations are not relevant *at all*. (See addendum.)

Rather, we simply ask each Senator, before casting a vote on Judge Bork's philosophy, to understand the positions Judge Bork has taken, and the positions that other eminent judges and scholars have taken on the legal issues under debate. In this regard, we believe that the Senate has been presented with a seriously flawed Committee majority report.

Consistently, the majority report attacks Judge Bork for positions he never held. Again and again it purports to state Judge Bork's position, without giving any citation. Invariably, the reason no citation is given is because none exists. Before the hearings began, Judge Bork's opponents created a "straw man" of a rigid, unbending, right-wing ideologue who was hostile to minorities, women and free speech. When Judge Bork's testimony, and the other evidence, did not support this image, the critics reacted by simply ignoring the evidence in some instances and by claiming in others that Judge Bork had changed his position—from the one they had falsely represented him to have.

We hope, in the next few days, to issue "White Papers" addressing the inaccuracies, misrepresentations, and omissions in the majority report with respect to the following specific subjects: women's rights; civil rights; privacy; law enforcement; executive power; antitrust; judicial restraint; and the so-called "confirmation conversion."

We respectfully request that Senators referring to the majority report for guidance as to Judge Bork's positions on these subjects refer also to the papers prepared by our Committee.

ADDENDUM

Senator Kennedy (on the nomination of Justice O'Connor):

"It is offensive to suggest that a potential justice of the Supreme Court pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential justice must past the litmus test of any single issue interest group."

Senator Biden (on the nomination of Abner Mikva):

"The real issue is your competence as a judge and not whether you voted right or wrongly on a particular issue . . . if we take that attitude, *we fundamentally change the basis* on which we consider the appointment of persons to the bench.

Senator Metzenbaum (to witness opposing nomination of Ruth Bader Ginsburg):

"You don't mean that every nominee up for confirmation ought to have his or her views explored as to what his or her positions are on all of the controversial issues that may come before those jurisdictions? *You don't actually mean that, do you?*"

JUDGE BORK AND FREE SPEECH

The majority report of the Senate Judiciary Committee devotes seven pages to a discussion of Judge Bork's position on the freedom of speech and press guaranteed by the First Amendment (Report, pp. 50-57) without including a single word about Judge Bork's extensive and impressive record in First Amendment cases as a Circuit Judge over the past five years. Instead of addressing that substantial body of case law, it chooses to focus on a law review article that Judge Bork wrote over fifteen years ago in 1971.

While it is entirely proper for the Senate to consider Judge Bork's extra-judicial writings and comments, the purported concern with the 1971 article to the exclusion of his judicial record is curious, particularly in light of the full consideration the article received when Judge Bork was confirmed by the Senate as Solicitor General in 1973 and again as a Circuit Court Judge in 1982. Moreover, a fair reading of the 1971 article, especially in view of Judge Bork's subsequent writings, his judicial record and his testimony before the Committee, fails to provide support for the majority report's assertion that Judge Bork is insensitive to the First Amendment.

A. JUDGE BORK'S RECORD ON THE COURT OF APPEALS

Judge Bork's record on the Court of Appeals, particularly his opinions in libel actions and in cases involving government regulation of speech, clearly reflects his determination to defend and expand the freedoms guaranteed by the First Amendment. Yet these opinions are studiously ignored by the report—not only in the section dealing with the First Amendment but also in the separate section which purports to assess Judge Bork's performance on the Court of Appeals (Report, pp. 50-51, 84-93).

*1. Defamation Cases*

It has been widely recognized that the greatest threat to First Amendment freedoms at the present time may lie in the vulnerability of the media to defamation actions. It is in this critical area that Judge Bork has made a major contribution to First Amendment values—a contribution that would remain unknown to anyone who read only the report.

In *McBride* v. *Merrell Dow and Pharmaceuticals,* 717 F.2d 1460, 1466 (1983), Judge Bork's opinion for a unanimous court stated: "Libel suits, if not carefully handled, can inhibit journalistic independence. Even

if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship."

Judge Bork's observation in *McBride* foreshadowed an even more significant opinion the following year in *Ollman* v. *Evans*, 750 F.2d 970 (1984), where the Court of Appeals, sitting *en banc*, dismissed a libel action against columnists Evans and Novak. In that case, Judge Bork wrote a concurring opinion which was joined by three other judges and which, in the view of many commentators, overshadowed the opinion of the Court. In his opinion, Judge Bork eloquently described values central to the First Amendment:

"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 assessments. Perhaps it would be better if disputation were conducted in measures phrases and calibrated assessments, and with strict avoidance of the ad hominem; better, that is, if the opinion and editorial pages of the public press were modeled on The Federalist Papers. But that is not the world in which we live, ever have lived, or are ever likely to know, and the law of the first amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate."—*Id.* at 993.

Judge Bork further stressed that the First Amendment must undergo a continuing evolution:

"In a case like this, 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. The world changes in which unchanging values find their application."—*Id.* at 995.

Judge Bork concluded that the Constitutional protection afforded statements of opinion must be extended to assertions of fact which could be fairly characterized as "rhetorical hyperbole." Such a conclusion was, in his view, essential to the protection of First Amendment freedom.

Judge Bork's concurrence in *Ollman* was hailed by such advocates of press freedom as Anthony Lewis (describing the opinion as "extraordinarily thoughtful") and libel lawyer Bruce Sanford ("There hasn't been an opinion more favorable to the press in a decade.").

*2. Government Regulation of Speech*

Judge Bork's protection of free speech in the context of defamation actions is complemented by his opinions protecting free speech from government regulation. For example, in *Lebron* v. *Washington Metropolitan Transit Authority*, 749 F.2d 893 (1984), Judge Bork participated in the reversal of a District Court decision and held that the Transit Authority had violated the First Amendment in refusing to lease advertising space for a poster critical of President Reagan. In *Brown & Williamson Tobacco Corp.* v. *FTC*, 778 F.2d 35 (1985), Judge Bork voted to vacate as overly broad an injunction directed against commercial advertising.

Judge Bork has also emphasized the importance of First Amendment freedoms in cases involving governmental regulation of broadcasting. In this connection, it is significant that the prevailing law established by the Supreme Court gives broadcasters significantly less freedom than that afforded the print media. While scrupulously adhering to Supreme Court precedent, he has pointedly suggested the desirability of reconsideration of this distinction by the Supreme Court. See *Telecommunications Research and Action Center* v. *FCC*, 801 F.2d 501 (1986); *Branch* v. *FCC*, 824 F.2d 37 (1984); *Loveday* v. *FCC*, 707 F.2d 1443 (1983).

Only in narrowly defined circumstances has Judge Bork approved of government regulations that impinges on free speech. For example, in *CCNV* v. *Watt*, 703 F. 2d 586 (1984), Judge Bork, in dissent, supported a Park Service regulation barring demonstrators from sleeping in tents across from the White House. In *Clark* v. *CCNV*, 468 U.S. 288 (1984), the Supreme Court upheld Judge Bork's position. In *Finzer* v. *Barry*, 798 F. 2d 1450 (1986), *cert. granted*, 107 S. Ct. 1282 (1984), Judge Bork writing for the court upheld the application of a law which barred the conduct of a demonstration within 500 feet of the Nicaraguan embassy.

B. JUDGE BORK'S 1971 LAW REVIEW ARTICLE

In 1971, Judge (then Professor) Bork wrote an article entitled "Neutral Principles and Some First Amendment Problems," 71 Indiana L.J. 1, in which he set forth, on a "tentative and exploratory" basis, a broad theory of Constitutional interpretation inspired by the work of Professor Herbert Wechsler. The latter part of the article undertook to illustrate the application of such principles to First Amendment law.

The report of the majority focuses upon two aspects of the article which it purports to find troubling: the extent to which the First Amendment protects (a) speech that advocates forcible overthrow of the government or violation of the law; and (b) speech that is non-political. With respect to both points, Judge Bork has substantially changed his position since 1971, in part as a matter of simply accepting settled doctrine of the Supreme Court and in part as a matter of philosophy. It is important to understand that such changes are by no means unique to Judge Bork. The reports of the Supreme Court are full of split decisions which, once decided, have been faithfully applied by the full Court, including those who initially dissented. Moreover, there are instances in which Justices have abandoned positions which they had previously persuaded their colleagues to adopt.[1]

Nevertheless, the report insists upon viewing Judge Bork's changes of position with profound suspicion. As shown below, we are persuaded that a fair reading of the record shows that the majority's concerns, if genuine, are misplaced.

*1. Speech Advocating Violence or Violation of the Law*

In the 1971 article, Judge Bork criticized, on philosophical grounds, the "clear and present danger" doctrine and the decision in *Brandenburg* v. *Ohio*, 395 U.S. 447 (1969), which had reformulated, or supplanted, that test by holding that the First Amendment does not "permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to lead to produce such action." *Id.* at 447. The particular speech held in *Brandenburg* to be protected occurred at a rally of the Ku Klux Klan at which references to a march on Washington and taking "revengeance" were accompanied by a variety of vivid racial epithets.

It seems perfectly reasonable to question, as a philosophical matter, whether the type of speech illustrated by *Brandenburg* has any political value. On the other hand, Judge Bork has since acknowledged the strength of the countervailing philosophical argument reflected by *Brandenburg* as well as the fact that *Brandenburg* is firmly embedded in the law of the land. He testified, repeatedly and unequivocally, that he had no interest is seeking to overturn *Brandenburg*.

Not satisifed with Judge Bork's acceptance of *Brandenburg*, the report attacks his lack of enthusiasm for two subsequent cases, *Cohen* v. *California*, 403 U.S. 15 (1971) and *Hess* v. *Indiana*, 414 U.S. 105 (1973). Both cases reversed convictions for disorderly conduct arising out of actions that involved, *inter alia*, the expression of obscenities. Contrary to the report (p.54), the decision in *Cohen* was *not* unanimous. Unaccountably, the report overlooked the dissent hy Justice Blackmun, joined by Chief Justice Burger and Justice Black, which observed that under the circumstances, "the Court's agonizing over First Amendment values seems misplaced and unnecessary." *Id.* at 27. In *Hess* v. *Indiana*, a dissent by Justice Rehnquist was joined by Justice Blackmun and Chief Justice Burger. One may agree or disagree as to the result in *Cohen* or *Hess* (or the significance of the obscenity in each), but surely neither decision is, as the report would suggest, beyond debate.

*2. Non-Political Speech*

In the 1971 article, Judge Bork suggested that since the First Amendment was intended to protect speech that is explicitly political, the scope of its application might be similarly limited. As he pointed out in his testimony before the committee, great scholars of the First Amendment, such as Kalven and Meicklejohn, "all start with political speech as the core of the amendment." (Tr. Sept. 16, 1987 pp. (112-113)). See also *Roth* v. *United States*, 354 U.S. 476, 484 (1956) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Brennan, J. citing a letter of the Continental Congress).

Nevertheless, the subsequent writings of Judge Bork, as well as his testimony before the Committee, make it clear that Judge Bork has long since concluded that the First Amendment protects a full range of non-political expression. Such protected expression might be moral, scientific, literary, or artistic, so long as it did not sink to the level of obscenity. (See, *e.g.*, Tr. Sept. 16, pp. 110-114; Tr. Sept. 17, pp. 16-25). The majority, however, professes concern that Judge Bork might still leave unprotected some legitimate forms of expression. Specifically, the Committee refers to a 1985 interview in which Judge Bork expressed doubt that the Framers of the Constitution "intended to protect some forms of dancing from regulation." From this, the report leaps to the

[1] For example, in *Miller* v. *California*, 413 U.S. 15 (1973), Chief Justice Burger pointed out that "Mr. Justice Brennan, author of the opinions of the Court, or the plurality opinions, in *Roth* v. *United States, supra; Jacobellis* v. *Ohio, supra; Ginzburg* v. *United States*, 383 U.S. 463 (1966), *Mishkin* v. *New York*, 383 U.S. 502 (1966), and *Memoirs* v. *Massachusetts, supra*, has abandoned his former position and now maintains that no formulation of this Court, the Congress or the State can adequately distinguish obscene material unprotected by the First Amendment from expression, *Paris Adult Theatre I* v. *Slayton, post*, p. 73 (Brennan, J., dissenting)." *Id.* at 26-27.

startling and unwarranted conclusion that, in Judge Bork's view:

"A Rubens painting could not be hung in a museum if the city council chose to prohibit it. The same would be true of a ban on performances by the Alvin Ailey Dance Troupe."—(Report, p. 56.)

That issue was squarely presented to Judge Bork at the hearing and squarely answered. He explained that, in his reference to "some forms of dance," he specifically had in mind a Supreme Court decision which was concerned with "whether a community could ban dancing nude in a bar." (Tr. Sept. 17, p. 19). He pointed out that the court had upheld the ban only on the basis of the Constitutional authority of the state to regulate sales of liquor. In Judge Bork's view, the same result could have been reached more directly without offense to the First Amendment. *Id.* See *California* v. *La Rue,* 409 U.S. 109 (1972).

The report simply ignores Judge Bork's explanation, however, and insists on equating his views on "nude dancing in a bar" with the view that he might take of a Rubens painting or the Alvin Ailey Dance Troupe. The attempt is, on its face, absurd. See *California* v. *La Rue, supra* at 118 ("But we would poorly serve both the interest for which the State may validly seek vindication and the interest protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the Constitutional equivalent of a performance by a scantily clad ballet troupe in a theatre").

It is Judge Bork's view—and it has long been the view of the majority of the Supreme Court—that the First Amendment does not protect obscenity. As the most casual observer of the Court is aware, the Court has had enormous difficulty in defining obscenity, and, thus, the ambit of speech protected by the First Amendment. The path of the Court in this area has been marked by twists and turns, abandonments of prior decisions and confessions of incoherence. It is entirely possible that Judge Bork would define obscenity somewhat differently than the Court has defined it from time to time in the past or may from time to time in the future. However, the difference between Judge Bork and the majority of the Court, if any, is likely to be rather modest—certainly in comparison with the wide difference between the court's position and the view of Justice Brennan (*i.e.,* that obscenity simply cannot be defined and that, therefore, at least in the case of consenting adults, it can never be prohibited). See *Pope* v. *Illinois,* 55 U.S.L.W. 4595, 4598 (May 4, 1987).

In no area do Judge Bork's opinions show a sharp divergence from the Court's current First Amendment positions. But to argue for his appointment to the Court on this basis leaves us with a sense of unease. If strict adherence to the perceived current doctrines of the Supreme Court is to be the litmus test for future nominees, what might become of a nominee who happened to subscribe to a minority position, such as that of Justice Brennan on obscenity, or to a nominee who once held such minority views?

In insisting on a rigid application of this criterion, Judge Bork's opponents are creating a dangerous precedent. Still, even if we measure Judge Bork by the standard that his critics have created, his performance in no sense justifies the unreasoned hostility that pervades the Judiciary Committee's majority report.

The same is true in other areas of First Amendment jurisprudence. Judge Bork's respect for these guarantees and their defense is profound. It is disheartening to see that the committee majority refuses to discuss his views with any seriousness.

Respectfully submitted,

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(Of Counsel, Griffin Bell, Carla Hills, Michael Armstrong, Leonard Garment, October 20, 1987.)

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ACLU FOUNDATION,
*New York, NY, August 31, 1987.*

Late yesterday ACLU Board voted to oppose nomination of Judge Robert Bork to U.S. Supreme Court.

Are moving at once to put in motion nationwide mobilization plan to block his appointment.

Detailed research reveals Bork far more dangerous than previously believed. His stated views clearly place him outside any range of judicial philosophy acceptable in recent decades. If his views were to prevail we risk nothing short of wrecking entire Bill of Rights and Federal courts in protecting individual liberty.

ACLU's decision not premised on single issue like abortion, racial equality, sex discrimination, privacy, religious liberty, or artistic freedom—even though all these would be in grave danger. Our decision to oppose is far more basic: his confirmation would threaten our system of government.

He does not believe in Supreme Court's role as defender of liberty against government abuse. In his mind Constitution protects power of majority to impose its moral values on all citizens. Record shows he believes that Supreme Court must defer to the will of local majorities—State and local legislatures.

This is basis for destroying protective function of Federal courts and overthrowing American tradition of tolerance for minority beliefs. Church/state issue good example. Bork says "Government is inevitably entangled with religion." He believes "* * * exclusion (of religion in public schools) is an affront to democratic majority."

An preparing detailed memo for you. Time is short. Urgently need your immediate financial help to launch this mobilization. Only tough, targeted campaign will work. Press releases, single issue pleas, "shouting from rooftops" simply not enough.

ACLU in unique position to make difference because Senate knows we have special credibility where entire Bills of Rights and Federal courts concerned.

Senate vote likely to be decided by slimmest of margins. ACLU most effective civil liberties voice in Washington. Highly respected by Senate. Can make the critical difference.

Early this morning began mobilization to fucus on key Senate votes—reveal startling results of our research to Senators and editorial boards—and marshall support of opinion leaders in key States.

Requires extra staff, sophisticated materials, best legal talent available, activating our network of State affiliates. Enormously expensive.

Your special help critical. Time is short. Hearings starts soon. Urge you to rush emergency contribution at once.

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THE CAMPAIGN AGAINST BORK: HOW FAR IS TOO FAR?

Every political debate has its exaggerated charges and inflated rhetoric. But the falsehoods spread in the last four months by the anti-Bork campaign have been much uglier than the usual give-and-take of American public life.

First, the campaign has told a considerable number of plain lies, using words that are either false or deliberately twisted to convey the opposite of the truth.

Here are just a few examples:

People for the American Way's main anti-Bork TV ad is narrated by Gregory Peck. Bork, says Peck in the ad, "defended poll taxes and literacy tests, which kept many Americans from voting." Anyone who actually took these positions would indeed be unfit to sit on today's Supreme Court.

But the accusation is a lie. Robert Bork has never defended any poll tax, and he has never defended any literacy test.

He has, as is well known, argued with parts of some of the Supreme Court's opinions on these matters, on the grounds that the Court reached its conclusion through wrong reasoning. That is a very long way from defending poll taxes. To say otherwise is simple falsification of the facts.

One of PFAW's big newspaper ads against Judge Bork claims he ruled that a company could force women to be sterilized or lose their jobs. Five women, the ad goes on to say, "underwent surgical sterilization."

The fact is that the women who chose sterilization were not part of the case that Judge Bork heard. No woman was coerced into sterilization as the result of any ruling Judge Bork made.

You can see why this particular lie is an especially inflammatory one.

The National Abortion Rights Action League has gone farther on the subject of sterilization. A NARAL anti-Bork newspaper ad says, "According to Bork, women can be forced to choose between being sterilized and losing their jobs." Anyone who really takes this position as NARAL states it, is of course a moral monster.

Here is what really happened: A case that Judge Bork once heard on appeal involved chemical company jobs that exposed workers to relatively high levels of lead. The lead caused birth defects. It was established, however, that the company could not get the lead out of the process. This was the awful circumstance that forced some women into their grim choice, not anything done or said by Judge Bork.

A Planned Parenthood anti-Bork ad begins, "Robert Bork's Position on Reproductive Rights: You Don't Have Any." This is, needless to say, an absurd slander even on the face of it.

This Planned Parenthood ad also says, "Bork sees the Court not as a problem-solver, guided by past decisions, but as a reckless troublemaker." Judge Bork sees no such thing. He has said the opposite at length under oath. Not one word he has written in his five years as a judge on the U.S. Court of Appeals provides evidence to the contrary.

A self-described "study" by Public Citizen accuses Judge Bork of favoring business over consumers 96 percent of the time in "controversial" cases. This "study" ignores 86 percent of Judge Bork's opinions to reach this conclusion.

It is hardly necessary to repeat the scurrilous details of Senator Kennedy's "back alley abortion" campaign opener.

Second, the anti-Bork campaign has relied on a good number of large, but no less clear, distortions of the record.

For instance, the campaign has repeatedly accused Judge Bork of having called the

1964 Civil Rights Act, or the principle of the Act, something of "unsurpassed ugliness."

The real story is this: In that 1963 New Republic article in which the controversial phrase occurred, then-Professor Bork quoted Mark DeWolf Howe, who had said that Southern resistance to civil rights advances was an effort to preserve the "ugly customs of a stubborn people."

Bork agreed with him. As Bork put it, "Of the ugliness of racial discrimination there need be no argument." He also expressed this sentiment elsewhere in the article.

What worried Bork, though, was that even the best intentioned legislation, like civil rights laws designed to prevent the oppression of a minority, could at some point turn into another form of coercion by a majority. It was coercion, according to Bork, that was the idea of "unsurpassed ugliness."

Bork chose to make his argument using the word "ugliness," of course, to emphasize that he was addressing the same set of problems originally raised by Mark DeWolfe Howe.

Bork's worries were by no means the anxieties of an extremist. In that same issue of the liberal New Republic, the editors wrote that many of the magazine's readers shared Bork's doubts.

Bork was wrong in his 1963 analysis of the pending civil rights legislation. He repudiated this early view, publicly, fourteen years ago. To attack Bork using a position that he long ago disowned is character assassination. To present that early phrase of his as evidence of racism is worse.

A final example: The anti-Bork campaign's use of the word "extremism" goes beyond the bounds of honest differences of opinion. Judge Bork has sat on a federal appeals court for five years. To take only the most dramatic of the statistics on this issue, he has never been reversed by the Supreme Court. He is the only judge of the D.C. Circuit Court with this record. Judge Bork's fellow Circuit Court judges appointed by Democratic presidents have voted with him from 75 ranging upward to 91 percent of the time.

There is simply no intelligible meaning of the word "extremist" that fits these facts.

The people campaigning against Judge Bork may have an answer to this challenge. But we do not know, because they have dealt with it by simply sweeping his judicial years under the rug and acting virtually as if they did not exist.

This is not honest. It is the sort of practice that tries to prevent difficult questions from every being discussed. It is not fitting behavior in a free society committed to settling its disputes through the open competition of conflicting positions and ideas.

Respectfully submitted,

COMMITTEE FOR A FAIR CONFIRMATION PROCESS.
By: LEONARD GARMENT.

Of Counsel: Griffin Bell, Carla Hills, Michael Armstrong, Leonard Garment.

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[From the Boston Globe, Oct. 11, 1987]

KENNEDY TELLS HOW HE ROUSED OPPOSITION

(By Ethan Bronner)

Forty-five minutes after President Reagan nominated Judge Robert H. Bork to the Supreme Court on July 1, Sen. Edward M. Kennedy was on the floor of the Senate, framing the opposition to confirmation in the starkest of terms.

But unless the White House pulls off a miracle before the full Senate votes, this battle can clearly be labeled a Kennedy victory.

A startled Bork, relaxing in a West Wing office, watched on the C-Span cable network as Kennedy declared that 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 citizens' doors in midnight raids. . . ."

Kennedy's statement, as well as his comments during the hearings, have been the object of unabated derision, referred to repeatedly in attacks on how the nomination has been scuttled through a shameful distortion of Bork's record.

Through his statements, through hundreds of telephone calls over the summer and through the drawing power of his name, Kennedy served as a prime mover in bringing the Bork nomination to its knees.

If Sen. Arlen Specter (R-Pa.) played the role of high-minded analyst in Bork's committee defeat, Kennedy served as the rough-and-tumble politician and troop-rouser.

He has been criticized severely for it, but he makes no apology.

"I wanted to make clear what was at stake in this nomination," said Kennedy, thinking back over the past few months as he sat in his Capitol Hill office Friday.

"The statement had to be stark and direct so as to sound the alarm and hold people in their places until we could get material together," he said. "I was confident we could win this one."

The story of Kennedy's success—one shared by liberal lobbying groups and by Sen. Joseph R. Biden Jr. (D-Del.), the committee chairman—begins the day Associate Justice Lewis F. Powell Jr. announced his retirement from the high court.

Kennedy knew that Bork was the likely replacement. His staff gathered a number of Bork's now well-thumbed writings, including his 1971 Indiana Law Journal article and his 1963 piece in The New Republic attacking portions of the proposed Civil Rights Act.

Over that weekend, the anti-Bork statement was written. Although its more alarming lines are usually cited, it is instructive to look at other parts of it to see how the arguments Kennedy made against Bork at the time served opponents during the effort to defeat his nomination.

He discussed the Watergate scandal and called Bork "outside the mainstream of American constitutional jurisprudence in the 1960s, let alone the 1980s."

He highlighted Bork's modifications over the years and pointed to the theme of confirmation conversion, saying that the changes resulted from the "twin pressures of academic rejection and the prospect of Senate rejection."

"America is a better and freer nation than Robert Bork thinks," Kennedy added. He insisted that although Reagan is president, he should not be allowed "to impose his reactionary vision of the Constitution on the Supreme Court and the next generation of Americans."

Kennedy said he considered delivering the speech the day before Bork was named in the hopes of deflecting the nomination, but that he ultimately decided that such a strategy would be ineffective.

He said he met with Biden, who had not yet made up his mind on the nomination. Within a week, and following a meeting with civil rights groups, Biden was aboard.

Kennedy had led the unsuccessful fight against elevating William H. Rehnquist from associate justice to chief justice a year ago. He garnered 33 votes in that one and said that with that base as well as with more votes from a newly controlled Democratic Senate, he felt victory was within reach.

On July 8, Kennedy met with Biden and Sens. Howard M. Metzenbaum (D-Ohio) and Alan Cranston (D-Calif.) to work on strategy.

The first point was to gain time to organize against the nomination, and so a decision was reached that there be no hearings until after the August recess.

The next point was to insist on the Senate's coequal role in the nomination process. Kennedy said he had long felt that the Senate should take this role more seriously but that because this nomination seemed so likely to shift the court's balance, many others began to accept it.

Biden made a crucial statement on the Senate floor about the Senate's role, and opinion polls showed that the public was very receptive to the examination of a nominee's philosophy.

The group examined a list of several dozen undecided senators and divided them based on who knew whom best. Kennedy's staff put together an inch-thick binder of Bork's provocative writings and handed one out to about 10 senators to read over the recess. In August, Kennedy hired Anthony Podesta, the founding president of People for the American Way and a liberal lobbyist, to work on organizing opposition.

Podesta recalls going up to the Kennedy summer home in Hyannisport and watching the senator call around the South—Ernest Morial, the former New Orleans mayor, and the city's current mayor, Sidney Barthelemy. In Alabama, he reached Mayor Richard Arrington of Birmingham, Mayor Johnny Ford of Tuskegee and Joseph Reed, the Alabama Democratic Conference chief.

At one point, Kennedy woke up Rev. Joseph Lowery at the Hyatt Hotel in New Orleans before the Southern Christian Leadership Conference's annual convention.

After talking with Kennedy, Lowery turned the entire day's meeting into an anti-Bork strategy session. From that meeting, the issue made its way into black churches throughout America.

"It has a special effect when Kennedy calls," reflected Jeffrey Blattner, one of Kennedy's judiciary committee aides and a key player in the anti-Bork fight. "A lot of people in this country think of Kennedy as the leading spokesman for civil rights, and when he calls personally it sends a pretty strong message about how important something is."

It was Kennedy who signed up Mayor Andrew Young of Atlanta, one of the hearings most effective witnesses. He also called former Rep. Barbara Jordan (D-Texas), who at first hesitated for health reasons and then agreed to testify.

From Cape Cod, Kennedy, chairman of the Senate Labor Committee, called every one of the 30 executive members of the AFL-CIO and, in September, held a conference call with 40 state labor leaders around the country in which he spoke about Bork's record on organized labor.

He called the former American Bar Association president, Robert Meserve, the former secretary of health and human services, Joseph Califano, and a host of prominent lawyers who subsequently became active in the fight through op-ed pieces, testimony and local organizing.

Finally, Kennedy gathered some noted liberal legal scholars, including Laurence

Tribe, Philip Kurland and Kathleen Sullivan, all of Harvard University, to build a substantive case against Bork.

He delivered the culmination of their efforts in a widely quoted speech Sept. 11 at Georgetown University Law School.

What Kennedy was most worried about was the testimony of Bork himself. He was known to be witty, charming and penetratingly intelligent, and he had been coached carefully by White House lobbyists. But Bork, Kennedy feels, was unsuccessful.

"It was increasingly apparent after the first hour or two of his testimony that he was not going to pull this off," Kennedy said of Bork's testimony.

In fact, while Kennedy questioned Bork about privacy, the constitutional protection of women, free speech and other sensitive areas, Biden kept passing to Kennedy a football scorecard on Senate stationery that read: 12–0, then 18–0 and 24–0. Toward the end of Kennedy's turn, Biden's sheet read "30–0 if he keeps on."

"Bork displayed a cold, judicial attitude," Kennedy said. "His background is economics and antitrust and he applied that kind of thinking to privacy and civil rights. It sounded terrible."

Kennedy says what was essential in beating Bork was the host of popular concerns about the judge's stands. Civil rights may have been a prominent issue for some southerners but, not wanting to appear to be bound to special interest groups, they could also refer to privacy and women.

Podesta said the apparent success of the anti-Bork efforts has much to do with the ability of opponents to set the agenda for debate. "We tried as often as possible to talk about cases from the 1920s and 1940s that Bork had attacked to show how fundamental his disagreement was," he said.

Finally, after the major events of the hearings were over, Kennedy said he realized that instead of sitting and listening to more liberal groups testify, he and Biden and others ought to be talking to senators. As a result, he met with the groups that planned to testify and discouraged them. They agreed and the hearings ended after 12 days. They had been expected to go longer.

Mr. HATCH. Mr. President, I do know that this never has been done before. Something has to be wrong with the process for 23 Federal judges to put their names to something like that. The other 17 who were contacted did not agree to put their names on it but, as I understand, agreed in principle with that statement, basically stated so.

At the outset of this debate, I would-like to honor Judge Robert H. Bork, one of the most qualified and impressive individuals, it seems to me, ever nominated to the Supreme Court. In the unlikely event that he is confirmed, history is likely to remember him as one of the greatest jurists of the latter half of this century. In the event that he is not confirmed, history will remember him in two senses—first, as an individual who did more than almost any other in the latter half of this century to restore legal honesty and integrity to the interpretation of the Constitution and, second, as the unfortunate and undeserving victim of political circumstances.

SUMMARY OF QUALIFICATIONS

In all seriousness, Mr. President, I feel honored to speak on behalf of one of the most qualified jurists ever to be on the Supreme Court.

His résumé—outstanding law student, successful trial practitioner, leading law professor, esteemed author and lecturer, excellent Solicitor General, and respected judge on the District of Columbia Circuit—speaks for itself.

Nonetheless a few details might demonstrate the quality of his life's work. He was not merely one of the top law students at the University of Chicago, but the managing editor of the Law Review. He was not merely a top law professor for 15 years, but the holder of two endowed chairs. He was not merely an excellent Solicitor General, but successfully represented the United States before the Supreme Court in hundreds of cases during his 4-year tenure. He was not merely another appellate judge, but a judge who in 416 total cases was never once reversed on appeal.

I will just show this one chart here. You talk about the reversal rate of those on the Circuit Court of Appeals for the District of Columbia. It lists the judges by order of reversal from J. Skelly Wright reversed 11 times right on down to Robert Bork who was the only one never reversed.

I am not saying that it is wrong for those people to be reversed. It is sometimes important for judges to render courageous opinions and take courageous positions that may be reversed. On the other hand, I think it is significant that in his experience as one of the great circuit court judges of the country he never was reversed on appeal.

Moreover, the Supreme Court six times adopted his position when he had the courage to dissent from the majority of his judicial colleagues. This is a jurist who, in the words of President Carter's legal counsel, Lloyd Cutler, will be counted by history as belonging alongside a few select Justices, like Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Potter Stewart, and Lewis F. Powell, Jr.

Judge Bork was paid an even higher tribute than even that endorsement, however. That tribute is found in the witness list of those who have volunteered to testify on your behalf. That list includes a former President, a former Chief Justice, 6 former Attorneys General of both parties, 12 top leaders of law enforcement officers, numerous law schools deans, numerous leading law professors in the Nation, several top antitrust lawyers, 3 bar leaders, several of your former colleagues at the Department of Justice and in the practice of law, and other influential lawyers and organization heads. If an individual can be judged by the company he keeps, Judge Bork is indeed an honored individual.

Now, I say the process is the issue.

In light of these remarkable credentials, it is difficult to understand why Judge Bork's nomination would generate controversy. In fact, I do not know of one member of the committee who did not agree that he is a person of high ethical standards, a person of extremely fine judicial competence and lawyer competence and legal competence, and a person with good judicial demeanor and ability.

The fact is that the answer, it seems to me, is found in one word of why anybody would be against him—and I think it is tragic in this judicial context—and I believe that word to be "politics." Judge Bork is experiencing the kind of innuendo, intrigue, underhanded tactics that usually accompany a political campaign.

And I have heard the comments about the President being political in picking him. Let me tell you, every President who has ever had an opportunity to appoint a Supreme Court nominee, every President, bar none, has tried to pick somebody who was consistent with his own philosophy, whether it was F.D.R. or John F. Kennedy, or Lyndon Johnson, or Richard Nixon, or Gerald Ford, or Jimmy Carter, or, in this case, Ronald Reagan. So politics does enter into it. And the Founding Fathers understood that in the sense that the President tries to pick somebody who is consistent with his own political philosophy.

But when it becomes a matter of politics, and outside politics at that, and becomes a major political campaign in America, we have to all stop and take note and ask ourselves what has happened.

The answer is found in one word, which is tragic in this judicial context, and that word is "politics." Judge Bork is experiencing the kind of innuendo, intrigue, and underhanded tactics that usually accompany a political campaign. The sensitive constitutional process of selecting judges has been characterized by distorted newspaper advertisements, erroneous radio commercials, 30-second TV smear campaigns, misleading fundraising appeals, competing and confusing and, I might add, dishonest polls, unsubstantiated accusations, false allegations, deceptive direct mail soliciting, and the list goes on. These tactics are familiar to Senators. Many of us have been the target of this kind of political campaign. I just saw one today put out by the Democratic Senatorial Campaign Committee that mentioned me rather prominently in a very bad way. These dirty campaign strategies are distasteful in political races, but they should have no place whatsoever in a judicial nomination proceeding.

Some of those who oppose Judge Bork's confirmation have countered that Judge Bork's supporters are raising these issues of procedural fairness and propriety only to shift the issue. To that I respond that, in this instance, the process is the issue. I welcome this debate and the opportunity to discuss Judge Bork's record in open, factual, and reasonable terms, but when political dirty tricks dictate the pace and outcome of judical confirmations, the process is the issue. The process in the issue because of the danger posed to our liberties by that process.

We need to openly confront that danger. To eliminate the threat posed by this process in the future, Judge Bork has taken the courageous step of requesting this debate. Accordingly, we owe him and we owe the Nation the respect of confronting directly the real issue.

There is the danger of political inquisitions.

Federal judges are not politicians and ought not to be judged like politicians.

The great danger I see in the impending ideological inquisition is injury to the independence and integrity of the Federal judiciary. When we undertake to judge a judge according to political, rather than legal criteria, we have stripped the judicial office of all that makes it a distinct separated power. If the general public begins to measure judges by a political yardstick and if the judges themselves begin to base their decisions on politics, we will have lost the reasoning processes of the law which have served so well to check political fervor over the past 200 years. I would ask Americans if they would wish to have their life, liberty, and property resting on the decision of judges who are primarily worried about tomorrow's newspaper headlines or what might be said in some future nomination proceeding. I would ask Americans if they want their judges to decide matters of life and death, liberty and imprisonment, wealth and poverty according to the law or according to politics.

For two centuries, our liberties have been secured by a Federal judiciary that was not afraid to stick to the law and the Constitution when political winds were blowing in a contrary direction. For two centuries, judges have not had to worry that their careers might be jeopardized by carrying out the law in the face of storms of passion and public frenzy. For two centuries, judges have not had to worry that the legal merits of their decisions might become the focal point of a political smear campaign, which this one has been for two centuries, Americans have been able to trust the judiciary to govern according to the rule of law, rather than the rule of men. We cannot afford to jeopardize that tradition.

The framers of the Constitution wisely insulated judges from politics. Judges were given life tenure and a fixed salary to prevent political pressures from clouding their legal judgment. This dirty tricks political campaign against Judge Bork, however, is changing those rules. This is a new threat to the independence and integrity of the Federal judiciary. This has become the issue.

Now, what about the Constitution and Senate precedent?

Some have contended that we need not fear because this has happened before in history without endangering the independence of the judiciary. We have heard that one in five Supreme Court nominees have been rejected and that political campaigns against Court nominees is not usual. Such justifications are misleading and illusory. This is unprecedented. This is a new and devastating threat. I would like to examine this misleading set of arguments.

In the first place, we often hear that the Senate has a duty to scrutinize judicial nominees as part of its "advice and consent" power. I would agree that the Senate must scrutinize candidates, but "scrutinize" is different from "politicize."

We have also heard that the Senate has often engaged in ideological inquisitions. I would note only a few points to rebut this false notion. Recognizing the dangers of politically charged campaigns against judges, the Senate has refused to employ political litmus tests while confirming 53 justices over the past century. Senate precedent does not support subjecting judicial nominees to ideological inquisitions. Look at recent history: F.D. Roosevelt appointed nine judges in his own image. In fact, he completely reshaped the Court. During that time, a total of 20 votes were cast—out of a possible 900 votes—against F.D.R.'s nominees. Where were the politics? Eisenhower appointed five justices. A total of 28 votes—out of a possible 500—were cast against Eisenhower's nominees. President Kennedy in only 3 years appointed two justices. On one of these occasions, Kennedy replaced the conservative Frankfurter with the ultra-liberal Goldberg. Not a single vote was cast against either of Kennedy's nominees. I could go on, but the point is that since 1894, the Senate has only failed to confirm four nominees. This is significant. The Senate has confirmed 53 justices in recent history, while considering nominees from Presidents as widely diverse as Roosevelt and J.F.K. and L.B.J. to Eisenhower, Ford, and Reagan. None of these 53 suffered the political indignities characteristic of this campaign against Judge Bork.

Now, we have also heard that the "advice and consent" power justifies the Senate's political tactics. The Constitution itself does not support that practice.

Based on the commonsense observation that a diverse congressional body would have difficulty overcoming jealousies and politics to select the best candidate, the framers in 1787 unanimously voted to vest the nomination power in the President.

The Senate, however, was given a checking function. In the words of Alexander Hamilton, the advice and consent function was to prevent the appointment of "unfit characters."

The advice and consent function was a checking function, not a license to exert political influence on another branch nor a license to control the outcome of future cases by overriding the President's prerogatives.

Despite the lessons of Senate precedent and the Constitution and despite the potential damage to the independence and integrity of the judiciary, we have witnessed a bruising political campaign waged against this nomination. A final vote in the Senate. My fear, however, is that the price of a politicized judiciary is too high to pay. If judges fear to uphold the Constitution due to political pressures or sense that their judicial careers might be advanced by reading that document in the smokey backrooms of political intrigue, when the Constitution will no longer be a solid anchor holding our Nation in place during times of storm and crisis. Instead the Constitution will just become part of the political storm—blowing hot and cold whenever the wind changes. That is a price we cannot afford to pay.

At this point, Mr. President, I would like to take a little time to detail some of the abuses of this poltical campaign.

In the first place, Judge Bork has been maligned with political labels. Even though political litmus tests do not apply to judges, Judge Bork has been branded an "extremist" and "right wing." One political advertisement called him an "extremist" and "right wing" 10 times on one page. We will get to that in a moment. In reality, these labels are flat wrong. Otherwise, it would be difficult to explain why Judge Bork voted with his Carter-appointed colleague, Judge Ruth Ginzburg, in 90 percent of the cases on which they both sat, or with his Carter-appointed colleague and so-called "liberal" colleague, Judge Abner Mikva, in 83 percent of the cases on which they both sat.

Look at this chart. He voted with Judge Ginsburg 91 percent of the time; with Judge Wald, who was considered a very liberal judge, 76 percent of the time; Ed Mikva, who admits to being an unabashed liberal, 82 percent of the time; Judge Edwards, 80 percent

of the time; and Judge Wright, 75 percent of the time.

When he went on the bench there was only one Reagan appointee and eight Johnson-Carter appointees to the District of Columbia Appellate Court. How could you say he was outside of the mainstream, or somebody not literally in the mainstream with his liberal colleagues?

This is a convenient time to turn to the political full-page ads that have distorted Judge Bork's record. As I mentioned, these ads enjoy name-calling. The damaging distortion of this tactic is found in the advertisement itself. At one point, in order to convince the public that Judge Bork will upset the Supreme Court, the ad states that the Supreme Court is now "fair-minded, deliberate and balanced." Yet a few lines later it states that the "Supreme Court is dominated by the right" and led by a "right-wing majority." Both cannot be true. The Supreme Court cannot be both "deliberate and balanced" and "dominated by a right-wing majority."

Both simply cannot be true. The Supreme Court cannot be both deliberate and balanced and at the same time dominated by the rightwing majority.

This kind of inconsistency has been the norm in this campaign. Time after time Judge Bork has been called both an "extremist" and, "the one vote likely to tip the balance." He cannot be both, unless those making the charge are actually saying that four other Justices are already "extremists." Frankly, it is more likely that those making the charges are extremists because the four other Justices include, I might add, one, Justice White, appointed by President John Kennedy; and two, Judges Scalia and O'Connor, who were unanimously approved by the Senate.

What about the political tactics? Let me summarize a few of them. I would like to take a little time to summarize some of the details of the political tactics against Judge Bork.

In the first place, he has been maligned with political labels and even though political litmus tests have not applied to judges before, Judge Bork has been branded an extremist and "right wing."

So you have to say consistency will not be a hallmark of this debate. This labeling distortion is evident, but it is also destructive. Justice Sandra O'Connor, the only woman Justice, and Justice White, John F. Kennedy's appointment, cannot be labeled as "rightwing" anymore than any other Justice.

Justices interpret the laws and the Constitution. At least that is what they are supposed to do. On occasion, these laws dictate so-called conservative results, but that does not make the interpreter of those laws rightwing, anymore than when the law dictates so-called liberal results. Lawmakers dictate those results and have a political label. We do, but not judges.

This labeling tactic is misleading and destructive of the basic judicial function of interpreting the laws.

The next tactic of this political free-for-all has been distortion. This occurs in several ways. One way that has been foremost in this debate has been to extract a few quotes from 15-year-old articles and to ignore Judge Bork's judicial actions. For example, we have repeatedly heard allegations that Judge Bork might not protect free speech. In fact, anyone who wants to know Judge Bork's views on censorship would merely need to read his Lebron decision where he held that the D.C. metro authorities violated Mr. Lebron's free speech rights by refusing to let him hang a poster that was extremely critical of President Reagan.

The judge was even willing to allow the embarrassment of the President who appointed him to uphold Mr. Lebron's rights, and he did.

We also continue to hear that Judge Bork might not protect all forms of speech. But only protect political speech. Once again, this is taking a comment from the professorial article that was written over 15 years ago with the express purpose of stimulating debate and provoking questions.

In fact the article was clearly labeled "Tentative and Exploratory." This concern about Judge Bork, however, is ludicrous in light of his judicial record and I think he should be judged basically on his public service record, general and judicial record and not because, as a professor, paid to be provocative, paid to look at things from all angles, he creates debate.

Look at his record. It is an eminent record, a prestigious record, a mainstream record; one that anybody would be proud of.

Well, I think that concern that he might restrict free speech in areas other than political speech is specious, especially in light of his judicial record in the Brown versus Williamson Tobacco Advertising case. He protected commercial speech.

In the McBride libel case, the judge protected scientific speech. In the Quincy Cable case involving television must-carry rules, Judge Bork protected artistic and literary speech. And above all, in the celebrated Ollman case, it was the Ollman libel case, Judge Bork protected all speech again evolving threats in our changing world.

Judge Bork's judicial record is pretty hard to distort and yet it has been. Accordingly, it has been relatively ignored, and where it has been cited it has generally been distorted.

In my mind, Judge Bork's actions as a judge and as a solicitor general speak a lot louder than his critics' words.

Another distortion tactic has been to selectively use evidence. For instance, we have already heard criticism about Judge Bork's decision in the Dronenburg case which denied homosexuals special constitutional privacy protections. In most studies of Judge Bork, this case was listed as a primary evidence that he would reduce the general privacy doctrine to exclude abortion on demand.

The evidence that these critics consistently ignore is that the Supreme Court reached precisely the same decision and the same results in the Bowers versus Hardwick case, which was decided several months after Judge Bork had reached his own decision. That denied homosexuals special constitutional privacy protections.

Still another distortion tactic which has been familiar to political campaigns but never really before in the history of judicial nominations is to accuse him of ethical violations.

In that vein we have heard too often, recently, about the Saturday night massacre. In fact, this is one of Judge Bork's finest hours.

It really was. The judge was not the cause of Watergate, but he was part of the solution. As a precondition of carrying out the President's order to fire Archibald Cox, Judge Bork gained a commitment that the investigation would go on further without interference. In sum, Judge Bork had to make a difficult decision on the spur of the moment. Even then, he had to be convinced by then Attorney General Richardson not to resign, but the evidence that his decision was correct, I think, is history. Because Judge Bork preserved the investigation, the President was later forced to resign and several others were prosecuted. This performance deserves a commendation and not criticism. So he was criticized because, they said, that it took too long for him to make the decision about getting a special prosecutor.

The fact is the most significant testimony in front of our committee was by former executive director of the American Bar Foundation, former law partner, former president of Brigham Young University, et cetera, Dallin Oaks, who himself has been considered as a potential nominee to the Court from time to time. One of the great legal minds in this country, the leading authority in the country on the exclusionary rule. He is one of the great constitutional thinkers of all times.

He said that within hours, within hours that Bork, then acting Attorney General, then Attorney General, called him from the Supreme Court itself and told him he was going to have to have a special prosecutor and that he felt it would have to be a former president of the bar association; it would have to be somebody of

that status and asked him who he would suggest.

He basically said there are only two: Lewis Powell, who had just been put on the Supreme Court, and of course none other than Leon Jaworski; to which—as I recall my conversation, personal conversation with Mr. Oaks—to which Judge Bork, then Attorney General Bork, replied: "Yes, I have been getting that from a number of others." Indicating he had been calling and trying to make this decision right after the firing.

And yet it was brought up, I suppose, so that they could embarrass the judge. It is a sad commentary on this case.

We could discuss likely political tactics for a long time. Indeed, as this debate proceeds, I look forward to discussing each of the allegations and dispose of each as distortions to one degree or another.

At this point, I would like to focus on one of the most offensive examples of the distortion campaign against this great judge. That has to be the full page ads.

To test the hypothesis that these advertisements mischaracterize, misconstrue, and mislead, I found in a short time 67 falsehoods, slants, and distortions, in just one of the full-page ads. I might add that the next ad was even worse, however. I found in just a short time 84 falsehoods, distortions, flaws, and biases in the second full-page ad. There were 151 falsehoods and distortions in only two pages. I think they deserve the Guiness Book of Records.

Let us quickly examine this first ad. This is the famous People for the American Way. How could anybody who goes by the name People for the American Way do anything wrong?

Well, this is a Norman Lear organization. I might add, it is not known for honesty. Let me just say this: Let us examine this. Even the boldface title: Robert Bork versus the People. Can you believe it? That grossly misconstrues the judge's philosophy. More than any other jurist in modern history, Judge Bork would be the one who would sustain the peoples' right to govern, the peoples' right to govern themselves.

As a matter of fact, the real issue in this whole debate is the judicial restraint versus judicial activism. Judge Bork did not believe that judges who are not elected for life should make laws. He thinks only elected representatives, people sitting here in this body and in the House of Representatives and in State legislatures should make laws.

The real issue here is judicial restraint versus judicial activism.

Nevertheless, look at that title.

I might add the titles should fairly judge Judge Bork and the people versus the special interests because that is what he faces.

There are 67 distortions or outright falsehoods, and I think there are too many to catalog here in one short speech.

A few examples I think will give a flavor for the distortion techniques employed in these particular articles.

Take falsehood 12 which comes in right here on the chart. Judge Bork is accused of "billing consumers for power they never got." This allegation is flatly incorrect. Neither Judge Bork, nor the majority of the D.C. Circuit Court which joined him in this opinion, could bill or authorize any billing of any customer. Utility companies under the eye of the Federal Energy Regulatory Commission, not the courts, bill consumers. The court's opinion found merely that FERC had not adequately responded to the evidence presented by the company. Moreover, no consumer has been billed a single dime in that case. That is just one illustration.

Take falsehood 22. Judge Bork is accused of "turning back the clock on civil rights."

I think we have heard that time after time even among members of the committee. This point is wholly unfounded. Judge Bork has never, I repeat never, advocated as Solicitor General or rendered a judicial decision as a judge on the Nation's second most important court in the country that was less sympathetic to the minority or female plaintiffs than a majority of the Supreme Court.

Moreover, as Solicitor General, Judge Bork won several significant civil rights victories, including prohibition of private discriminatory contracts, and redistricting to enhance minority voting strength. He enhanced minority voting strength.

Take falsehoods 27 and 28. Judge Bork is accused of criticizing "decisions which stopped States from using poll taxes to keep minorities from voting."

What a lie. This assertion misstates the Supreme Court case in question. The Harper case involved no evidence whatsoever of racial discrimination, and so said. It also misstates Judge Bork's position. The judge repeatedly wrote, and testified, that he would not criticize Harper if it involved racial bias. In fact, as a judge, Judge Bork struck down a South Carolina voting plan that might have been discriminatory, the *Sumter County* case, and approved a discrimination case against the Navy.

Falsehoods 29 and 30: Judge Bork is accused of criticizing "decisions that stopped States from using literacy tests to keep minorities from voting."

For the same reasons as above, the claim misstates both the content of the *Katzenbach* case and Judge Bork's position. In fact, Judge Bork has punished discrimination wherever he has found it—the *Palmer* case, the *Ososky* case, the *Laffey* case.

I found this particular distortion to be most galling. In 1981, Judge Bork exhibited great moral courage by testifying in opposition to the human life bill. It was wanted by most of the people in the pro-life movement because it attempted to redefine the words of the Constitution by statute. He was joined by Archibald Cox and Larry Tribe, both liberal law professors, and others, in opposition to this bill which would define "person" in the Constitution to include "unborn children"; thus it would overturn *Roe* versus *Wade* by a mere statute.

The right-to-life community was infuriated with Judge Bork but he stuck to his guns. Yet today, that very act of courage is what has been used against him because he criticized the *literacy test* case, for the same reason.

Yet if we allowed our Constitution to be changed by a majority vote, the basic principle of judicial review would become the principle of political review with the foundation of our liberties changing with every passing political wind.

I am grateful for Judge Bork's courage and resent the distortions that contend he is against literacy tests. He has said no such thing. He has never said that. He has only said that we have to protect the Constitution from change by a mere political majority.

Look at No. 46. Judge Bork is charged with having "already made up his mind." Later in the same ad, the judge is accused of being too open to change. Both cannot be true. This is also galling.

Throughout this debate, Judge Bork has been called too rigid at one moment and too quick to change at the next. I personally wish his opponents would make up their minds.

Ironically, in a speech months before the Bork nomination, Tony Podesta, the then head of the organization that published this ad, People for the American Way, stated that he would support the nominations of Antonin Scalia, Robert Bork, or Frank Easterbrook if nominated for the Supreme Court. Evidently this organization does not care whether its word is good or not.

Let us take a quick look at the next ad. I have spent a lot of time on these, but I will mention a few. It is sickening to read them and yet millions of Americans have thought since it appeared in print it is accurate. It is not accurate.

Here is one with 84 errors and distortions, an ad put out by the National Abortion Rights Action League.

This implies that all women do or should fear Robert Bork. "What women have to fear from Robert Bork."

In fact, many women groups contacted the Judiciary Committee to indicate support for the judge. There are a number of letters from Democrats as well saying they support Judge Bork.

One of these groups was Concerned Women for America, which purports to be the Nation's largest political women's organization.

Let us take falsehood 2, just an illustration. The title also suggests that women should fear the judge. There is no such reasoning. In fact, his record as Solicitor General and a judge indicates that he has never advocated a position less protective of women's rights than that adopted by the Supreme Court itself. For instance, in the *Palmer* and *Ososky* cases, he struck down sex discrimination in the State Department. In *Laffey*, he guaranteed equal pay for equal work done by airline stewardesses. In fact, Judge Bork has advocated more protections for women's rights than accepted by the present Supreme Court. For example, in *Gilbert* versus *CE*, he argued that women should not be discriminated against because they choose to become pregnant. The Supreme Court rejected his argument and Congress later had to overcome that Supreme Court decision by statute. And I participated in helping to overcome that.

Now, Bork's argument then became the law, protecting women and allowing the pregnancy disability benefits, and I voted for that bill.

Take falsehood No. 5, right here. They say, "Every advance." The implication that Judge Bork has opposed every advance for women is flatly wrong. He is responsible for a number of those advances. For example, he contended against pregnancy discrimination, as I have said. He also made the Equal Pay Act work to grant women equal pay for equal work in the Corning Glass case.

Take falsehood No. 10. "His rulings might leave you no choice in relationships." Absolutely false. Judge Bork sustains, for example, the Loving versus Virginia case which grants to individuals the right to choose their spouses without any Government intervention.

Mr. BIDEN. Will the Senator yield? I did not understand one word the Senator said. Did he say the ad said "might" leave no choice or "would" leave no choice?

Mr. HATCH. The ad said "might" leave you no choice in relationships.

Mr. BIDEN. Might leave.

Mr. HATCH. It has the word "might." But the implication is that he is going to go against your right to chose your spouse. You would have to read it that way. And let me tell you I do not see any other implication than that. That is the only reason it is in there.

Now, falsehood 15 said, "He will be the deciding vote." Now, that is wrong. What makes Judge Bork's vote the next deciding vote? He must be joined by at least four other Justices in order to be a deciding vote. If he is extreme, he will not have the support of four other Justices on the Court. And one of those Justice who will purportedly join Bork to form a right wing majority in herself a woman. Now why is not her vote the decisive vote? No one vote counts any more than another on the Supreme Court.

Falsehood 24: "Judge Bork's record indicates a hostility to personal privacy." Now, Judge Bork has upheld every specific privacy provision in the Constitution. Likewise, he has upheld statutory privacy rights like the Privacy Act of 1974. Whenever the people through their elected representatives have spelled out privacy rights, Judge Bork has upheld that privacy right with pleasure.

I would like to comment more on this privacy question in the future and I will.

Take falsehood 35: "You wouldn't even be protected against sexual harassment at work." That is clear deception. Judge Bork would punish, and clearly said so, unwelcomed sexual harassment. He would even impose liability on an employer who was not involved in harassment but permitted it to continue. The Supreme Court in the Merritor versus Vincent case agreed with Judge Bork's analysis of that very issue. So another purely false thing.

Falsehood 53: "Women who made this profoundly private abortion decision have been singled out and denied education." Now, even if that statement were true, how can this be attributed to Judge Bork? The closest analogy to that case was the Gilbert case, the pregnancy discrimination case where Judge Bork argued for women. Falsehoods 73 and 74. Right over here. "Judge Bork is an extremist nominated by extremists." The National Abortion Rights Action League calling Judge Bork extreme speaks for itself. This group would not know a judicial mainstream from a judicial jet stream. I might add moreover extremists did not nominate Judge Bork. One man, the President alone, makes this nomination, not a group of people. And this President is not extreme. He was elected by the largest margin in electoral history. So if he is extreme, so, too, are the people out there who elected him.

Finally, I reviewed one other ad and found 99 flaws in this particular ad. And that is a Planned Parenthood of New York ad. Ninety-nine flaws. Actually, we have had 67 flaws in one ad, 84 in another, 99 in this one. This ad as well as the other ads closed with an appeal for donations. That is what all these ads do. We expect that in political campaigns and, even though it is distorted and out of place, it is probably fair game, I suppose, the way some people do it. But in any event, I think you can say that since they appeal for donations, and this is an ad against a sitting judge, no doubt you can conclude that it is profitable to create a monster and then cast yourself as the only knight to fight that monster, albeit an impecunious knight in this particular case, able to rid the land of the scourge. Readers should realize, however, that this is not the art of advertising or fundraising. This is the art of character assassination.

PRIVACY AND NATURAL LAW

As I stated earlier, I would like to discuss one issue in detail because it has been widely misread and misunderstood by my colleagues and the public. This is the question of the so-called right to privacy and the broader subject of how our rights are created and protected.

At the conclusion of the hearings, one Senator described the primary issue of the Bork debate as whether individuals have rights because they are human or whether individuals have rights because the Constitution grants them. Of course the Senator attributed the former view to himself and the latter to Judge Bork. This statement is a convenient formulation, but the issue was resolved in 1776 not 1987. The Declaration of Independence states that "all men are created equal and endowed by their creator with certain inalienable rights." America has never since questioned that rights are a citizen's natural inheritance.

The question that has divided America is how to identify those natural rights. This is where Judge Bork and some Senators differ. Because rights belong to the people, Judge Bork would let the people identify and define them. This process occurs either by constitutional amendment or by statute. The most recent right identified by the people in the Constitution came in 1971 when 18-year-olds gained voting rights. Similarly statutes, like the Equal Pay Act and title IX, are the most effective guarantors of women's rights. The people continue to identify and define rights through their elected representatives. This is the essence of self government.

The alternative advocated by some Senators is to empower unelected judges to create rights for the people. Judges are thus trusted to provide adequate protections for the people. This short changes rule by people made law in favor by judges.

The so-called right to privacy, which dominated the Bork hearings, provides an illustrative contrast to the alternative means of finding natural rights. The people have identified and defined several privacy rights in the

Constitution. These include, among others, the right to privacy against unreasonable home searches—the fourth amendment, the right to privacy in records against self incrimination—the fifth amendment, the right to privacy in speech, the right to privacy in publishing, and the right to privacy in religious practice—the first amendment. In addition, the people have identified and defined several statutory privacy rights, including, among others, the Financial Right to Privacy Act, the Privacy Act of 1974, and various restrictions on Federal surveillance activities. Judge Bork has diligently defended each of these specific rights.

On the other hand, in 1968, a sharply divided Supreme Court read the "penumbras"—as opposed to the words—of the Constitution to encompass a general "right to privacy." Other judges expanded that sweeping notion to create a privacy right to abortion on demand. Other Supreme Court judges voted to create a privacy right to homosexual conduct. Still other jurists, including some who testified against Judge Bork, desire a privacy right to use drugs in private or a privacy right to engage in prostitution in private. Others might argue for price fixing in private or, as is currently being litigated in the Supreme Court, the right to discriminate against others as long as it is done in private.

If these kinds of privacy are in fact natural rights, the people can embrace them as their own by constitutional amendment or statute. Senator KERRY, for example, has introduced legislation to guarantee homosexual rights. If these are rights the people acknowledge, they certainly will press their legislators to grant the protection. If judges are free to create rights, however, conservative judges will create a right to a balanced Federal budget and liberal judges will create these new privacy rights. Either result—conservative or liberal—would reduce our Constitution to government by men, rather than by the people's law.

In sum, the great natural rights debate was in reality settled in 1776. Today we all agree that rights are inherent in the people. The modern issue is whether the people will be free to identify their natural rights or will be subject to the rule of unelected judges. On this point, Judge Bork spoke for the people's most sacred right—the right to self Government.

CONCLUSION

The lasting consequence of the Bork confirmation debate poses a silent threat to basic constitutional protections. The threat springs from the manner in which Judge Bork was assailed. The Bork debate was characterized by all the intrigue, innuendo, and inaccuracies of a political campaign.

In that regard, let me allude to my remarks concerning the Harris Poll, the art of character assassination.

I will not comment about it but I think the questions speak for themselves. Do you wonder why after some polls everybody started to become construed against Judge Bork? You ought to read this. It is one of the most terrible examples of I think dishonesty I have ever seen in polling. This same pollster, Lou Harris, did the same thing to Justice Rehnquist. Most of the media did not carry it because it was so bad. This one was carried by almost all the major media in this country and it is absolutely dishonest in my opinion.

HARRIS POLL—THE ART OF CHARACTER ASSASSINATION

Yesterday I mentioned the Harris Poll. Overnight that poll has been given considerable attention. The only thing we hear, however, is the conclusion—57 percent would turn Bork down, only 29 percent would confirm him. We are told that that is what the American people believe should be done. Let's take a look at this poll to see if it really supports that conclusion.

This poll sets out to be the model of fairness by giving two pro-Bork questions, and two anti-Bork questions. Absolute fairness would ensure that the subject does not have a skewed view when the final question is asked. This seems to be the only attempt at fairness, from there is it downhill—fast.

Let's read the first pro-Bork question. Remember, this is supposed to favor Bork's position so that the subject will not receive a slanted view:

"Judge Bork seems to be well informed about the law. * * *" Already the poll begs the question of whether he is informed or only "seems to be." But that is nitpicking, let's continue. Remind yourself that this is the first pro-Bork question.

> 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.

For heaven's sake, in order to favor Judge Bork on this question, you have to vote against equal treatment for minorities, protecting privacy and other issues of critical importance. The marvel is that Judge Bork only loses this count by 2 percentage points.

If that wasn't bad enough, let's look at the second pro-Bork question. If you think this is bad, wait until we get to the anti-Bork questions.

> 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.

That is a classic. The subject is asked to admit that the President does all their thinking for them. This is an insult to the person being polled. Anyone who answers "yes" would have to be shameless. As strongly as I support him, it is only after years of examining the record and knowing the man that I support him.

Frankly, if those two pro-Bork questions were asked of this committee, I am sure that neither question would get a single vote. Nonetheless 27 percent still blindly followed the President and said "yes" to question 2.

Now comes the anti-Bork questions. We have finished the questions that were supposed to make you like the guy.

The first anti-Bork question, clearly labelled as such, says:

> Judge Bork has said, "When a State passes a law prohibiting a married couple from using birth control devices in the privacy of their own home, 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.

This is too much. This invokes images of bedroom searches. If someone asked anyone in this room if they are worried by police raids in their bedrooms in the middle of the night, I think I could predict the answer.

By the way, I seriously doubt if this is a Bork quote because he repeatedly said that the Connecticut law was never used and never could be used to invade the privacy of the home. Nonetheless this quote is attributed to Bork. The amazing thing about this poll is that 27 percent say again that they are not worried by this quote.

We haven't finished yet. We still have the second anti-Bork question. It is a beauty. It says:

> 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.

This is incredible. Listen to this litany: Too extreme; do the country harm; turn back the clock; harm rights of minorities; harm women; abortion; other areas of equal justice for all people.

After that litany, if anyone who actually votes for Judge Bork, we don't want him.

Now comes the big question: After the pro-Bork questions have slandered him and the anti-Bork questions have defamed him, what is left to say? What a one-two punch.

Now the big question is asked:

It starts: "All in all * * *."

Nothing to subtle here. They don't want you to miss the point. After they have called Bork a bedroom-invading bigot, they want to make sure you remember it.

> 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?

Surprise. Surprise.

The real surprise is that 29 percent actually voted to confirm the monster described in this poll.

My only question is how Harris can, with a straight face, announce his conclusion: "Public opposes Bork 57-29." The only thing this poll proves is that the public hates bedroom-invading bigots.

This is not the art of polling, it is the art of character assassination. This is the worst of everything we have talked about throughout this hearing. This is not a political circus; it is worse; it is a freak sideshow—complete with five-legged cows, bedroom invading bigots, and—oh, yes—don't forget the extreme conservatives.

At the outset, Senator SIMPSON and others warned of the consequences of making a confirmation into a cheap political sideshow. Well, it has happened and the star ringleader is Lou Harris and his tricky pollsters.

Seriously for a moment, think of what this means to the Supreme Court and the Federal judiciary. What is going to happen to our only nonpolitical branch if we keep launching these political missiles in their direction?

I ask unanimous consent that the Harris poll be printed in the RECORD.

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

PUBLIC OPPOSES BORK NOMINATION BY 59-27 PERCENT

(By Louis Harris)

By a clear-cut 57-29 percent, the American people believe the U.S. Senate should turn down, not confirm, the nomination of Judge Robert Bork to the U.S. Supreme Court. While 14 percent are still undecided, nonetheless it now appears that a decisive majority have decided they would prefer Judge Bork not to become part of the high court.

These results, according to the latest Harris Survey of a cross section 1,249 adults nationwide and taken by telephone between September 17th and 23rd, reflect public reaction to Bork's own testimony on the stand, and not the subsequent comments, pro and con, after he finished his appearance before the Senate Judiciary Committee. Significantly, among those who said they saw the hearings on TV or who followed them closely in the newspapers, a higher 61-32 percent majority oppose confirmation of Bork. Thus, the evidence is that the Judge did not help himself in his testimony.

Indeed, no more than 57 percent of the adult public say they have paid close attention to the Bork hearings. This is far below the 70 percent, for example, who saw or followed the Iran-Contra hearings when Lt. Col. Oliver North testified. Most curious is the fall-off of viewing of the Bork hearings among conservatives. Only 53 percent of all conservatives say they have followed the Judiciary Committee hearings, compared with 62 percent of moderates and 66 percent of liberals. This would indicate that many conservatives have not been pleased with some of the answers which Bork has given, such as his seeming contradiction of his previous stands critical of high court decisions in cases involving abortion, privacy, and other controversial cases.

Significant as well is the fact that when asked up or down whether Judge Bork should be confirmed, conservatives opt for confirmation, but only by a narrow 44-40 percent margin, compared with opposition among moderates by 61-30 percent and by liberals by a massive 79-13 percent. Among those who voted for Ronald Reagan in 1984, only a slender 45-42 percent plurality favor confirming Bork. A slightly higher 48-38 percent plurality among Republicans feel the same way. By contrast, independents are against Bork by 60-30 percent and Democrats by 70-16 percent.

In other key divisions, all regions of the country oppose Judge Bork's confirmation: the East by 56-29 percent, the Midwest by 60-29 percent, the south by 55-31 percent, and the West by 58-28 percent. Men oppose him by 55-36 percent, but women by a higher 59-23 percent. Whites oppose his confirmation by 55-31 percent, blacks by 71-15 percent, and Hispanics by 62-27 percent. The pattern by education is interesting: those with a post graduate degree oppose Bork by a close 47-45 percent, while those with a four year college degree oppose him by a wider 52-38 percent, and those with less than a high school education oppose him by 64-17 percent.

When some of the arguments which have been made about Bork—pro and con—are tested, it is evident immediately that his supporters have not made a strong case for him, while opponents have been more convincing to the public.

By 67-27 percent, a big majority of the public disagrees with the view that "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." Normally, past surveys have shown that the people are inclined to go along with most nominees selected by a president. Indeed, in the case of the elevation of Justice William Rehnquist to the post of Chief Justice last year, a clear 57-39 percent majority expressed sympathy with the view that the President's choice should be backed up. This can be taken to mean that with public confidence in President Reagan reduced, the fact that he named Bork apparently carries less weight than before.

The claim of Judge Bork's backers that he is "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, and other issues" meets with a narrow 43-41 percent rejection by the public. This indicates that Judge Bork perhaps did not impress the public viewing him as nearly as erudite and steeped in the law as his supporters have claimed. Those who viewed the hearings deny the claim that his legal literacy should count heavily by a higher 50-37 percent.

Most damaging to Bork is his statement early on that "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," which worries a 68-27 percent majority.

Also, even though much of his testimony vigorously denied it, a 47-41 percent plurality of the public goes along with the criticism that "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, woman, abortion, and other areas of equal justice for all people."

Taken as a whole, it is evident that Judge Bork has not made a convincing case for his nomination to the high court.

TABLES

Between September 17th and 23rd, 1987, a national cross section of 1,249 adults was asked: "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 on the U.S. Supreme Court. Have you seen or followed any of the hearings on TV and in the newspapers, or not?"

| Followed Bork Hearings: | *Percent* |
|---|---|
| Seen or followed | 57 |
| Not seen or followed | 42 |
| Not sure | 1 |

"Now let me read you some statements about the Bork nomination. For each, tell me if you agree or disagree."

STATEMENTS PRO AND CON ON BORK NOMINATION

| | Agree (percent) | Disagree (percent) | Not sure (percent) |
|---|---|---|---|
| Pro-Bork: | | | |
| 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 | 41 | 43 | 16 |
| Pro-Bork: | | | |
| 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 | 27 | 67 | 6 |
| Anti-Bork: | | | |
| Judge Bork has said, "When a state passes a law prohibiting a married couple from using birth control devices in the privacy of their own home, 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 | 68 | 27 | 5 |

STATEMENTS PRO AND CON ON BORK NOMINATION

| | Agree (percent) | Disagree (percent) | Not sure (percent) |
|---|---|---|---|
| Anti-Bork: | | | |
| 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 | 47 | 41 | 12 |

"All in all, if you had to say, do you think the U.S. Senate should confirm or turn down the nomination of Judge Robert Bork to be on the U.S. Supreme Court?"

| Confirm or turn down Judge Bork? | *Percent* |
|---|---|
| Confirm | 29 |
| Turn down | 57 |
| Not sure | 14 |

METHODOLOGY

This Harris Survey was conducted by telephone within the United States between September 17th and 23rd, 1987, among a cross section of 1249 adults nationwide. Figures for age, sex, race, and education were weighed where necessary to bring them into line with their actual proportions in the population.

In a sample of this size, one can say with 95 percent certainty that the results have a statistical precision of plus or minus three percentage points of what they would be if the entire adult population had been polled.

This statement conforms to the principles of disclosure of the National Council on Public Polls.

Mr. HATCH. Mr. President, I ask unanimous consent that documents entitled "84 Flaws in the NARAL Ad," "99 Flaws In the Planned Parenthood Ad," and "13 Flaws of TV People for the American Way" be printed in the RECORD following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered. (See Exhibit 1.)

Mr. HATCH. Despite the lessons of the Constitution and Senate precedent, the Bork nomination has become a bruising political wrestling match, ultimately decided by political muscle in the form of lobbying strength, media attacks, fundraising, and majority party solidarity. The potential damage to the independence and integrity of the judiciary is a cost yet to be fully counted.

The tragedy is that this "deft blend" of ridicule, rumor, and racism is politicizing a sensitive constitutional process, which carries implications far beyond the career of Judge Robert Bork. The seriousness of the Senate's task and the independence of the judiciary are jeopardized by this crass political trickery.

For two centuries, the Federal courts have fortunately remained as the one nonpolitical branch of Government. Judges have been expected to make decisions without worrying about their opinions appearing on the front page of a tabloid journal. If judges are impelled by the tactics of the Bork debate to worry about politics, appearance, polls, and misleading headlines, what will be the consequences for equal justice under the law?

THE REAL ROBERT H. BORK

In my final moments today, I would like to set aside for a moment the law, the politics, and the dangers of this precedent-shattering and precedent-setting event. Instead I would like to look past the distortion and ridicule to the real Judge Bork—the capable individual, the caring individual, the considerate individual. It is hard to conceive of finding another individual more qualified in terms of ability and compassion.

After all, this is the individual who, as a junior associate, stood up to senior partners to prevent anti-Semitism from claiming another victim.

This is the individual who stood up to colleagues at the Department of Justice on behalf of a black woman to prevent subtle discrimination from claiming another victim.

This is the individual who stood by his former wife and made great personal sacrifices as her health was drained by a debilitating and eventually fatal disease.

This is the individual who, after fulfilling an active-duty assignment, left school and willingly returned to his country's service as a Marine in the Korean war.

This is the individual who gave nearly half of his 60 years to teaching and public service, eschewing the enormous financial rewards his talents might have brought in favor of educating our children and assisting our Government.

This is the individual who won significant advances for civil rights as Solicitor General and never advocated a position less sympathetic than the Supreme Court to minorities or less sympathetic to minorities than that adopted by the Supreme Court itself.

This is the individual who took no position on civil rights cases in 5 years as a judge less favorable to the minorities and women than the position adopted by the Supreme Court.

This is the individual whom Congress twice confirmed unanimously to significant posts in this country within our Government.

This is the individual who served for 4 years as our Nation's leading trial attorney.

This is the individual who served for 5 years on our Nation's second most important court—without a single reversal.

This is the individual who states that Congress should be allowed to make policy and that he, as a judge, will not impose his own agenda on the Nation.

This list might go on indefinitely, but the point is evident. The most tragic final chapter does not concern politics, nor lobbying pressures, nor issues of marital privacy or homosexual privacy or abortion privacy or prostitution privacy or any of the other issues which may interest one or another Senator.

The most tragic final chapter is a chapter about an individual—one of the most qualified individuals ever nominated to the most important judicial post in the Nation. The Supreme Court and the Nation has lost the services of one of its finest individuals. That is the most tragic, and most final, chapter.

What does it mean for our Nation and our independent Federal judiciary that an individual of this caliber can suffer what he has suffered? I genuinely hope that this will never happen again in our history and that my colleagues will reconsider Judge Robert Bork, the real Judge Bork not the distorted political accounts, and vote to confirm him as an Associate Justice of the Supreme Court.

Mr. President, I have read the committee report and it is filled with inconsistencies, and I am highly disturbed by the way it is written. I think it is a very, very poor job. As I have said before, I think the Senate Judicary report is the grossly slanted and biased distortion of all that really occurred before the committee and what was really at stake in this nomination. I do not have time to list all of the flaws and the inaccuracies of the staff report and I have done it rather hurriedly. But I ask unanimous consent that my remarks concerning that, and the work that I have done concerning that chronicle of a few of the errors and inconsistencies be placed in the RECORD at this point.

Mr. BIDEN. Reserving the right to object, Mr. President, I would ask since we are not going to get a chance to read those in this debate, rather than read them all if the Senator would read a few of those distortions to us so the Senator from Delaware has some notion of what he is allowing to go in the RECORD.

Mr. HATCH. I would be glad to do it.

Mr. BIDEN. For the moment I do object.

Mr. HATCH. I am more than happy to do it but I have listed, them, chronicled them, and I will be happy to debate any one of these points any time anyplace anywhere.

Mr. BIDEN. In the meantime, I object.

Mr. HATCH. Object to what?

Mr. BIDEN. I object to the chronicle of distortions in the majority report, which the Senator from Delaware is responsible for having written.

Mr. HATCH. The Senator objects to putting my report in the RECORD so the American people can see it? He is going to keep it out of the RECORD?

Mr. BIDEN. If the Senator will listen, I object to his putting in the RECORD rather than listing them now. I am here all night. I would love to hear them so I know what I am going to respond to, rather than waiting until tomorrow morning to have to read the RECORD to find out what the distortions allegedly are.

Mr HATCH. I would be glad to do it. Does the Senator want me to read it all?

Mr. BIDEN. No. Just several, so I know how bad my report was.

Mr HATCH. Let me take the 15th objection, pages 30 through 36. I am just picking them at random. I think you can find, and anybody can pick some that they think are worse than others. The report's treatment of the privacy question is riddled with false assumptions, slanted commentary. Examples are numerous.

1. Skinner is once again read as a "fundamental rights" case rather than an equal protection case. This case consistently illustrates the report's elementary legal error of emphasizing some dicta and short-changing the holding. Regardless of the merits of this "fundamental rights" reading of Skinner.

Judge Bork only criticized the case's equal protection reasoning.

2. The pivotal fact that Judge Bork would reach the same result as in Skinner but by a more sound reasoning process is buried in a fine-print footnote.

3. Similarly, the report quickly dismisses without commentary the fact that Judge Bork might reach the same result as in Griswold by a different route.

4. The report mentions Judge Bork's Zech opinion in a disparaging context several times without explaining that Judge Bork's reasoning was adopted by the Supreme Court itself in the Hardwick case. Judge Bork is apparently more in tune with the Supreme Court on privacy than is this report.

5. Despite claims to the contrary, the Judge did not first articulate the distinction between results and reasoning in 1987. This is the heart of his 1971 article, namely that the Court must use an honest and neutral reasoning process.

6. Professor Tribe's criticism that Judge Bork seems to be playing "hide and seek" with the Constitution is disingenuous at best. In fact, the Supreme Court discovered new rights in 1973 (abortion), 1961 (exclusionary rule), 1963 (school prayer), and so forth that had not been found in nearly two hundred years. The Court is the body that has been playing "hide and seek" as a scholar of Tribe's purported dimension would be expected to understand. Moreover Judge Bork's assertions that he wants to examine the issues fully before finally asserting a legal position is appropriate judicial conduct, not "hide and seek." Professor Tribe's criticism smacks of a disposition to prejudge on political criteria which would be very inappropriate conduct to expect from any judge.

Let me go to No. 4, pages 8 through 10.

The report's approval of substantive due process is appalling in light of the use of this doctrine to reach the unprincipled and dangerous conclusions of Dred Scott (blacks are only property with no constitutional rights) and Lochner (economic rights prevent health and safety regulations) and Roe (unborn children have no constitutional protections), to name just a few.

Let me go to No. 21, which I think is a fairly decent consideration.

The Poll Tax myth is debunked by the following facts:

As Judge Bork continually noted, the Harper case contained no evidence whatsoever of racial discrimination. If it had involved racial discrimination, Judge Bork would fully agree with the decision.

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.

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).

22. Page 40, The one-man, one-vote myth is debunked by the following facts and is perpetuated in the report.

Judge Bork, despite the erroneous report's insinuation, has not questioned and does not oppose the Banker versus Carr opinion. He feels that the courts should participate in the apportionment process. He would protect the "rules of the game" as former Congressman Jordan has stated.

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.

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).

I might add that we go to No. 25, and I will not read too much longer.

Mr. BIDEN. I say to the Senator that I have a flavor of what the Senator——

Mr. HATCH. Let me continue.

Mr. BIDEN. I would like you to continue. I would like to know, now that I have a flavor, if the Senator wishes to put them in.

Mr. HATCH. I will give you a copy.

Mr. BIDEN. Good.

Mr. HATCH. Is it in the RECORD?

The PRESIDING OFFICER. Does the Senator renew his unanimous consent request?

Mr. HATCH. I renew my request. I would like this in the RECORD, and I would like the American people to read it.

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

COMMITTEE REPORT INCONSISTENCIES

As I have said before, the Senate Judiciary Committee report is a grossly slanted and biased distortion of what really occurred in the Committee and what was really at stake in this nomination. I do not have enough time to list all the flaws and inaccuracies of this staff effort, but I will chronicle a few of the many glaring errors and inconsistencies.

1. Page 3 and 4. The Report states that this is the first time a minority of the ABA Standing Committee found a nominee "not qualified." The Report then continues to report that three members found Justice Rehnquist "not qualified" when he was first appointed in 1971—a toally falacious charge in light of his 16 years of exemplary service and his elevation to the Chief Justiceship. It also points out that Judge Haynesworth was also subject to several dissenting votes.

2. Page 5. The Report spends considerable time detailing the reasons for the ABA dissenting votes without pointing out that the reasons given are outside the standards for ABA assessment. None of these political objections fit within the three ABA standards for assessment, thus lending great weight to the charges that these were politically motivated votes.

3. Page 8-14. The Report's heavy reliance on the extremist view that the Constitution is a mirror of an evolving "image of human dignity" is ludicrous. This points out the major flaw of this entire attack on Judge Bork. It assumes that judges must manufacture new rights out of the "open-ended phrases of the document," rather than allowing the people to identify their own rights through constitutional amendments or statutes.

4. Page 8-10. The Report's approval of substantive Due Process is appalling in light of the use of this doctrine to reach the unprincipled and dangerous conclusions of *Dred Scott* (blacks are only properly with no constitutional rights) and *Lochner* (economic rights prevent health and safety regulations) and *Roe* (unborn children have no constitutional protections), to name just a few.

5. Page 11. The Report's comment that "expanding the liberty of any of us . . . expands the liberty of all of us" is silly. Take any case currently before the Supreme Court as an example. One litigant argues for a liberty and right to abortion on demand. The opposing litigant argues for a liberty and right of parents to counsel with their minor children before an abortion. Both liberties cannot prevail. The Court chooses between the two and its choice limits one right and grants another. It cannot do otherwise. This is true of any other case.

6. Page 12. The Report cites James Iredell for the notion that the Constitution contains vast "unennumerated 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.

7. Page 13. The Report's claim that no justice in history has had as narrow a view of liberty as that of Judge Bork is absurd. Professor McConnell disposed of that falsehood in the hearing. Numerous justices, including Chief Justice Burger who testified of his agreement with Judge Bork, share Judge Bork's view of the Constitution's clauses. Chief Justice Rehnquist and Justice Scalia (who voted with Judge Bork 98% of the time on the Circuit Court) are two living justices who are likely to share his views. After all, if no one shares his views, then he is not likely to tip the balance because no one will vote with him.

8. Pages 14-19. The Report's error in listing the views of several justices lies in citing some loose dicta in various cases as if it was

the controlling principle of that justice's jurisprudence. In other instances, the Report cites a justice's approval of the incorporation doctrine as evidence of difference with Judge Bork when Judge Bork, too, agrees with the established incorporation principle. The descriptions of the cases are often faulty at best. For instance, *Skinner* (p. 17) did not outlaw all sterilization, but instead stated that laws requiring sterilization for thieves but not for embezzlers worked an "unmistakable discrimination." The Court was not making any binding legal judgments about procreation, but merely saying that if a state refused to sterilize embezzlers then it could not presume to discriminate by sterilizing robbers.

9. Page 19. The Report hits ecstacies when discussing the "concept of fundamental rights" without ever specifying the limits of these fundamental rights. For instance, is the right to sodomy a fundamental right as the *Hardwick* minority contended?

10. Page 20. The Report reiterates that Judge Bork's definition of liberty sets him apart. This is unsubstantiated. See 7 above.

11. Pages 21-29. The Report chooses to ignore and discount Judge Bork's explanations of his view of *stare decisis*. Although Judge Bork articulates a principled theory of *stare decisis* perhaps better than any other judge to come before the Judiciary Committee, his explanations are pushed aside. It would be an interesting challenge to see if the Report writers could find a single instance in history where a nominee expressed a more principled and defined theory of precedent.

12. Page 25-26. The Report's analysis of *Brandenburg* is incorrect on several counts: 1. Judge Bork never recanted his position that Justice Holmes' reasoning for the "clear and present danger" test is inadequate. Judge Bork does not accept Justice Holmes' reasoning that "if . . . beliefs expressed in proletarian dictatorship are destined to be accepted . . ., then the only meaning of free speech is that they should be given their chance and have their way." 2. To say Judge Bork cannot fairly apply the *Brandenburg* test in light of that criticism is wrong. Judge Bork can apply the "clear and present danger" test on reasoning other than Justice Holmes' protection for subversive speech.

13. Page 27. The Report misstates Judge Bork's position on the *Hess* case. Judge Bork did not contest that the Supreme Court correctly applied the *Brandenburg* test in the *Hess* case. The Judge only went further to explain that he thought Hess could still be punished on other grounds, namely the shouting of obscenities in public.

14. Page 28. The report complains even when Judge Bork agrees with controversial Supreme Court decisions. The Report dismisses with a passing reference the Judge's commitment to abide by the Supreme Court's rulings in dozens of controversial cases. In the Report's view, these various commitments do not meet Judge Bork's *stare decisis* criteria. This is evidence that the Report writers do not understand Judge Bork's criteria and detailed theory.

15. Page 30-36. The Report's treatment of the privacy question is riddled with false assumptions and slanted commentary. The examples are numerous. A few of these are: 1. *Skinner* is once again read as a "fundamental rights" case rather than an equal protection case. This case consistently illustrates the Report's elementary legal error of emphasizing some dicta and short-changing the holding. Regardless of the merits of this "fundamental rights" reading of *Skinner*, Judge Bork only criticized the case's equal protection reasoning. 2. The pivotal fact that Judge Bork would reach the same result as in *Skinner* but by a more sound reasoning process is buried in a fine-print footnote. 3. Similarly, the Report quickly dismisses without commentary the fact that Judge Bork might reach the same result as in *Griswold* by a different route. 4. The Report mentions Judge Bork's *Zech* opinion in a disparaging context several times without explaining that Judge Bork's reasoning was adopted by the Supreme Court itself in the *Hardwick* case. Judge Bork is apparently more in tune with the Supreme Court on privacy than is this Report. 5. Despite claims to the contrary, the Judge did not first articulate the distinction between results and reasoning in 1987. This is the heart of his 1971 article, namely that the Court must use an honest and neutral reasoning process. 6. Professor Tribe's criticism that Judge Bork seems to be playing "hide and seek" with the Constitution is disingenuous at best. In fact, the Supreme Court discovered new rights in 1973 (abortion), 1961 (exclusionary rule), 1963 (school prayer), and so forth that had not been found in nearly two hundred years. The Court is the body that has been playing "hide and seek" as a scholar of Tribe's purported dimension would be expected to understand. Moreover Judge Bork's assertions that he wants to examine the issues fully before finally asserting a legal position is appropriate judicial conduct, not "hide and seek." Professor Tribe's criticism smacks of a disposition to prejudge on political criteria which would be very inappropriate conduct to expect from any judge.

16. Pages 30-36. The Report protests too much about the privacy doctrine. It even goes to the lengths of arguing that privacy has been a settled doctrine for 75 years. If privacy is this settled and is clearly part of the Constitution, then no judge could overturn it. In fact, the privacy doctrine remains very controversial and has been criticized by four current justices. This entire campaign against Judge Bork is motivated by a fear that he will be the fifth vote to reconsider a doctrine with little, if any, constitutional foundation. In sum, this Report is conclusive evidence that the privacy doctrine is a judge-made doctrine which can be changed by other judges. If it were indeed part and parcel of the Constitution, no judge could dispute or presume to change it.

17. Pages 36-45. The Report repeats much of the erroneous demagoguery about Judge Bork's record on civil rights. These errors have been often pointed out, but the corrections go unheeded. The Report begins with the false assertion that "[T]hroughout his career" Judge Bork has opposed civil rights advances. This overlooks his outstanding record as SG and Circuit Court judge. In nearly a decade of service in those capacities, he never advocated a civil rights position less favorable to minorities or women than that adopted by the Supreme Court.

18. Page 37. The Civil Rights legislation myth debunked by the following facts:

Nowhere does the report note the distinction between Judge Bork and Professor Bork. In different roles, he performed different functions. The function of a professor is to be provocative.

Professor Bork wrote in that same 3-page article that "Of the ugliness of racial discrimination there need be no argument." This fundamental premise of the article is not reported.

Professor Bork recanted his academic concerns about the 1964 Act numerous times. He recanted his opposition soon after the event in classes and formally in 1973.

19. Page 38. The Racially Restrictive Covenants myth debunked by the following facts:

As Professor Bork stated in 1971 (note that the distinction between a judge and a professor is ignored), "the difficulty with *Shelley* was not that it struck down a racially restrictive covenant, which I would be delighted to see happen, but that it adopted a principle, which if generally applied, would turn almost all private action into action to be judged by the Constitution." This compelling explanation appears nowhere in the Report.

Nowhere does the Report mention that Judge Bork was responsible for the *Runyon v. McCrary* case which outlawed racially discriminatory private contracts under 42 U.S.C. 1981. Judge Bork in no way endorsed racially discriminatory contracts, but instead he outlawed them.

*Shelley* made private covenants subject to the 14th Amendment solely because they were enforced in state court. This tends to ignore that the language of the Constitution only applies to "state actions," not all private endeavors.

In case after case, the Supreme Court has refused to extend the principle of *Shelley*. It has not proved to be a precedent of any significance.

20. Page 38. The School Desegregation myth debunked by the following facts:

Judge Bork has time and again enforced civil rights laws against federal government discrimination. In the *Emory* case, for example, he held that the Navy's promotion systems are subject to civil rights claims. It is ludicrous to question whether he will "challenge discrimination by the federal government." He has repeatedly done so.

None of the witnesses questioned Judge Bork's integrity. But the Senate staff Report seems intent to do so by giving no value whatsoever to his stated intention to abide by *Bolling* and other such cases.

21. Page 39. The Poll Tax myth is debunked by the following facts:

As Judge Bork continually noted, the *Harper* case contained no evidence whatsoever of racial discrimination. If it had involved racial discrimination, Judge Bork would fully agree with the decision.

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 discrimina-

tion is an outrageous breach of the Senate staff's professional responsibility.

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).

22. On page 40. The One-man, One-vote myth is debunked by the following facts:

Judge Bork, despite the erroneous Report's insinuation, has not questioned and does not oppose the *Baker v. 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.

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.

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).

23. Page 42. The literacy test myth is debunked by the following facts:

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 v. 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 v. Madison* that the Court is the final arbiter of the Constitution.

The Supreme Court itself rejected its *Katzenbach* rationale four years later in the *Morgan* case dealing with the 18-year-old vote.

Judge Bork's comments on this issue came in opposition to the Human Life Bill in which Congress attempted to define the word "person" in the Constitution to include "unborn children" thus overturning *Roe*. He was joined in this opinion by Professors Tribe and Cox, among others.

24. Pages 45-50. The Report once again repeats many misleading distortions of Judge Bork's statements and views of women's rights and the Equal Protection clause. Both as SG and Judge, Judge Bork has been instrumental in advancing women's rights. As SG, won victories for the principle of equal pay for equal work *(Corning Glass)* that he carried forth on the Circuit Court *(Laffey* and *Ososky)*. Moreover the hearings indicated that he defended Ms. LaFontant against subtle discrimination in the Justice Department.

25. Pages 45-46. The Report simply misreads Judge Bork's prior position on the Equal Protection clause. For example: 1. Judge Bork never questioned whether women were covered by the clause. After all the language of the Constitution covers "any person" and Judge Bork above all would adhere to the written document. All of Judge Bork's comments on women and equal protection clause dealt with the burning question of what standard should be applied. The question of coverage was too obvious for deep consideration. The Report's effort to make Judge Bork's position appear to change on this point is flat wrong. 2. Judge Bork consistently criticized the old "rational basis" test for gender discrimination. This was the basis of his criticism of the *Goesart* case (women may not generally be bartenders) in his 1971 article. 3. Judge Bork's reasonable basis test, as he so often stated, would reach the same results as the Court's current "heightened scrutiny" analysis. He agreed, for instance, with *Reed v. Reed* (men not preferred as estate administrators). He could think of only two extreme gender distinctions that MIGHT be upheld (all-male draft, segregated toilets). 4. In fact, as a judge, Judge Bork upheld an Equal Protection gender challenge to parole regulations. *Cosgrove v. Smith)*

26. Pages 50-57. The Report parrots many hallow assumptions about Judge Bork's potential votes on the First Amendment speech clause without ever acknowledging that he has already voted on *many occasions* to grant broad protections to many varieties of speech. A few of the many distortions are: 1. The Report ignores Judge Bork's actual record wherein he broadly protected the press against libel suits *(Ollman)*; he prohibited a prior restraint of distasteful ads about President Reagan *(Lebron)*; he protected scientific speech *(McBride)*; he protected commercial speech *(Brown & Williamson)*; and he protected artistic and literary speech *(Quincy Cable)*. 2. The Report ignores that Judge Bork stated well before his appointment that the 1st Amendment covers more than the mere political core of the speech clause. (See 1984 ABA Journal) 3. Judge Bork's criticism of *Cohen* is a criticism of the rationale of that case which held that "one man's vulgarity is another man's lyric". This rationale would overturn any law against obscenity and is inconsistent with later Supreme Court cases permitting the FCC to punish radio stations that broadcast profanities *(FCC v. Pacifica)* and permitting schools to discipline students for profanity in a speech to the student body *(Fraser)*. Judge Bork sees no role for protection of obscenity under the Constitution, a position shared by a majority of the Supreme Court *(Roth, Miller)*

27. Pages 52-53. The Report raises unfounded concerns about Judge Bork's willingness to permit peaceful civil demonstrations. In fact, as Judge Bork explained, "there is a large difference between advocating that things be burned down or blown up and urging a sit-in demonstration." Judge Bork drew a logical distinction between demonstrations to test the constitutionality of a law and subversive inciting to violence. The *Brandenburg* case itself is a good example. In that case, an excited speaker at a KKK rally urged his audience, many of whom were carrying firearms, to "bury the niggers" and otherwise commit acts of violence. You can imagine what might have happened if a black individual had appeared at that moment. This is far different from Dr. Martin Luther King's efforts to dramatize the faults of segregation laws with peaceful sit-ins. Judge Bork is making a very logical and time-honored distinction.

28. Pages 51-54. The Report misconstrues Judge Bork's position on the "clear and present danger test." See 12 and 13 above.

29. Pages 57-65. The Report's discussion of separation of powers issues overlooks significant evidence before the Committee and presents an otherwise incomplete picture of Judge Bork's actual views. For example, the report's charge that Judge Bork advocates an "almost limitless" view of presidential power is rebutted by Solicitor General Bork's actions on the pocket veto while an officer in the Executive branch. Solicitor General Bork advocated that the President must not employ the pocket veto in a manner that defeats Congress's right to override vetoes. His reading—that pocket vetoes should be limited to sine die adjournments—prevailed in the Ford Administration only after he threatened to refuse to defend the alternative view in court. Another example of Solicitor General Bork, while an executive officer, ruling against Executive prerogatives came when he prepared a brief arguing that Vice President Agnew (and, by analogy, President Nixon) was not immune from criminal prosecution. His brief put an end to the executive immunity argument which had been before a primary component of the Watergate debate. These are hardly the acts of an individual who advocates no limits on executive powers or who has a bias for executive power.

30. Pages 57-59. The Report's discussion of the War Powers Act overlooks several critical points: 1. At the time that Judge Bork first observed that the War Power Act is "probably unconstitutional," the Act contained a legislative veto provision. In the interim, the *Chadha* decision has established that at least this much of the War Powers Act addressed by Judge, then-Professor, Bork was indeed unconstitutional. 2. Judge Bork's further point on the War Powers Act should not be controversial. He merely notes that the Act should not be allowed to permit the Congress to "micromanage" tactical military situations, a power solely within the province of the commander-in-chief. Indeed by amending the draft Constitution to limit Congress's power from the power to "make" war to the power to "declare" war, James Madison and the 1787 Convention specifically avoided granting Congress any power to dictate tactical or strategic military policies.

31. Pages 61-62. The Report's allegations about Judge Bork's position on the special prosecutor statute also misrepresent several important facts: 1. The bill that Solicitor Bork testified against in 1973 was never enacted and, unlike the current Ethics in Government Act, would have established prosecutors wholly outside the appointment, control, or removal of the President. The Supreme Court has established that prosecuting cases is a core executive function (*Buckley, Nixon*) and Judge Bork was merely defending, as a member of the Executive branch, that executive function in 1973. 2. Subsequent administrations, including those of Presidents Carter and Reagan, have made arguments very similar to those of Judge Bork about this Act. 3. The difference between Judge Bork's Solicitor role and his role as a judge is illustrated by his rejection of the Justice Department's argument that the Ethics in Government Act in *Nathan v. Smith*. Despite the Department's argument that the Act might allow judicial control of prosecutors and prosecutions, Judge Bork ruled the Act constitutional. Moreover he upheld the Act against constitutional challenges a second time in *Banzhaf v. Smith*.

32. Pages 62-64. The Report's examination of congressional standing doctrines omits

the perfectly defensive reason for Judge Bork's concern about this doctrine. Specifically Judge Bork stated that he was no more "hostile to congressional standing than to . . . Presidential standing or judicial standing." His apprehension about congressional standing is that it could allow the President to sue Congress anytime he believed it passed a law abridging his constitutional powers. Or members of Congress could challenge the allocation of committee seats between the two parties as occurred in the *Vanderjagt* v. *O'Neill* case. Or Senators could challenge the legality of a filibuster in court. In short, Judge Bork is merely trying to prevent courts from umpiring every inter- or intra-branch squabble that might arise. This is not the constitutional function of the courts and would expand judicial power at the expense of executive and legislative power. Interestingly, Justice, then Judge, Scalia held the same views, but faced no criticisms during his nomination proceedings. (*Moore* v. *House of Representatives*).

33. Page 65. The Report's treatment of the executive privilege doctrine is wholly inadquate. The *Wolf* case arises under the Freedom of Information Act which includes, thanks to the wisdom of Congress, an exemption for "inter-agency and intra-agency memoranda" essential to executive deliberations. Although this exemption might in itself exempt the record from disclosure, Judge Bork nonetheless would have remanded the case for a determination of whether the records were involved in "directly" advising the President. This is a very reasonable resolution of a difficult case and hardly evinces a bias for the Executive or any other branch.

34. Pages 65-71. The Report's account of the Watergate crisis transparently attempts to create controversy where none should exist. The overwhelming fact is that Judge Bork successfully preserved the integrity of the special prosecutor's office and investigation, successfully preserved the integrity of the Justice Department, and successfully preserved the nation's integrity in a time potentially debilitating constitutional crisis. The two questions raised by the Report are easily answered. First, Judge Bork's action was in firing Prosecutor Cox was legal. The only opinion to the contrary, a decision by Judge Gesell, was vacated—in other words, expunged, erased, eliminated, dismissed. Judge Bork's account of the legality and wisdom of the difficult firing decision was corroborated completely by former Attorney General Eliott Richardson, the only other person who was present during the entire proceedings.

On the second issue, Judge Bork's account that he privately undertook a campaign immediately both to preserve the special prosecutor's investigation and to find a new prosecutor was corroborated by the most authoritative witnesses. Phil Lacovara, Cox's deputy, agreed that Judge Bork acted to protect investigation and to permit it to continue as before. Dallin Oaks, among others, testified that Judge Bork was seeking a new prosecutor "within hours" of the firing. Of course, his public affirmance of his search for a new prosecutor was delayed for a few days because the President did not immediately share his views on this subject. All in all, however, the proof is the result. Judge Bork's efforts were indispensable to the eventual resolution of the Watergate crisis. This may have been one of Judge Bork's finest hours.

35. Pages 71-78. The Report's account of Judge Bork's antitrust views as "extreme" and as advocating judicial activism are farfetched at best. As to whether Judge Bork's views are "extreme," the Report declined to mention that 15 past chairmen of the ABA Antitrust Section wrote to report that Judge Bork's views are "mainstream." They further noted that his book, which is harshly criticized by the Report, has been cited with approval in six Supreme Court decisions joined by all nine current justices.

The real agenda of those attacking Judge Bork is revealed by their alternative antitrust agenda. In their view, antitrust laws should be used as levelers of wealth and political influence. In other words, they would use antitrust law to protect inefficient producers at the expense of the consumer and let courts impose ideologies that affect competition in the marketplace. Chief Justice Burger summed it up by stating that "Congress designed the Sherman Antitrust Act as a consumer welfare prescription." For this proposition, the Chief Justice cited Judge Bork's book. (*Reiter v. Sonotone*).

The Report faults Judge Bork's *Rothery* decision as an example of judicial activism. The facts rebut that assertion. Judge Bork reached the unremarkable conclusion that a firm supplying a mere 6% of the market has no market power and hence was not restraining trade beyond reason. In fact, Professors Areeda and Turner who have written the authoritative multi-volume treatise of antitrust law suggest that a market share of less than 30% is presumptively evidence of lack of sufficient market power to produce a monopolistic result.

36. Pages 78-81. The Report's account of the allegations of Judge Gordon evince a calculated but wholly unsuccessful effort to impugn Judge Bork's professional reputation. A quick and fair review of the evidence before the Committee disposes of this aspect of the slanted Report: 1. The ABA was requested to review this matter. After hearing Judge Gordon's recollection of the events and without even taking the time to get Judge Bork's side of the story, the ABA dismissed the matter as something that "happens once in a while in any event with the best circumstances," to use the words of Judge Tyler of the ABA. 2. It is frankly preposterous to insinuate that Judge Bork would try to get his opinion adopted by the D.C. Circuit if it was not a majority opinion. In fact, Judge Bork purposely circulated the opinion to ensure that it would not escape the notice of his colleagues. As Judge Bork stated, "there is simply no possibility that any judge could change the law of the circuit surreptitiously." This allegation was not worth the time spent to explain it in the Committee Report.

37. Pages 81-92. The Report's assertion that Judge Bork's record as Solicitor General and Judge are irrelevant on the one hand and are evidence of his judicial activism on the other is ludicrous on its face. A few of many examples will suffice on this point: 1. The Report cites Judge Bork's *Dronenburg* decision that the privacy doctrine does not extend to homosexual activity as an "example of Judge Bork's activist approach." The Report conspicuously fails to mention that the Supreme Court reached the same result as Judge Bork by similar reasoning in the subsequent *Bowers v. Hardwick* case. Either the Supreme Court is also "activist" on this issue or Judge Bork is not activist.

2. The Report recites again the hackneyed allegations about the *Cyanamid* case. The facts the Report ignores are indicative of the bias of the staff authors. Accordingly, it seems to be once again necessary to recount the facts: a. Despite the claims that Judge Bork approved or endorsed a sterilization policy, he in fact merely construed a statute which did not cover the company policy before the Court. If there was a problem, it was a problem with the statute created by Congress which did not include this policy within the term "hazard." It is interesting that some Senators have acknowledged that Congress is the problem by introducing legislation to correct the legislative problem. (Metzenbaum). The term "recognized hazard" was clearly intended by Congress to cover only "physical workplace conditions," not policies such as this. b. None of the women were before the court in this case. Each of them had brought a separate suit and had been compensated for their injury under Title VII. Indeed Judge Bork in his opinion stated that this policy was very likely an unfair labor practice or a Title VII violation, but not a "hazard" as defined. c. The Court's opinion was unanimous. One of the Judges was Judge, now Justice Scalia, who was unanimously approved without any fanfare over this opinion. Moreover the entire Circuit did not undertake to review or reconsider this unanimous opinion. This is because it was correctly decided. Incidently the OSHA review commission had already made the same finding as well. The Court merely sustained that decision. d. Most important, Judge Bork did not approve of the "unhappy choice" presented the women. In fact, he deplored it.

3. The Report also stretches the *Vinson* case out of its responsible context. Judge Bork in this case wrote a dissent from denial of rehearing. This type of opinion is designed to preserve certain issues in the case for appeal. Indeed on appeal to the Supreme Court, Judge Bork's view of the primary issues was approved by the Supreme Court. This was a case where the District Court found that the sexual relationship between a superviser and employee had been "voluntary." The circuit reversed and imposed automatic liability on the employer for allowing sexual harassment in violation of Title VII. Judge Bork raised two issues and was sustained on both. First, on the evidentiary issue, he contended that a court to be able to consider evidence of "dress or behavior" to show if the sexual advances were "solicited or welcomed." The Supreme Court agreed with Judge Bork and reversed the Circuit panel. On the second issue, Judge Bork disagreed with the imposition of automatic liability on the employer for conduct "he knows nothing of and has done all he can to prevent." The Supreme Court agreed with Judge Bork and reversed the Circuit panel. Both the Supreme Court and Judge Bork were concerned with distinguishing between a consentual and voluntary office romance and unwelcomed advances by a supervisor. Judge Bork never questioned the applicability of Title VII to sexual harassment, but only called for sensivity and care in doing so. The Supreme Court agreed.

38. Pages 93-95. The notion that Judge Bork has altered his views during the hearings to appease the Committee is absurd. In fact, the three alleged instances of this shift are evidence that Judge Bork had explained on the record as early as 1984 that he felt that 1st amendment protections ought to be expanded to include broad classes of speech beyond the amendment's political speech core. In fact, in that 1984 ABA Journal article, he explained that he had fully stated this expansion in his classes years before. This charge becomes even more absurd

when Judge Bork's judicial record is examined. He upheld broad categories of speech in the *Quincy Cable* case, to name only one.

39. Pages 96-99. In light of the distortions in the body of the Report, the 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.

This conclusion betrays far too much. It shows 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. HATCH. Mr. President, let me go to my point number 25, pages 45 and 46 in the report.

25. Pages 45-6. The Report simply misreads Judge Bork's prior position on the Equal Protection clause. For example: 1. Judge Bork never questioned whether women were covered by the clause. After all the language of the Constitution covers "any person" and Judge Bork above all would adhere to the written document. All of Judge Bork's comments on women and equal protection clause dealt with the burning question of what standard should be applied. The question of coverage was too obvious for deep consideration. The Report's effort to make Judge Bork's position appear to change on this point is flat wrong. 2. Judge Bork consistently criticized the old "rational basis" test for gender discrimination. This was the basis of his criticism of the Goesart case (women may not generally be bartenders) in his 1971 article. 3. Judge Bork's reasonable basis test, as he so often stated, would reach the same results as the Court's current "heightened scrutiny" analysis. He agreed, for instance, with Reed v. Reed (men not preferred as estate administrators). He could think of only two extreme gender distinctions that might be upheld (all-male draft, segregated toilets). 4. In fact, as a judge, Judge Bork upheld an Equal Protection gender challenge to parole regulations. (Cosgrove v. Smith).

There is much more that needs to be said. I have done this in a cursory manner, and I think it glares at you.

37. Pages 81-92. The Report's assertion that Judge Bork's record as solicitor General and Judge are irrelevant on the one hand and are evidence of his judicial activism on the other is ludicrous on its face. A few of many examples will suffice on this point: 1. The Report cites Judge Bork's Dronenburg decision that the privacy doctrine does not extend to homosexual activity as an "example of Judge Bork's activist approach." The Report conspicuously fails to mention that the Supreme Court reached the same result as Judge Bork by similar reasoning in the subsequent Bowers v. Hardwick case. Either the Supreme Court is also "activist" on this issue or Judge Bork is not activist.

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And, I might add, made the legal suggestion as to how to remedy it, which they had already done.

3. The Report also stretches the *Vinson* case out of its responsible context. Judge Bork in this case wrote a dissent from denial of rehearing. This type of opinion is designed to preserve certain issues in the case for appeal. Indeed on appeal to the Supreme Court, Judge Bork's view of the primary issues was approved by the Supreme Court. This was a case where the District Court found that the sexual relationship between a supervisor and employee had been "voluntary." The Circuit reversed and imposed automatic liability on the employer for allowing sexual harassment in violation of Title VII. Judge Bork raised two issues and was sustained on both. First, on the evidentiary issue, he contended that a court ought to be able to consider evidence of "dress or behavior" to show if the sexual advances were "solicited or welcomed." The Supreme Court agreed with Judge Bork and reversed the Circuit panel. On the second issue, Judge Bork disagreed with the imposition of automatic liability on the employer for conduct "he knows nothing of and has done all he can to prevent." The Supreme Court agreed with Judge Bork and reversed the Circuit panel. Both the Supreme Court and Judge Bork were concerned with distinquishing between a consensual and voluntary office romance and unwelcomed advances by a supervisor. Judge Bork never questioned the applicability of Title VII to sexual harassment, but only called for sensitivity and care in doing so. The Supreme Court agreed.

I could go on and on. All I can say is that I am disturbed by the majority report in this matter. I think it is biased, one-sided, misleading, and I think in many ways has ignored not only the judge's testimony but has always resolved every issue, it seems to me, against Judge Bork, and I think not very fairly.

With that, I yield the floor.

EXHIBIT 1

84 FLAWS IN THE NARAL AD

Falsehood 1: Title ("What women have to fear . . .")—This implies that all women do or would fear Judge Bork's jurisprudence. In fact, many women's groups contacted the Judiciary Committee to indicate their support for the nomination. One of these was Concerned Woman for America which purports to be the largest women's political organization.

Falsehood 2: Title—This implies that women have some reason to fear Judge Bork. There is no such reason. In fact, his record as Solicitor General and Judge indicate that he never advocated a position less protective of women's rights than that adopted by the Supreme Court itself. On the other hand, Judge Bork has advocated more protections for women's rights than accepted by the Supreme Court. For example, in the *Gilbert v. G.E.* pregnancy discrimination case, his argument for women was rejected by the Court and later adopted by Congress.

Falsehood 3: "You wouldn't vote for a politician who threatened to wipe out every advance women have made. . ." This equates Judge Bork with a politician. Judges are not politicians and ought not be judged by political standards. If judges begin to worry about the political implications of their decisions, the judiciary's ability to guarantee women's rights as well as the rights of all citizens will be impaired and jeopardized.

Falsehood 4: "Threatened to wipe out. . ." This implies that Judge Bork threatens women's rights. To the contrary, he has been an exemplary judge in defending women's rights. In *Palmer v. Schultz* and *Ososky v. Wick*, he struck down gender discrimination in the State Department. In *Laffey v. NW Airlines*, he guaranteed equal pay for equal work done by airline stewardesses.

Falsehood 5: "every advance" The implication that Judge Bork has opposed every advance for women is flatly wrong. He is responsible for many of these advances. For example, SG Bork was responsible for the initial argument that Title VII covered pregnancy discrimination. *Gilbert.* Similarly he was responsible for the case made the Equal Pay work to grant women equal pay for equal work. *Corning Glass v. Brennan.* His judicial record is likewise excellent in advancing women's rights.

Falsehood 6: "your Senators are poised to cast a vote that could do just that." Doubly misleading. In the first place, the Senate is performing its advice and consent function, not voting on the single issue of women's rights. In the second place, the bulk of the reliable evidence indicates that Judge Bork's confirmation would aid, not hinder, women's causes.

Falsehood 7: "Senate confirmation of Robert Bork to the Supreme Court might cost you the right to make your most personal and private decisions." Empty rhetoric. Judge Bork has no intention of depriving individuals of their personal and private decisions. His record shows a willingness to give women more choices by eliminating discrimination and granting equal pay. See cases cited in 4 and 5 above. Moreover his lengthy testimony indicates a personal willingness to leave decisions to individual decisionmaking.

Falsehood 8: same as above. Judge Bork alone can make no ruling on the Supreme Court. The only way individual choice is limited by the Bork confirmation is if at least four other justices agree with his reading of the law made by Congress or the state legislatures. Moreover in that instance, it would be Congress or the state, not the majority of the Supreme Court, which limited individual choice in favor of some higher legal value.

Falsehood 9: "His rulings might leave you no choice . . ." Misleading, see 7 and 8 above. Moreover this is completely speculative.

Falsehood 10: ". . . in relationships . . ." False. Judge Bork sustains, for instance, the *Loving v. Virginia* case which grants individuals the right to choose their spouse without government intervention.

Falsehood 11: ". . . in childbearing . . ." False. Judge Bork has never commented in anything but protective and reverential terms about the decision to bear children, to become a mother. This, however, is probably a veiled allusion to the abortion decision, which created a right to abortion on demand. On that point, Judge Bork has never said that he would reverse *Roe v. Wade*. The Judge, while a law professor, criticized the reasoning of that case as have many Justices and legal scholars.

Falsehood 12: ". . . in your career . . ." Utterly false. In fact, Judge Bork has furthered women's careers by eliminating discrimination and granting equal pay. See 4 and 5 above. The hearings also indicate that he defended a black woman at the Department of Justice who might otherwise have become a victim of subtle discrimination. Moreover, Judge Bork has criticized since 1971 those Supreme Court decisions which denied women the opportunity to serve as lawyers or to receive pilot's licenses.

Falsehood 13: "He must be stopped." Stopped from doing what? Stopped from striking down gender discrimination and granting equal pay? Stopped from opposing pregnancy discrimination? He has consistently defended women's rights. Why is he to be stopped?

Falsehood 14: "Our lives depend on it." Gross exaggeration.

Falsehood 15: ". . . He'll be the deciding vote . . ." Wrong. What makes Judge Bork's vote the deciding vote? He must be joined by four other Justices at least. One of the four justices who currently question *Roe v. Wade* is a woman. Why isn't her vote the decisive vote? No one vote counts anymore than another on the Supreme Court.

Falsehood 16: "The Fair-Minded, deliberate . . . Supreme Court . . ." This same Court has been harshly criticized by NARAL for sustaining Congress's ability to cut off federal funds for abortion. *Harris v. McRae*. The Court seems to be "fair-minded" or not depending on the political circumstances.

Falsehood 17: "Balanced Supreme Court." Preserving a particular Court "Balance" is impossible and extremely unwise. If past Presidents had preserved the balance, the abominable "separate but equal" doctrine would still be the law of the land.

Falsehood 18: "A right-wing 5-4 majority . . ." False labelling. This labels Justice Sandra Day O'Connor, the only woman justice, and Justice White, John Kennedy's appointment, as "right wing." None of the justices are "right-wing" but are interpreters of laws that may, on occasion, dicate conservative results.

Falsehood 19: See Above. The justices do not vote as blocks. The votes are not consistently 5-4 even on a given set of issues.

Falsehood 20: "Will prevail for decades." Does this mean NARL has a crystal ball? Justices change positions and resign. Many things are likely to affect the next decades.

Falsehood 21: "Robert Bork's writings . . . Demonstrate a hostility to rights . . ." Judge Bork is one of the nation's most articulate defenders of rights, including among the most important, the rights of the people to govern themselves rather than having Judges govern for them.

Falsehood 22: "Robert Bork's . . . Record demonstrate a hostility to rights . . ." Flat wrong. Judge Bork has never advocated a position on minority or women's rights less protective than adopted by the Supreme Court.

Falsehood 23: "Most women." Erroneous conclusion. See 1 above.

Falsehood 24: "from personal privacy . . ." Judge Bork has upheld every specific privacy provision in the Constitution. Likewise he has upheld statutory privacy rights, like the Privacy Act and the Financial Right to Privacy Act. Wherever the people have spelled out privacy protections, Judge Bork has upheld their direction with pleasure. He has not presumed to speak for them.

Falsehood 25: "equality of women and men before the law . . ." Judge Bork would grant women and men equality before the law. In fact, he would require legislatures to justify substantially any law that treats women differently from men. He does not question this principle.

Falsehood 26: "he's threatened to overturn any Supreme Court precedent that stands in his way." Blatant misstatement. As Judge Bork consistently reiterated, he has great respect for precedent. He would only overturn precedents after the most careful and circumspect analysis.

Falsehood 27: "According to Bork . . ." This overlooks that the Circuit Court ruled unanimously. Judge Bork was only one of several judges who reached the same conclusion that the law did not include this regrettable situation as a "hazard." Congress, not Judge Bork, caused whatever problem this case presents. Judge, not Justice Scalia, was one of these other judges and indeed the rest of the Circuit refused to reverse this unanimous ruling.

Falsehood 28: same as above. This overlooks that the OSHA Review commission, the expert government agency, had already found that the company in this case could offer women a choice.

Falsehood 29: "women can be forced to choose . . ." Judge Bork did not force any women to choose, nor could he. He merely upheld the law that did not cover this "unhappy" situation.

Falsehood 30: same as above. This sounds like Judge Bork approved of the "unhappy choice" posed by this case. In fact, he deplored it.

Falsehood 31: same as above. Blatant sensationalism. In fact, the company offered the women a choice. Due to hazards, fertile women could not work in the plant. Rather than release the women outright, the company offered a choice. The women themselves made the difficult choice.

Falsehood 32: "A state can declare the use of birth control illegal . . ." Misleading. This phrase makes it sound as though Judge Bork approves of outlawing contraception when, in fact, he considered the Connecticut law to be "nutty."

Falsehood 33: same as above. Misimpression. Judge Bork only criticized the reasoning the Supreme Court used to reach its decision in the *Griswold* contraceptive case. The so-called general "right to privacy" was unknown until 1965 when some judges discovered it in the "penumbras of the emanations" of the some constitutional phrases. Several justices, including Black, Stewart, Rehnquist, White, and others, continue to question this reasoning. Professors of all backgrounds, from Bickel to Kurland, have also faulted this reasoning.

Falsehood 34: "and invade your privacy to enforce the law . . ." Error. This suggests that homes were invaded by bedroom raiders. This never happened and never could have. In fact, the "nutty" law was never used to prosecute a married couple.

Falsehood 35: "you wouldn't even be protected against sexual harassment at work . . ." Clear deception. Judge Bork would punish, and clearly said so, any unwelcomed sexual harassment. Judge Bork would even impose liability on an employer who was not involved in the harassment but permitted it to continue. The Supreme Court in *Merritor Bank v. Vinson* agreed with Judge Bork's analysis of this issue.

Falsehood 36: "Bork doesn't believe . . . is "discriminatory." Distortion. In *King v. Palmer*, one woman was granted a promotion over another due to a romantic relationship with the supervisor. The issue of whether this was discrimination under Title VII was not presented to the court, but Judge Edwards' opinion seemed to decide the issue. A majority of the Circuit Court joined to note that the Title VII issue was not decided. This is really axiomatic. Both the woman promoted and woman denied promotion were obviously female; the discrimination, if any, was not based on the sex of the one denied. That issue, however, was not decided by Judge Bork or the rest of the Circuit.

Falsehood 37: "The fact is . . . won the right to vote." False conjecture. See 2, 4, 5 above.

Falsehood 38: "He would deny women the freedom, fairness, . . . first-class citizens." Baseless prevarication. Judge Bork stood by his wife throughout her debilitating and ultimately fatal disease. He defended a black woman's prerogatives at the Department of Justice. He has never regarded women as other than equals.

Falsehood 39: "Stripped of our most basic constitutional guarantees of personal privacy . . ." This suggests that Judge Bork would strip women of privacy. This is false. See 24 above.

Falsehood 40: same as above. Misleading assumption. This seems to suggest that the Constitution contains some mystical general right to privacy. In fact, the word "privacy" appears nowhere in the Constitution. Moreover, legal scholars, like Archibald Cox and John Hart Ely, who support abortion, agree that the Supreme Court had no business basing *Roe* v. *Wade* on a flawed reasoning. This flawed reasoning was the so-called privacy doctrine.

Falsehood 41: "Stripped of . . . equal protection" Wrong. Judge Bork has repeatedly stated that the equal protection clause, by its terms, applies to "any person." Thus, it is obvious to Judge Bork and any other fair-minded observer that it applies to women. Judge Bork would not strip women of equal protection. In fact, he would require legislatures to have substantial justification for any distinctions between men and women.

Falsehood 42: "Women would have no defense" Offensively patronizing. Women are not so weak. They do not have to be "protected" but can easily defend themselves in the political, social, and economic marketplace.

Falsehood 43: "Moral Majority Extremists" Shallow attempt to create an ogre.

Falsehood 44: "First to go? Your right to make a private decision about abortion." This demonstrates the impossibility of defining the broad concept of privacy. In addition to abortion "privacy," judges have voted to created a privacy for homosexual conduct. Scholars at the Bork hearings have advocated privacy to take illegal drugs in privacy. What about prostitution privacy? Price-fixing privacy?

Falsehood 45: Same as above. Judge Bork has never said he would overturn *Roe* v. *Wade*. In fact, he has said he would hesitate to overturn an established precedent. How is it known that this would be the "First to go?"

Falsehood 46: "With Bork on the Court, your basic freedom . . . forever." This admits too much. If the right to abortion or the general right to privacy were actually in the Constitution, no judge or group of judges could remove them. They could only be removed by constitutional amendment. This argument betrays that the right to abortion on demand is a creation of judges and therefore can be changed by other judges.

Falsehood 47: "Whether and under what circumstances to bear children . . ." Poppycock. See 7, 8, 10, 11, 24, etc. above.

Falsehood 48: "A State could ban both birth control and abortion . . ." This attributes to Judge Bork a decision which would be made by the people's representatives in the State.

Falsehood 49: "Throwing women back to the age . . ." Misleading hyperbole.

Falshehood 50: ". . . Pregnancy was, in effect, compulsory. . ." Judge Bork advocates no such situation, was not responsible for the past situation, and would not be responsible for the exaggerated hypothetical situation.

Falsehood 51: " . . . women risked their lives to terminate a pregnancy." This is rash conjecture. If the Supreme Court itself did not acknowledge exceptional circumstances (rape, incest, life of the mother endangered) when abortion would be permitted, most states would surely grant such protections. In fact, it is inconceivable that this would ever result. It is impossible for Judge Bork to cause these problems.

Falsehood 52: "Attempts have been made to officially permit discrimination against women who've chosen abortion. . ." Is this too to be laid at Judge Bork's feet. No substantiation at all.

Falsehood 53: "Women who made this profoundly private decision. . . . singled out and denied education . . ." How can this be attributed to Judge Bork? The closest analogy to this case was *Gilbert v. G.E.*, where Judge Bork argued, and the Supreme Court rejected, the case that women should not be treated differently simply because they elected to become pregnant. Based on facts, Judge Bork would appear to be against this conjured evil.

Falsehood 54: "The Supreme Court nominee doesn't think vital Constitutional guarantees apply to women." False. False. False. See 25, 41.

Falsehood 55: "And a Supreme Court dominated by the right . . ." Falacious. This says that at least five justices: 1. vote as a block, 2, vote to preserve a political agenda, and 3. vote for a "right as opposed to a left" leaning agenda.

Falsehood 56: same as above. Error. This assumes that Supreme Court Justices can be defined by political labels. In fact, judges are not political, but legal, officers.

Falsehood 57: same as above. Ludicrously inconsistent. Earlier in this same ad, the Supreme Court was described as "fair-minded and deliberate." Now the same Court is described as "Dominated by the right." Both cannot be true.

Falsehood 58: "Whatever your personal feeling on abortion, the decision must be made up to you. . . ." This oversimplifies a complex issue. Who protects the rights of the unborn child? What abut unborn children who are viable and able to live outside the womb? What about minor children who cannot choose to have their ears pierced without parental approval, but need not even notify their parents before an abortion?

Falsehood 59: ". . . not imposed by some political appointee." Judge Bork would not and could not impose any abortion or birth decision. This canard has been repeated now dozens of times. Even if Judge Bork did vote to overturn the right to abortion on demand (which is not sure) and four other justices joined him (which is very unlikely), the states would still be free to permit abortion on demand (which several are likely to do) or to permit liberal abortion policies (which many more are likely to do). Judge Bork would be likely to uphold those state statutes permitting abortion. This is hardly an extremist.

Falsehood 60: "that's precisely why Judge Bork was nominated . . ." Utter lies. The President has never mentioned the abortion decision in connection with this nomination and Bork states forthrightly that he was never even asked about his position on the abortion cases, which is not entirely clear.

Falsehood 61: "His expedient reading of the Constitution . . ." Wrong. If Judge Bork stands for anything, it is a fair and honest reading of the Constitution regardless of the political experiences. This criticism is so transparent as to be funny.

Falsehood 62: "allows 'moral majority' extremists . . ." With no basis in fact, Judge Bork is allied with right-wing extremists on the abortion issue. In fact, Judge Bork was hotly criticized by these "extremists" because he had the courage to oppose the Human Life Bill which attempted to overturn the abortion case by redefining the words of the Constitution by statute.

Falsehood 63: "force their dogma on the rest of us . . ." This falsity is apparent. If any force was employed, it must be traced to the Supreme Court's invalidation of the laws of all 50 states on the subject of abortion. The people had chosen by lawful processes to regulate abortion to different degrees in the interest of the unborn child and maternal safety. The people's choices were overturned without clear warrant. No one proposes to employ any force to reinstate what was forcibly taken away from the people—namely the right to govern these sensitive questions.

Falsehood 64: "extending into every aspect of women's lives . . ." Repeat a lie often enough and it may begin to sound credible. Certainly no evidence exists that Judge Bork would wish to harm women in this fashion.

Falsehood 65: "as if the Constitution simply didn't apply to women." These are the same hollow arguments that the nation did not buy when it refused to ratify the ERA. In fact, the Constitution clearly applies to women. Judge Bork would be among the first to see that it was so interpreted.

Falsehood 66: "Your Senators . . . inviting right wing extremists . . ." Extreme language without foundation. Once again this partakes of both idle conjection about the future and name-calling.

Falsehood 67: "Or they can . . . uphold the Constitution . . ." These alternatives are classically exaggerated. This alternative suggests that Judge Bork would not uphold the Constitution—an absurd assertion. It also suggests that everything this particular group advocates is in the Constitution—another absurd assertion.

Falsehood 68: "status of women in a free society . . ." This nomination is not going to change the status of women in a free society under any circumstances.

Falsehood 69: "a man you have never met will decide your future . . ." Slimey. First, Judge Bork is not going to decide anything alone. Next, Judge Bork is not seeking to deprive women of their future.

Falsehood 70: "one vote away from losing . . . rights . . ." Admits too much. If one vote on the Supreme Court can alter these so-called "rights," they must not be constitutional rights which can only be altered by constitutional amendment.

Falsehood 71: "One justice from injustice . . ." The Supreme Court was created only to give effect to the Constitution and laws of the U.S. in the resolution of cases and controversies. If injustices are done by the court, those injustices must be the product of the law or the Constitution which the judges apply. The solution is to change the law or the Constitution to remedy injustice, not to change the judges who are not supposed to be subject to political forces.

Falsehood 72: "Bork must be stopped." Stopped from doing what? His record is one of full vindication of women's rights. See above.

Falsehood 73: "Dear Senator. We cannot accept a . . ." This unfairly misrepresents Judge Bork's record. Judge Bork clearly thinks and has testified and written that the Constitution protects women. More important, as a judge, he has enforced those rights of women.

Falsehood 74: "Judge Bork is an extremist . . ." NARAL calling Judge Bork "extreme" speaks for itself. This group could not tell a judicial mainstream from a judicial jet stream.

Falsehood 75: ". . . nominated by extremists . . ." Extremists? President Reagan alone makes these nominations as empowered by the Constitution. This is one of the parts of the Constitution which NARAL must not have read recently.

Falsehood 76: same as above. Infantile name-calling. This calls President Reagan—the President elected by the largest margin in electoral history—an "extremist." This shows the vantage point from which this organization operates.

Falsehood 77: "Senate has rejected one out of five nominees." Very misleading. In nearly one hundred years and 53 nominations, the Senate has refused to employ po-

litical litmus tests and ideological inquisitions to reject nominees. In fact, in the history of the Court, only a handful of nominations were defeated on political grounds and this occurred mostly during the Civil War period.

Falsehood 78: same as 73 above.

Falsehood 79: same as 74 above.

Falsehood 80: same as 75 above.

Falsehood 81: same as 76 above.

Falsehood 82: same as 77 above.

Falsehood 83: same as 78 above. Apparently by repeated falsehoods, NARAL hopes that their case will be more believable.

Falsehood 84: "I'm able to support . . ." Fundraising. Finally the motives are clear. It can be profitable to create a "monster" and then cast yourself as the only knight—albeit an impecunious knight—able to rid the land of the scourge. This is politics at its crassest when a judicial nominee is used as an excuse to raise funds.

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99 FLAWS IN THE PLANNED PARENTHOOD AD

Falsehood 1: Title ("Robert Bork's Position . . .")—This equates Judge Bork with a politician who takes positions on issues while running for office. Judges are not politicians and ought not be judged by political standards. If judges begin to worry about the political implications of their decisions, the judiciary's ability to guarantee reproductive rights, women's rights and all other rights citizens possess will be impaired and jeopardized.

Falsehood 2: Title—("on Reproductive Rights")—This is simply false. Judge Bork has never taken a position on reproductive rights. In fact, Judge Bork has never commented on anything but protective and reverential terms about the decision to bear children, to become a mother. He has criticized the reasoning of *Roe v. Wade*, the abortion decision, which created a right to abortion on demand. Judge Bork has never said that he would reverse *Roe v. Wade*.

Falsehood 3: ("You'll need more than a prescription to get birth control.")—Misleading and inflammatory. See 1 and 2 above. Judge Bork has never taken a position against birth control or reproductive rights.

Falsehood 4: ("It might take a constitutional amendment.")—This is simply false. Not only has Judge Bork taken no position on abortion as a political issue, but even if *Roe v. Wade* were overturned, and it would take 5 justices to do it, regulation of abortion would be a matter of state and congressional action. Statues, passed by a simple majority, not a constitutional amendment would be sufficient to permit abortion. Interestingly, it is because of the Supreme Court's action in *Roe v. Wade*, that constitutional amendments have been proposed in order to permit meaningful regulation of abortion decisions with regard to informed consent, third trimester abortions, etc. by state legislatures. Such legislation is currently being struck down under the authority of *Roe v. Wade*. Because of this Supreme Court decision, America has the most permissive abortion law in the world, other than communist China.

Falsehood 5: ("Bork is an extremist . . .")—This attempt to influence by name-calling is simply not supported by Judge Bork's admirable record. In fact, his record as Solicitor General and Judge indicate that he never advocated a position less protective of minority or women's rights than that adopted by the Supreme Court itself. On the other hand, Judge Bork has advocated more protections for minority and women's rights than accepted by the Supreme Court. For example, in the *Gilbert* v. *G.E.* pregnancy discrimination case, his argument for women was rejected by the Court and later adopted by Congress. Moreover, in *Palmer* v. *Schultz* and *Ososky* v. *Wick*, he struck down gender discrimination in the State Department. In *Laffey* v. *NW Airlines*, he guaranteed equal pay for equal work done by airline stewardesses.

Falsehood 6: ("believes you have no constitutional right to personal privacy . . .")—This is false. In fact, Judge Bork has upheld every specific privacy provision in the Constitution. Likewise he has upheld statutory privacy rights, like the Privacy Act and the Financial Right to Privacy Act. Wherever the people have spelled out privacy protections, Judge Bork has upheld their direction with pleasure. He has not presumed to speak for them.

Falsehood 7: ("He thinks the government is free to dictate what you can and can't do in highly personal and intimate matters.")—Empty rhetoric. Judge Bork has no intention of depriving individuals of their personal and private decisions. His record shows a willingness to give women more choices by eliminating discrimination and granting equal pay. See cases cited in 5 above. Moreover his lengthy testimony indicates a personal willingness to leave decisions to individual decision-making.

Falsehood 8: (". . . in marriage . . .")—False. Judge Bork sustains, for instance, the *Loving* v. *Virginia* case which grants individuals the right to choose their spouse without government intervention.

Falsehood 9: (". . . in childbearing . . .")—False. Judge Bork has never commented in anything but protective and reverential terms about the decision to bear children, to become a mother. This, however, is probably a veiled allusion to the abortion decision, which created a right to abortion on demand. On that point, Judge Bork has never said that he would reverse *Roe* v. *Wade*. The Judge, while a law professor, criticized the reasoning of that case as have many Justices and legal scholars.

Falsehood 10: (". . . parenting . . .")—same as above. Judge Bork has never advocated governmental restrictions on parenting.

Falsehood 11: ("If he wins a lifetime seat on the Supreme Court . . .")—Again, this implies that judges should be treated like politicians running for election. See 1 above.

Falsehood 12: ("Bork could radically change the way Americans live.")—False. Judge Bork alone can make no ruling on the Supreme Court. The only way individual choice is limited by the Bork confirmation is if at least four other justices agree with his reading of the law made by Congress or the state legislatures. Moreover in that instance, it would be Congress or the state, not the majority of the Supreme Court, which limited individual choice in favor of some higher legal value.

Falsehood 13: ("Here's how to stop him . . .")—Stop him from doing what? His record exemplifies respect for judicial restraint. His judicial action as to abortion is unclear. His record as judge and as solicitor general with regard to the rights of women and minorities is exemplary.

Falsehood 14: ("moral-Majority exremists")—Again, transparent name-calling. Judge Bork is not an extremist, see 5 above.

Falsehood 15: ("White House has been trying to impose their beliefs . . .")—President Reagan an extremist? This fails to recognize that President Reagan, elected by the largest margin in electoral history, nominated Judge Bork to the Supreme Court. Perhaps Planned Parenthood has forgotten that under the United States Constitution President Reagan alone makes nominations to the Supreme Court.

Falsehood 16: ("They think they have the right to tell you how to live your life")—President Reagan's exercise of his constitutional authority to nominate a brilliant jurist like Judge Bork is hardly an example of trying to tell the rest of the country how to live their lives.

Falsehood 17: ("So far, our democratic system has blocked them.")—In fact, our democratic system was blocked from the opportunity to act by the Supreme Court in *Roe* v. *Wade*. Prior to that decision, states could regulate abortion as strictly or loosely as was acceptable to the people of individual states. If any force was employed, it must be traced to the Supreme Court's invalidation of the laws of all 50 states on the subject of abortion. The people had chosen by lawful processes to regulate abortion to different degrees in the interest of the unborn child and maternal safety. The people's choices were overturned without clear warrant. No one proposes to employ any force to reinstate what was forcibly taken away from the people—namely the right to govern these sensitive questions.

Falsehood 18: (". . . they might just succeed after all . . .")—See 16 above. Judge Bork has taken no position on reproductive rights, see 1 and 2 above.

Falsehood 19: ("They've been given their very own Supreme Court nominee . . .")—Utter lies. The President has never mentioned the abortion decision in connection with this nomination and Bork states forthrightly that he was never even asked about his position on the abortion cases.

Falsehood 20: ("ultra-conservative")—Misleading, unfair. If Judge Bork stands for anything, it is a fair and honest reading of the Constitution regardless of the political expediencies.

Falsehood 21: ("judicial-extremist")—With no basis in fact, Judge Bork is allied with right-wing extremists on the abortion issue. In fact, Judge Bork was hotly criticized by these "extremists" because he had the courage to oppose the Human Life Bill which attempted to overturn the abortion case by redefining the words of the Constitution by statute.

Falsehood 22: ("interference in your most personal and private decisions") Repeat a lie often enough and it may begin to sound credible. See 7, 8, 9, 10 above.

Falsehood 23: ("Bork has long been known in legal circles")—Certainly, he has long been known in legal circles, but as a brilliant scholar and jurist, not as stated here. 7 former Attornies General, a former President, and a former Chief Justice testified on Judge Bork's behalf.

Falsehood 24: ("unusual ideas on civil rights")—In fact, Judge Bork's record as a judge and as Solicitor General has been exemplary on civil rights. See 5 above.

Falsehood 25: ("unusual ideas on . . . free speech")—This criticism is simply not supported by the record. Judge Bork's record on the first amendment is unassailable. His judicial decisions demonstrate that he is protective of freedom of the press and hostile to government censorship of the editorial process. For example, in *Lebron v. Washington Metropolitan Transit Authority*, Judge Bork ordered the Washington, D.C. subway system to display an anti-Reagan poster and in *McBride v. Merrell Dow and*

*Pharmaceuticals Inc.*, Judge Bork held scientific speech protected under the first amendment. Moreover, in *Ollman v. Evans and Novak*, a libel case, Judge Bork extended substantially the constitutional commitment to a free and open political debate.

Falsehood 26: ("unusual ideas on . . . personal privacy")—This is false. In fact, Judge Bork has upheld every specific privacy provision in the Constitution. Likewise he has upheld statutory privacy rights, like the Privacy Act and the Financial Right to Privacy Act. Wherever the people have spelled out privacy protections, Judge Bork has upheld their direction with pleasure. He has not presumed to speak for them. Moreover, when he has criticized the legal reasoning of *Roe v. Wade* and *Griswold v. Connecticut*, such criticism was far from "unusual." He has joined a number of other legal scholars who have outlined the legal inadequacies of these opinions.

Falsehood 27: ("the only correct method for interpreting the Constitution")—Wrong. Judge Bork stands for a fair and honest reading of the Constitution. He stands for judicial restraint not judicial legislating.

Falsehood 28: ("Bork uses obscure academic theory")—Name-calling. Judge Bork is universally recognized as a brilliant legal scholar.

Falsehood 29: ("Bizarre" positions)—A shallow attempt to discredit his legal scholarship. In fact a lexis search disclosed no case or article written by Judge Bork in which he used the word "bizzare" to describe a position reached.

Falsehood 30: ("as a Supreme Court justice he would have the power to change your life")—Gross over-statement. When confirmed, his would be but one of nine votes; he would need four sitting justices to join him to constitute a majority.

Falsehood 31: ("Bork wouldn't hestitate a moment to use that power")—Totally without foundation. Bork has no agenda to change anyone's life. Nor could he do so, given that his would be only one of nine votes on the Supreme Court.

Falsehood 32: ("Require basis and unsettling changes . . . when the Constitution, fairly interpreted, demands it.")—Taken out of context. The wrong implication is that Judge Bork does not respect judicial precedent. In fact he has repeatedly demonstrated a strong respect for judicial precedent.

Falsehood 33: ("Bork . . . not . . . guided by past decisions.")—Same as above. Judge Bork has articulated a clear and persuasive theory of stare decisis.

Falsehood 34: ("reckless trouble-maker")—Shallow name-calling. Not supported by Judge Bork's record of judicial restraint.

Falsehood 35: ("aggressively seeking ways to upset past rulings.")—False. Totally unsupported by Judge Bork's record. Judge Bork has never been reversed by the Supreme Court and six of his dissents have been adopted on appeal.

Falsehood 36: ("regardless of the social havoc that may result")—This statement is inflammatory and unsupported by the record. Judge Bork has caused no havoc on the Circuit Court.

Falsehood 37: ("Or the pain and suffering of innocent people")—Same as above, inflammatory and unsupported by the record. Judge Bork, as judge and as Solicitor General, has consistenly upheld and advocated minority rights to relieve suffering.

Falsehood 38: ("What unsettling changes would Bork make in your personal life")—Misleading the statement implies that Judge Bork alone could make changes as one vote in nine. Of course Judge Bork has never indicated an interest in making "unsettling changes" or in promoting any other sort of agenda. On the contrary, Judge Bork has consistently reiterated a great respect for precedent. He would only overturn precedents after the most careful and circumspect analysis.

Falsehood 39: ("Decades of Supreme Court decisions uphold your freedom to make your own decisions about marriage and family, childbearing and parenting.")—Misleading. The statement fails to disclose the controversy on the Supreme Court as well as outside with regard to the reasoning of these "right of privacy" decisions. In fact, there has been tremendous criticism of this line of cases by respected legal scholars based on the inability to define or limit this "right" within the reasoning of these cases. Many have asked, "right of privacy to do what?" Create pornography in private; do drugs in private; commit incest in private? This seems to suggest that the Constitution contains some mystical general right to privacy. In fact, the word "privacy" appears nowhere in the Constitution. Moreover, legal scholars, like Archibald Cox and John Hart Ely, who support abortion, agree that the Supreme Court had no business basing *Roe v. Wade* on a flawed reasoning. This flawed reasoning was the so-called privacy doctrine.

Falsehood 40: ("Bork is convinced that government has the power to interfere in the most intimate areas of all")—This is totally false. Judge Bork does not define areas that government may or may not govern. That's the purpose of the Constitution.

Falsehood 41: ("He attacks as 'utterly specious' the landmark Supreme Court decision . . .")—Misleading. Judge Bork only criticized the reasoning the Supreme Court used to reach its decision in the Griswold Contraceptive case. The so-called general "right of privacy" was unknown until 1965 when some judges discovered it in the "pnumbras of the emanations" of selected constitutional phrases. Several Justices, including Black, Stewart, Rehnquist, White and others, continue to question this reasoning. Professors of all backgrounds, from Bickel to Kurland, have joined in faulting this reasoning.

Falsehood 42: ("striking down a ban by the state of Connecticut on the use of birth control")—Misleading. Judge Bork in no way condoned or supported the Connecticut statute at issue; he described it as "nutty." However, it is important to remember that the statute had never been enforced against anyone for using birth control.

Falsehood 43: ("use of birth control by married couples in the privacy of their own homes")—Misleading. The "right of privacy" whatever its limits has never been confined to "married couples," as the ad implies. In fact, it has been argued by a number of the witnesses who testified against Judge Bork at the hearing that this "right of privacy" should extend to homosexual couples, pornography, drug use, and prostitution. Not all of us are comfortable with a generalized "right of privacy" that could be interpreted by a judge, not elected by the people, to protect drug use, incest, or homosexual acts. Moreover married couples were never prosecuted under the "nutty" Connecticut law.

Falsehood 44: ("In a case involving a company which produced dangerous amounts of toxic lead, Bork")—This overlooks that the Circuit Court ruled unanimously. Judge Bork was only one of several judges who reaches the same conclusion that the law did not include this regrettable situation as a "hazard." Congress, not Judge Bork, caused whatever problem this case presents. Judge, now Justice Scalia, was one of these other judges and indeed the rest of the Circuit refused to reverse this unanimous ruling.

Falsehood 45: same as above. This overlooks that the OSHA Review Commission, the expert government agency, had already found that the company policy in this case was not a hazard.

Falsehood 46: "Women can be forced to choose . . ." Judge Bork did not force any women to choose, nor could he. This question was not before the Judge. The woman had already challenged the policy and received compensation. The only issue was whether to fine the company for a hazard. The law did not cover that policy as a hazard.

Falsehood 47: same as above. This sounds like Judge Bork approved of the "unhappy choice" posed by this case. In fact, he deplored it.

Falsehood 48: same as above. Blatant sensationalism. The fact that this is a legislative problem is clear from the bill introduced by Senator Metzenbaum to redefine hazard and cover this instance. Congress is to blame.

Falsehood 49: ("He denounces the Supreme Court decision recognizing a woman's right to choose abortion . . .")—Here we go again. One wonders how many times the same misleading threat can be repeated in a single advertisement. See 1, 2, 7, 8, 9, 10, 39, 40, 41, 42, 43.

Falsehood 50: ("private medical decision")—Same as above. Who protects the privacy and choice of the unborn child or the parents of a minor female seeking a public abortion service.

Falsehood 51: same as above.

Falsehood 52: ("right-winger Bork")—Again, Judge Bork is allied with right-wing extremists on the abortion issue. In fact, Judge Bork was hotly criticized by these "extremists" because he had the courage to oppose the Human Life Bill which attempted to overturn the abortion case by redefining the words of the Constitution by statute.

Falsehood 53: ("We couldn't even choose our own relationships")—False. See 8 above.

Falsehood 54: ("Bork would throw the Court off balance.")—The real issue here is not whether the Court would be off balance with Judge Bork confirmed, but instead whether the balance preferred by Planned Parenthood would be maintained. As stated earlier, Judge Bork has taken no position on reproductive rights. Therefore, even if one agrees with Planned Parenthood's view of the most desirable "balance," such a statement is speculative at best. Note: even the picture tends to show Judge Bork "far to the right"—an unfair characterization.

Falsehood 55: ("we couldn't even choose our own . . . living arrangements")—Absurd. Wholly unsupported by the record.

Falsehood 56: ("without fear of government intrusion")—The lie is repeated yet again. See 49 above

Falsehood 57: ("Bork upheld a local zoning board's power to prevent a grandmother from living with her grandchildren . . .")—Gross error. This phrase refers to the City of East Cleveland v. Moore case. Judge Bork had nothing to do with this case. It was a Supreme Court case that never came before the D.C. Circuit. It is at best absurd to hold Judge Bork responsible for a case neither he nor his circuit heard.

Falsehood 58: same as above:

Falsehood 59: ("Is this the sort of closed-minded extremism we want on the Supreme Court?")—Judge Bork's record as a judge speaks for itself. He is not an extremist. Of over four hundred cases in which he has been in the majority, Judge Bork has never been reversed by the Supreme Court. He has been in the majority in over 95% of the 416 cases in which he has participated. In 7 of 8 civil rights cases, Judge Bork held in favor of the claimant. This is hardly the record of an extremist jurist.

Falsehood 60: ("turn back the clock")—Misleading hyperbole. He, in fact, has advanced women's rights clock as Solicitor General and as a judge.

Falsehood 61: ("a time when moral majorities choked off almost all family planning . . .")—It is absurd to imply that Judge Bork is responsible for everything bad that has happened in past state and local legislatures. In fact, he has never advocated a return to such an environment and his opponents have no evidence that would link Judge Bork to the exaggerated hypothetical situation described in the advertisement.

Falsehood 62: ("through a welter of state and local laws")—This is rash conjecture. Even if *Roe* v. *Wade* were overturned, which is not clear, States would have the option of permitting and regulating abortion and would surely grant such protections (rape, incest, life of the mother endangered) even if abortion were restricted in some respects. In fact, it is inconceivable that this would ever result. As to family planning generally, states can regulate it now and none of these horror stories exist. In any case, as a Supreme Court justice, it would be impossible for Judge Bork to cause these problems.

Falsehood 63: ("It has happened before.")—Judge Bork is not responsible for the past situation and advocates no such situation.

Falsehood 64: ("it can happen again")—This admits the controversial nature of the "right of privacy" with regard to abortion. As the advertisement points out, four sitting justices are critical of these decisions. However, even if *Roe* v. *Wade* were overturned, see above 62, there is no reason to assume that state legislators, responsive to the people, would attempt to "turn back the clock."

Falsehood 65: ("Bork . . . will be on the Supreme Court for life")—This cuts two ways. It is because justices of the Supreme Court serve for life that judicial restraint, practiced by judges such as Judge Bork, is so critical. Legislating must be left to representatives elected and accountable to the people, not to life tenured justices.

Falsehood 66: ("right-wing extemists")—Once again, Judge Bork is inappropriately linked with a political group. See 59 above.

Falsehood 67: ("got him nominated in the first place")—False. It is the President's Constitutional role to nominate the candidate of his choice. The President has never mentioned the abortion decision in connection with this nomination and Bork states forthrightly that he was never even asked about his position on the abortion cases.

Falsehood 68: ("The Senate historically has rejected one out of every five nominations to the Supreme Court.")—Very misleading. In nearly one hundred years and 53 nominations, the Senate has refused to employ political litmus tests and ideological inquisitions to reject nominees. In fact, in the history of the Court, only a handful of nominations were defeated on political grounds and this occurred mostly during the Civil War period.

Falsehood 69: ("Would Robert Bork preserve the Court's social consensus")—"Social consensus?" The court is not the organ of social consensus. Moreover its decisions have often been divisive. Certainly, Planned Parenthood would prefer to hold on to a slim majority upholding abortion on demand. As mentioned above, Judge Bork's future action on this issue is unclear.

Falsehood 70: ("Spark disastrous conflict")—Mere hyperbole. If there is conflict, it was created by the Supreme Court's overstepping of legal bounds.

Falsehood 71: ("Safeguard our liberties")—Distortion. Judge Bork's record is exemplary in the area of safeguarding liberties and protecting our rights. See 5 above.

Falsehood 72: ("threaten their very existence")—A clear attempt to incite fear. Judge Bork's record is clear. He will not wholesale reject rights. He has not done so on the Circuit Court.

Falsehood 73: ("Balance the court")—Attempting to preserve a particular Court "balance" is impossible and extremely unwise. If past Presidents had preserved the balance, the abominable "separate but equal" doctrine would still be the law of the land.

Falsehood 74: ("Throw it out of kilter")—Same as above.

Falsehood 75: ("into the hands of extremists eager to tell us how to live our lives")—The extremist claim again. This labels Justice Sandra Day O'Connor, the only woman Justice, and Justice White, John Kennedy's appointment, as "extremist." None of the justices are extremist but are interpreters of laws that may, on occasion, dictate conservative results.

Falsehood 76: ("Bork's record")—False. Bork's record proves no such thing. See 49 above.

Falsehood 77: ("carrying Bork's position to its logical end")—Gross distortion in an attempt to incite fear. This series of horror stories has nothing whatsoever to do with "Bork's position." Moreover, it is absurd to conjecture that any legislature in the United States would ever enact laws to ban or require birth control, impose family quotas, sterilize anyone they chose. In fact, what protects us from such outrageousness is the structure of our Constitution which makes legislators accountable to the people who elect them. No state legislature in this day would ever consider proposing such laws. However, justices of the Supreme Court serve for life and are accountable to no one. For this reason it is critical that nominees be judges who are known to practice judicial restraint, such as Judge Bork. Justices of the Supreme Court must be willing to leave legislating to the legislative branch.

Falsehood 78: same as above.

Falsehood 79: same as above.

Falsehood 80: same as above.

Falsehood 81: same as above.

Falsehood 82: same as above.

Falsehood 83: ("he believes that most private and personal aspects of our lives—marriage")—False. Repeated lies. See 49 above.

Falsehood 84: ("childbearing")—False. See 49 above.

Falsehood 85: ("parenting")—False. See 49 above.

Falsehood 86: ("from government intrusion")—False. See 49 above.

Falsehood 87: ("the right to make life's most important decisions")—False. These distortions are repeated once again. See 49 above.

Falsehood 88: ("it will be too late")—Too late for what? What is there to fear from a judge who upholds the law and Constitution?

Falsehood 89: ("one of the most cherished and unique features of American life, has never been in greater danger")—This admits too much. If the right to abortion or the general right to privacy were actually in the Constitution, no judge or group of judges could remove them. They could only be removed by constitutional amendment. This argument betrays that the right to abortion on demand is a creation of judges and therefore can be changed by other judges.

Falsehood 90: ("Do the Court justice")—The Supreme Court was created only to give effect to the Constitution and laws of the U.S. in the resolution of cases and controversies. If injustices are done by the Court, those injustices must be the product of the law or the Constitution which the judges apply. The solution is to change the law or the Constitution to remedy injustice, not to change the judges who are supposed to be insulated from political forces.

Falsehood 91: ("May be your most important vote as a Senator.")—Doubly misleading. In the first place, the Senate is performing its advice and consent function, not voting on the single issue of abortion. In the second place, it is not clear how Judge Bork would rule on these cases.

Falsehood 92: ("Bork is a judicial extremist")—Unsupported by the facts. See 59 above.

Falsehood 93: ("Will throw the Supreme Court out of balance")—Misleading and dangerous. Preserving a particular Court "balance" is impossible and extremely unwise. If past Presidents had preserved the balance, the abominable "separate but equal" doctrine would still be the law of the land.

Falsehood 94: ("Who doesn't have an ideological agenda")—False. Judge Bork is not a politician. He does not have an ideological agenda. On the contrary, if his legal career can be said to embrace a theme, it would be the practice of judicial restraint.

Falsehood 95: Same as 91 above.

Falsehood 96: Same as 92 above.

Falsehood 97: Same as 93 above.

Falsehood 98: Same as 94 above.

Falsehood 99: ("I'm enclosing my contribution in support of all Planned Parenthood's activities and programs.")—Fundraising. Finally the motives are clear. It can be profitable to create a "monster" and then cast yourself as the only knight—albeit an impecunious knight—able to rid the land of the scourge. This is politics at its crassest when a judicial nominee is used as an excuse to raise funds.

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### 13 Flaws of TV People for the American Way Ad

Mr. President, another of the advertisements that has misled the American public is the television ad that was sponsored by the People for the American Way Action Fund. Rather than analyze this ad in detail, let me point out 13 of the most misleading aspects of this television spot.

Falsehood 1: "This is Gregory Peck." The ad begins with an attempt at sales. Gregory Peck is a successful actor, not an expert on constitutional law. The sponsor of the ad hopes that the viewer will transfer the positive feelings felt toward the actor to the message of the ad.

Falsehood 2: "The record shows . . ." In fact, the record shows no such thing. An examination of the record discloses that more than any other jurist in modern history,

Bork would sustain the people's right to govern themselves. He has consistently sustained every right found in the Constitution and opposed judges who tried to interpret the Constitution to fit their own views.

Falsehood 3: "Strange idea . . ." Judge Bork's judicial philosophy is hardly strange. In fact, he is eminently qualified and centrist in his views. The controversy is generated by those who do not want President Reagan to make another appointment.

Falsehood 4: "What justice is." It should be noted that Judge Bork's view of justice has placed him in the majority in 95% of the cases he has heard as a judge of the District of Columbia Circuit court. Moreover, not one of the more than 400 opinions that he has authored or joined has been reversed by the Supreme Court. This is not the record of a judge with "strange" views or the record of a judge who is "out of the mainstream."

Falsehood 5: "He defended poll taxes and literary tests . . ." Misleading. Judge Bork personally opposes poll taxes and literary tests; he criticized only the reasoning by which the Court reached its results—positions shared by Justices Harlan, Stewart, Frankfurter, Jackson, Brandeis, Cardozo, and Black, not to mention a broad array of constitutional scholars.

Falsehood 6: "Which kept many Americans from voting . . ." This is incorrect. This misstates the Supreme Court cases in question. The Court in *Katzenbach* and *Harper* pointedly mention that the cases involved no evidence of racial discrimination. Judge Bork stated that if the *Katzenbach* or *Harper* decisions had involved racial discrimination, he would not have criticized either case. He would vote to strike down any discriminatory literacy test or poll tax.

Falsehood 7: "He opposed the civil rights law . . ." Judge Bork did criticize the Civil Rights Act, as did many, including distinguished senators who still serve with us today. But that was in an article written in 1963, a position which he recanted over fourteen years ago. Judge Bork's admission of error is well-known, yet nowhere mentioned in this 30 second slot.

Falsehood 8: "That ended 'whites only' signs at lunch counters . . ." Misleading. Judge Bork criticized the effect the law would have on coercion of private accommodations owners. He in no way condoned racial discrimination but instead castigated all forms of racial discrimination as "ugliness." Professor Bork's position, even though later recanted, should not be portrayed in a light that appears insensitive to racial prejudice. In fact, Judge Bork's record in civil rights is exemplary. While serving as a judge on the D.C. Circuit, Judge Bork held in favor of the claimant in 7 of the 8 civil rights cases that came before him. Moreover, as Solicitor General, he never advocated a position less protective of minority or women's rights than that adopted by the Supreme Court itself. As S.G., Judge Bork won several significant advances for civil rights, including prohibition of private discriminatory contacts (*Runyon v. McCrary*) and redistricting to enhance minority voting strength (*United Jewish v. Cary*).

Falsehood 9: "He doesn't believe the constitution protects your right to privacy . . ." False. In fact, Judge Bork has upheld every specific privacy provision in the Constitution. Likewise, he has upheld statutory privacy rights, like the Privacy Act and the Financial Right to Privacy Act. Wherever the people have spelled out privacy protections, Judge Bork has upheld their direction with pleasure. He has not presumed to speak for them. Moreover, when he has criticized the legal reasoning of *Roe v. Wade* and *Griswold v. Connecticut*, such criticism was far from "strange." He has joined a number of other legal scholars who have outlined the legal inadequacies of these opinions.

Falsehood 10: "Freedom of speech . . ." Unfair. Judge Bork's record on the First Amendment is unassailable. His judicial decisions demonstrate that he is protective of freedom of the press and hostile to government censorship of the editorial process. For example, in *Lebron v. Washington Metropolitan Transit Authority*. Judge Bork ordered the Washington, D.C. subway system to display an anti-Reagan poster and in *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, Judge Bork held scientific speech protected under the first amendment. Moreover, in *Ollman v. Evans and Novak*, a libel case, Judge Bork extended substantially the constitutional commitment to a free and open political debate.

Falsehood 11: "Bork could have the last word on your rights as citizens. . ." This statement implies that Judge Bork alone could make changes as one vote in nine. He alone will never have the last word on citizens' rights. Only if he can convince four other sitting justices of his view can he have an impact on the Supreme Court and as the most junior justice, it is more likely that he will join four other justices in their view.

Falsehood 12: "If Robert Bork wins a seat . . ." This phrase equates Judge Bork with a politician who "wins" a seat in a political body. Judges are not politicians and ought not be judged by political standards. If judges begin to worry about the political implications of their decisions, the judiciary's ability to guarantee the rights of all citizens will be jeopardized.

Falsehood 13: "It will be for life, his life—and yours." Interestingly, given Judge Bork's record, this statement should elicit confidence from the listener instead of fear, contrary to what the ad intends. This is because Judge Bork will practice judicial restraint. Judges who serve for life have tremendous power and are totally unaccountable to the people of this country for their decisions. Some judges and justices have used this power to create "pnumbras of emanations" in the law in order to reach the result that they think best, whether of not this result is consistent with the legislation enacted by our elected representatives or found in the text of the constitution. Other judges, such as Judge Bork, believe that judicial interpretation involves a fair and honest reading of the constitution and that interpretation of statutes should reflect the legislative intent of the statute not the subjective goals of the judge.

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TEXT OF TV AD BY THE PEOPLE FOR THE AMERICAN WAY ACTION FUND—OCTOBER 1987

THE LAST WORD

There's a special feeling of awe people get when they visit the Supreme Court of the United States, the ultimate guardian of our rights as Americans. That's why we set the highest standard for our highest Court Justices, and that's why we are so concerned.

This is Gregory Peck. Robert Bork wants to be a Supreme Court Justice, but the record shows that he has a strange idea of what justice is.

He defended poll taxes and literary tests, which kept many Americans from voting. He opposed the Civil Rights law that ended "Whites Only" signs at lunch counters. He doesn't believe the Constitution protects your right to privacy and he thinks that freedom of speech does not apply to literature and art and music. Robert Bork could have the last word on your rights as citizens, but the Senate has the last word on him. Please urge your Senators to vote against the Bork nomination, because if Robert Bork wins a seat on the Supreme Court, it will be for life, his life—and yours.

Several Senators addressed the Chair.

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

Mr. KENNEDY. Mr. President, I make no secret——

Mr. THURMOND. Mr. President, the Senator yielded to me, and I want to make some remarks.

The PRESIDING OFFICER (Mr. WIRTH). Will the Senator from Massachusetts yield?

Mr. KENNEDY. Mr. President, who has the floor?

Mr. HATCH. I believe I have the floor.

The PRESIDING OFFICER. The Senate will be in order.

Mr. THURMOND. I asked him to yield to me.

The PRESIDING OFFICER. The Senator from Utah yielded the floor. The Senator from Massachusetts then was the first Member of the Senate to ask for recognition, and the Chair recognized the Senator.

Mr. HATCH. Mr. President, a parliamentary inquiry.

I believe the Senator from Massachusetts would yield to the distinguished Senator for a question or two.

Mr. THURMOND. I just want 1 minute.

Mr. KENNEDY. First of all, who has the floor?

The PRESIDING OFFICER. The Senate will be in order.

The Chair will note the Senator from Massachusetts has the floor. The Senator from Utah had yielded the floor. The Senator from Massachusetts had been the first who asked for recognition and the Chair recognized the Senator from Massachusetts. The Senator from Massachusetts has the floor.

Mr. THURMOND. Will the Senator yield 1 minute?

Mr. KENNEDY. Without losing my right to the floor, I yield 1 minute to the Senator.

Mr. THURMOND. I want to commend the able Senator from Utah for the excellent presentation he made. He has been a member of the Judiciary Committee a number of years.

I want to ask him: Does he know of any person who was nominated to the Federal judgeship who is better qualified than Judge Bork?

Mr. HATCH. I do not know of anyone who has the overall record, the overall dignity, the overall capacity who would even compare.

Mr. THURMOND. In fact, with the experience of Judge Bork as a lawyer, teacher, Solicitor General, and member of the circuit court, can the Senator imagine anyone with better qualifications to be a member of the Supreme Court than a man like that?

Mr. HATCH. I really cannot. People looking at it I think will arrive at the same conclusion, if they listened to what he said, read what he said and, of course, look at his public record both as Solicitor General and a judge for the last 6 years.

Mr. THURMOND. I hope the Members of this body will study this record carefully. I realize there may not be any changes but there could be some, and I hope Senators will keep their minds open as this debate goes on and read this record and this entire matter could be turned around. I believe that they will do that.

I thank the Senator very much for yielding.

Mr. KENNEDY. I thank the Senator.

Mr. President, It is no secret that I oppose the nomination of Judge Bork to the Supreme Court. I stated my opposition the day the nomination was announced—and I'm proud of it.

Although I strongly oppose Judge Bork, I have often supported conservative Supreme Court nominees by conservative Republican Presidents. I voted for the nominations of Chief Justice Burger, Justice Blackmun, and Justice Powell by President Nixon. I voted for the nomination of Justice Stevens by President Ford. And I voted for the nominations of Justice O'Connor and Justice Scalia by President Reagan. In fact, President Reagan has named over 300 judges to the Federal bench during the past 7 years, and I have supported all but eight.

But from the beginning, it was clear that the nomination of Judge Bork was more than the usual nomination—which is why it has attracted more than the usual controversy and attention. Virtually everyone, no matter where they are on the issue, recognizes that the Supreme Court is at a turning point, and that whoever fills this vacancy may play a large role in setting the Court's direction for a decade or even longer to come.

Rarely have we had such a combination of circumstance. The Supreme Court is closely divided—and the President has consciously sought to bend it to his will. The Justice who resigned defied any ideological category and he held the decisive balance on many critical issues—and the Justice who was nominated tilted so consistently toward one narrow ideological point of view.

No one disputes the President's right to try to force that tilt on the Supreme Court—and no one should dispute the right of the Senate to try to stop him. That's what advice and consent means in the Constitution. That was the original intent of the Founding Fathers, as that is the meaning of the constitutional role of the Senate today.

At the outset, the advocates of the nomination implicitly conceded that they had a hard case to make. They tried to discredit Judge Bork's opposition, on the foolish ground that all the Senate can or should do on a nomination is read the résumé and FBI report—and if the nominee is smart enough, and has stayed out of trouble, the Senate is compelled to confirm him. Ideology shouldn't count, they said, and often it hasn't. But what is sauce for the goose is sauce for the gander. President Reagan obviously took Robert Bork's ideology into account in making the nomination, and the Senate has every right to take it into account in acting on the nomination.

This debate has been a timely lesson, in this bicentennial year of the Constitution, of our commitment to the rule of law, to the principle of equal justice for all Americans, and to the fundamental role of the Supreme Court in protecting the basic rights of every citizen.

In choosing Robert Bork, President Reagan selected a nominee who is unique in his fulminating opposition to fundamental constitutional principles as they are broadly understood in our society. He has expressed that opposition time and again in a long line of attacks on landmark Supreme Court decisions protecting civil rights, the rights of women, the right to privacy, and other individual rights and liberties. Judge Bork may be President Reagan's ideal ideological choice for the Supreme Court, but that ideology is not acceptable to Congress and the country, and it is not acceptable in a Justice of the Nation's highest court.

In analyzing the record of Judge Bork's long professional career, and in his testimony before the Senate Judiciary Committee, a number of themes have emerged:

Judge Bork is antagonistic to the role of the law and the courts in fundamental areas such as ensuring racial justice, protecting the rights of women, and preserving the right of privacy for individuals against oppressive intrusions by the Government.

Judge Bork is a true believer in concentrated power, whether it is big government in the form of unrestrained executive power, or big business in the form of corporations virtually unrestrained by antitrust laws and health and safety regulation.

Judge Bork is not only an enemy of the individual in confrontations with the Government, but he is equally an enemy of Congress in confrontations with the President or when the will of Congress is in conflict with his ideology.

Judge Bork has little respect for precedent. His habit of intemperate statements—some made this year, on the very eve of his nomination—suggests how eager Judge Bork is to rewrite the meaning of the Constitution. His numerous confirmation conversions, implying a newfound respect for precedent, are hardly reassuring.

Judge Bork's hostility toward individuals is nowhere clearer than in his attitude toward civil rights. People of great courage in this country endured great risks over the past three decades in the struggle against race discrimination in America. In the 1960's, while we sought to end segregated lunch counters and "Whites Only" want ads, Robert Bork stridently opposed legislation to end racial discrimination in public accommodations and employment.

Nor can Judge Bork's intemperate opposition be passed off as the understandable aberrations of a provocative professor confounded by the swiftly moving events of a quarter century ago. In 1964, a Senator or a scholar did not have to be a liberal to weigh the issue and judge it rightly. The Civil Rights Act of that year was an historic product of mainstream America, Republican as well as Democrat. It was overwhelmingly endorsed by constitutional experts and swiftly and unanimously sustained by the Supreme Court. And Judge Bork's mentor and colleague at Yale, one of the most respected advocates of conservative legal philosophy and judicial restraint, Alexander Bickel, was a forceful voice in favor of Federal action against discrimination, but Robert Bork disagreed—he said that the historic public accommodations legislation was based on a principle of "unsurpassed ugliness"—when most Americans thought that phrase better described Jim Crow.

It took 9 long years—and the pressure of his nomination to be solicitor general—for Mr. Bork to recant his opposition to that landmark measure. But that convenient retraction belies his consistent assault against other Supreme Court decisions mandating racial equality before the law.

He rejected the Supreme Court's unanimous 1948 decision outlawing court enforcement of racially restrictive clauses in deeds for the sale of property.

When voting rights were at issue, he condemned Supreme Court decisions enshrining the principle of one man, one vote, striking down poll taxes, and upholding the ban on literacy tests and other devices employed to deny the right to vote.

At the Judiciary Committee hearings, he even indicated he could find no constitutional support for the Su-

preme Court's 1954 decision banning segregated schools in the District of Columbia.

From the purchase of a home to the ballot box, to the job site, to the indignity of "whites only" signs in public places, to the schools of the Nation's Capital, Robert Bork has made a career of opposing simple justice, and he does not deserve a new career on the Supreme Court of the United States.

Judge Bork has been just as wrong on the rights of women. Three weeks before his nomination, he repeated his extremist view that "the equal protection clause probably should have been kept to things like race and ethnicity"—thereby reading out of the Constitution all protection against sex discrimination.

Under the pressure of these confirmation hearings, Judge Bork retreated from that indefensible position; but he rejected the notion that more vigorous scrutiny should be applied to sex discrimination. Instead, he would decide on a case-by-case basis whether sex discrimination is reasonable. But that is the very approach under which courts upheld sex discrimination in a long line of cases extending into the 1960's, before the current stricter standard of review was adopted. As in the case of civil rights, when the issue is equal rights from women, the jurisprudence of Judge Bork is an invitation to plow up settled ground and return to the injustices of the past.

In fact, Judge Bork has set himself at odds in other areas with Supreme Court decisions hardly doubted by anyone else—and broadly accepted as basic to constitutional rights.

Legal scholars differ about the degree to which the Constitution protects a general right to privacy, but few if any espouse the extreme position of Robert Bork that there is no such right to privacy at all.

He has condemned 60-year-old Supreme Court precedents upholding the right of parents to send their children to religious schools, and striking down statutes barring the teaching of foreign languages—statutes inspired by anti-Catholic bigotry and the anti-German hysteria of World War I.

He has called improper and intellectually empty a Supreme Court opinion striking down the forced sterilization of convicted criminals.

His far-out theory against privacy would reject Justice Powell's ruling that a zoning ordinance may not bar a grandmother from living in the same home as her grandchildren.

He derided as unprincipled and unsupportable the Griswold decision upholding the right of married couples to decide for themselves whether to purchase and use birth control.

He has even said, in the intemperate rhetoric that is his trademark, that a husband and wife have no greater right to privacy than a smokestack has to pollute the air.

The point is not that Robert Bork attacked any one of these holdings on privacy, but that he instinctively reacted against all of them. None of the 105 Supreme Court Justices in our history has as narrow a view of the meaning of constitutional liberty as Judge Bork.

Robert Bork's Constitution preserves precious little freedom for the individual against government interference with fundamentally personal human activities. Real judicial conservatives like John Marshall Harlan and Lewis Powell rejected the Bork view—and it is one of the most important reasons why the Senate should now reject Judge Bork.

Equally disturbing is his roll-back-the-clock record on free speech. It is true that he authored one strong opinion, upholding Evans and Novak against a libel suit by a Marxist professor. But a single first amendment flower does not make a constitutional spring. And it must be remembered that the real threat to a free press comes not from individuals, but from an all-powerful government.

Both in his 1971 law review article and in a 1979 address, he stated unequivocally that no matter what the Supreme Court has said, the first amendment does not protect literature, art or scientific discourse from official censorship.

In 1984, after strong public criticism, this became another of Judge Bork's convenient recantations. But even today, the extent to which he would protect artistic and literary expression is unclear.

In the realm of political speech, Judge Bork persists in his criticism of the landmark opinions of Justices Holmes and Brandeis establishing the clear and present danger test before speech can be restricted. Under questioning at his hearing last month, he indicated his belief that the Supreme Court's Brandenburg decision adopting that test was wrong, but that he would apply it in future cases. The problem is that Judge Bork made clear that he would not apply Brandenburg the way the Supreme Court has. He rejected as wrong the Hess decision, the leading case in which the Court applied Brandenburg to uphold a free speech claim.

On the bench, Judge Bork has been quick to sacrifice the free speech of individuals to the preferences of the President. He dissented from the decision limiting the Government's ability to exclude controversial speakers from the United States—a decision affirmed this week by a divided Supreme Court. He has also been a persistent adversary of freedom-of-information claims. Justice Brandeis wrote that sunlight is the best disinfectant of arbitrary government—but Judge Bork leans toward secrecy and suppression.

Where Judge Bork has not found a way to curtail a right, he has often tried to cut off a remedy. He constantly invokes the doctrine of standing to stand in the way of constitutional claims. In one of his most recent dissents, he suggested that it would be constitutional for Congress to cut off all judicial review of the Government's denial of Medicare benefits. Judge Bork would deny older Americans their day in court, and the Senate should deny him his day on the Supreme Court.

During his recent confirmation hearings, Judge Bork professed a new respect for recent Supreme Court precedents. But as recently as last January, he told the Federalist Society that a judge with his so-called originalist views would have no problem whatever in overruling a precedent—because, as he said, "that precedent by the very basis of his originalist philosophy has no legitimacy."

And in the notorious words that Senator HEFLIN has often quoted, the passage from the so-called Bork Wave speech to the Philadelphia Society last April, Judge Bork used some of the most intemperate language ever uttered by a sitting Federal judge to describe his ideological vision of the future and what he has in store for the country if he can only get his hands on the Constitution: "It may take 10 years," he said, "It may take twenty years, for the * * * wave to crest, but crest it will, and it will sweep the elegant, erudite, pretentious, and toxic detritus of nonoriginalism out to sea."

Respect for precedent—hardly. Judicial temperament—no thank you. If Robert Bork were on the Supreme Court, a vast body of fundamental Supreme Court decisions would be placed in jeopardy.

Yet another persuasive rationale for rejecting this nomination is Judge Bork's bias for concentrated power. The Bork apologists have attempted to transform his role in the Watergate scandal from obedient lackey of a current President to battling savior of the Department of Justice and staunch defender of the Watergate investigation. They say, in effect, that Robert Bork only did his duty when he fired Archibald Cox and precipitated the infamous Saturday Night Massacre of October 1973; they say that he kept the trains running on time at the Department of Justice, and that he was vigilant to ensure the integrity of the Watergate investigation.

But the only Court ever to examine the issue ruled that Robert Bork broke the law when he obeyed the President and fired Archibald Cox. Rather than doing his duty, he was a dutiful apparatchik of President Rich-

ard Nixon in his desperate bid to keep the Watergate coverup from unraveling.

And as Archibald Cox's deputies testified at the Judiciary Committee hearings, Judge Bork was no defender of the integrity of their investigation in the critical days after Cox was fired, when the rule of law in America was hanging in the balance. The investigation was saved, not because of any action by Solicitor General Robert Bork, but because of the pressure from the firestorm of public criticism that erupted across the Nation over what Richard Nixon and Robert Bork had done. As Henry Ruth testified, Judge Bork was irrelevant to the successful continuation of the Watergate investigation—and he has no right to try to rewrite that critical period of our recent history.

Judge Bork's role in the Saturday Night Massacre is the leading example of his profoundly troubling belief in virtually unrestrained Presidential power, but it is not the only example. He maintained in 1973 that the President had the inherent constitutional authority to dismiss Archibald Cox from his position as Watergate special prosecutor—despite legally binding regulations.

Under the Bork reading of Presidential power, the Constitution also forbids the enactment of legislation authorizing independent special prosecutors to be appointed by the Federal courts—such as the five court-appointed prosecutors now investigating alleged misconduct of Attorney General Ed Meese and other officials in the Reagan administration.

In the world according to Judge Bork, the checks and balances carefully structured in the Constitution are in disarray—he believes it is unconstitutional for Congress to take action to prevent a corrupt executive branch official from investigating himself.

The Bork view of unbounded Presidential power does not stop at Watergate's edge. In 1971, he expressed doubt that Congress could limit the scope of an undeclared war, and suggested that Congress could not even constitutionally exercise its power of the purse to forbid the invasion of Cambodia.

In 1978, he wrote that the War Powers Act is "probably unconstitutional." And that same year, ignoring the plain language of the fourth amendment, he contended that the Constitution prohibits Congress from limiting the President's inherent national security power to engage in wiretapping and electronic surveillance of U.S. citizens in their homes and offices.

It is bad enough that Judge Bork believes that the Constitution grants the President such vast and unrestrained authority. Even worse, he regards it as largely unreviewable. Given the chance, he would drastically restrict access to the courts by anyone, including Members of Congress, to challenge the constitutionality of Presidential action.

His extreme inclination to insulate the President from legal challenge culminated last year in his dissent in Barnes versus Kline, in which he issued a 30-page diatribe closing the courthouse door to challenges by Congress against Presidential abuse of the pocket veto power—even though the Reagan Justice Department itself conceded that Congress had standing to bring the case.

No person nominated to the Supreme Court in this century—or the last—has demonstrated a belief in so broad and unrestricted a view of Presidential power, even when it is exercised illegally. Nothing could be further from the original intent of the Founding Fathers—the last thing they intended at Philadelphia in 1787 was to create a President with the powers of George III.

Finally, the distressing pattern of Judge Bork's jurisprudence becomes complete when we examine his conception of antitrust—the field in which he has written most extensively. In the private as well as the public sector, he decisively favors concentrated power.

He would permit mergers between rival companies in situations where even the Meese Justice Department would object. He would let producers swallow up distributors and retailers, except in the rarest of circumstances. He would permit manufacturers to conspire with retail stores to fix prices and drive discount stores out of business; the Bork attitude on this latter point is so extreme and so contrary to congressional intent that Congress passed a law forbidding the Government to advance it—and Judge Bork's position was unanimously rejected by the Supreme Court in 1984.

The Bork antipathy toward antitrust demonstrates again the falsity of the claim that he is a practitioner of judicial restraint. He has urged the courts to ignore Federal statutes and expressions of legislative intent that conflict with his extremist notions of economic efficiency. And he has proposed that judges substitute their judgment for that of Congress in determining what in fact promotes competition in our society. The Senate and House of Representatives may not have the expertise of Robert Bork on antitrust, but we do have the constitutional power to write the antitrust laws—and we do not intend to cede that power to Robert Bork.

In recent days, some supporters of this nomination have tried to divert attention from the issue of Judge Bork's record by attacking the opponents of the nomination for the tactics used in this debate. Granted, we have been the messengers bringing the bad news about Judge Bork, and it is a natural, if deplorable, instinct to attack such messengers. But the Reagan administration's difficulties with this nomination are self-inflicted wounds. The administration itself invited this debate by launcing their no-holds-barred game of capture the Court. The Bork nomination was intended to be the long-anticipated millennium for the right-wing supporters of the administration, and it was widely hailed by them as such. But to the rest of us, it was the culmination of their concerted effort to wrench the Court from its moorings, out of the mainstream of its own precedents and history.

It is preposterous—and hypocritical—for the White House to complain that politics suddenly intruded to mar the confirmation process. For much of 1986, President Reagan himself barnstormed the country, calling for the election of Republican Senators who would confirm his judicial nominees. President Reagan failed in that campaign, and his failure there was a harbinger of the American people's rejection of Judge Bork.

It is ridiculous—and untrue—for the supporters of Judge Bork to suggest that politics has been confined to only one side of the current debate. From the day the nomination was announced, my Senate office was inundated by an unprecedented tidal wave of mail. I received over 29 letters of support for Judge Bork from across the country, and an even larger number of preprinted postcards expressing such support. And I was hardly a likely target of their affections. Who does President Reagan think was orchestrating that massive political campaign throughout America for Judge Bork—the tooth fairy?

It is equally ridiculous for Judge Bork and the White House to make the dire assertions we have all heard in recent days that the politics of this debate have somehow endangered the independence of the judiciary. As the constitutional scholar he is, Judge Bork himself should certainly know better. As Justice Oliver Wendell Holmes once said, the Supreme Court is a quiet place, but it is the quiet at the center of the storm. This stormy confirmation debate and the repudiation of Judge Bork may have shaken the foundations of right-wing ideology in America, but it is only a passing gentle breeze in the long and often much more turbulent history of the Supreme Court in our society. Judge Bork himself was a far greater threat to the role of the Supreme Court than anything that happened in this debate. The simple truth is his nomination collided with the Constitution and with democracy in America, and

the Supreme Court and the country have emerged the stronger for it.

As the record of this nomination demonstrates, the unseemly attacks by Judge Bork's supporters are baseless—the desperate responses of the losing side searching for scapegoats for their failure. In my 25 years in the Senate as a member of the Judiciary Committee, I have not participated in a confirmation process for a Supreme Court nominee that was more thorough or more fair than the hearings on Judge Bork. I commend our committee chairman, Senator BIDEN, for his leadership in conducting the hearings and guiding the committee review of the nomination.

It also comes with special irony, pettiness, and ill grace for the White House with its vast resources and access to the media, to complain that a 1-minute television message by Gregory Peck unfairly helped to turn the tide against Judge Bork. In this year, in this debate, Gregory Peck turned out to have a better and deeper understanding of what the Constitution means in America's daily life than either Robert Bork or Ronald Reagan.

The allegations that opponents of the nomination have mounted a smear campaign against Judge Bork are particularly inappropriate to this debate, which has been remarkable for its absence of personal attacks on the nominee. The frustration of the White House and the right-wing is understandable over the loss of their dream nominee. But I am confident that the Senate will not be diverted by this sideshow of sour grapes from the issue now awaiting us—which is to fill the large vacancy on the Supreme Court left by Justice Powell with a Justice who genuinely understands the meaning of justice in America.

The question is not, and never has been, loyalty to party but to the Constitution; not special interests but the national interest; not the person who would be Justice but the future of justice itself.

At similar moments in the past, when the issue has been the future of American justice and the fate of the Supreme Court as the ultimate guardian of that justice, Senators have risen above party. In 1937, a Democratic Senate defeated President Franklin Roosevelt's attempt to pack the Supreme Court. And, just 7 years earlier, a Republican Senate defeated President Herbert Hoover's nomination to the Supreme Court of the now-forgotten John J. Parker, who had expressed bias against blacks and working men and women.

During that debate, the great Republican Senator George Norris addressed the issue in words that speak to us today:

When we are passing on a judge . . . we ought not only to know whether he is a good lawyer, not only whether he is honest . . . but we ought to know how he approaches these great questions of human liberty.

That is the standard by which Robert Bork must be measured—the standard by which any nominee for the Supreme Court should be judged, and the standard which the American people have always set for our highest court. And by that standard, Robert Bork's record does not paint the portrait of a man who should have the last word on what justice means in America.

There is no better way in this bicentennial year to commemorate the Constitution—and to secure its blessings for future generations—than for the Senate to reject the nomination of Robert Bork. And when the President and his advisers try once more, I urge them not to make the Bork mistake again—and to nominate someone who is in the mainstream of constitutional jurisprudence, who will deserve confirmation by the Senate.

I ask unanimous consent that a compilation of quotations from Judge Bork's decisions, speeches, and articles that I prepared for the Judiciary Committee hearings be printed in the RECORD.

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

BORK ON BORK—THE WORLD ACCORDING TO ROBERT BORK

On respect for precedent:

When asked whether he could identify any Supreme Court doctrines that he regarded as particularly worthy of reconsideration in the 1980's: "Yes I can, but I won't." (District Lawyer 1985.)

"The only cure for a Court which oversteps its bounds that I know of is the appointment power." (Senate Judiciary Committee 1982.)

"Well, we never really undid a lot of the New Deal, I'm afraid, did we?" (UCLA Oral History Interview with Friedrich von Hayek 1978.)

"Democratic responses to judicial excesses probably must come through the replacement of judges who die or retire with judges of different views." (Society Magazine 1986.)

"I have been as severe, as unsparing, as anyone here in my criticisms of the judiciary, and I take back not one word." (Virginia Bar Association, 1986.)

"[T]he role of precedent in constitutional law is less important than it is in a proper common law or statutory mode. . . . So if a constitutional judge comes to a firm conviction that the courts have misunderstood the intentions of the founders, he is freer than when acting in his capacity as an interpreter of the common law or of a statute to overturn a precedent. . . . [A]n 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." (Federalist Society, January 31, 1987.)

"What are the chances of restoring legitimacy to constitutional theory? I think they are excellent. My confidence is largely due to a law of nature I recently discovered. To future generations this will be known, and revered, as 'Bork's wave theory of law reform.' . . . [T]he courts addressed what they regarded as social problems after World War II and often did so without regard to any recognizable theory of constitutional interpretation. A tradition of looking to original intention was shattered. Constitutional theorists from the academies, in sympathy with the courts politically, began to construct theories to justify what was happening. So was non-originalism born. That was to become a tsunami and its intellectual and moral excesses are breathtaking. . . . [T]hese theorists exhort the courts to unprecedented imperialistic adventures. But the second wave is rising. When I first wrote on original intent in 1971, one of my colleagues at Yale told a young visiting professor not to bother with it because the position was utterly passe. And so indeed it was. But it was more than passe; it was, I think, the future as well. On the side of the issue there are now, to name but a few, Judges Ralph Winter and Frank Easterbrook, Professor Henry Monaghan, and former professor, now Chief Justice of the High Court of American Samoa, Grover Rees. There are many more younger people, often associated with the Federalist Society, who are of that philosophy and who plan to go into law teaching. It may take ten years, it may take twenty years, for the second wave to crest, but crest it will and it will sweep the elegant, erudite, pretentious, and toxic detritus of non-originalism out to sea." (Philadelphia Society, April 3, 1987.)

"Not to put too fine a point on the matter, what these [non-originalist] scholars are urging, and what an increasing number of students, lawyers, and judges are accepting, is civil disobedience by judges." (Canisius College 1985.)

"[Question] O.K. If I can follow that up. Now the relationship between the judge, the text, and precedent, what do you do about precedent?"

"Mr. BORK. I don't think that in the field of constitutional law, precedent is all that important. And 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 to correct you. If you construe the Constitution incorrectly, Congress is helpless. Everybody is helpless. You're the final word. And 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 meaning of the Constitution. And if a new court comes in and says, "Well I respect your precedent, what you have is a ratchet effect, with the Constitution getting further and further and further away from its 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." (Excerpt from Questions and Answers Session at Canisius College 1985.)

"There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not be overturned, even if thought to be wrong. The example I usually give, because I think it's noncontroversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private

expectations, and so forth have been built up around that broad interpretation of the commerce clause that it would be too late, even if a justice or judge became certain that that broad interpretation is wrong as a matter of original intent, to tear it up and overturn it." (District Lawyer 1985.)

On his judicial philosophy:

"These remarks are intended to be tentative and exploratory. Yet at this moment I do not see how I can avoid the conclusions stated. The Supreme Court's constitutional role appears to be justified only if the court applies principles that are neutrally derived, defined and applied. And the requirement of neutrality in turn appears to indicate the results I have sketched here." (Indiana Law Journal 1971.)

"I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece." (Conservative Digest 1985.)

When asked whether he had "eaten" his Indiana Law Journal article, he responded: "I haven't eaten the article—one little sentence." When asked which is the sentence, he responded "I'll never tell." (Federalist Society 1986.)

"It's always embarrassing to sit here and say no, I haven't changed anything, because I suppose one should always claim growth. But the fact is no, my views have remained about what they were. After all, courts are not that mysterious, and if you deal with them enough and teach their opinions enough, you're likely to know a great deal. So when you become a judge, I don't think your viewpoint is likely to change greatly. . . . Obviously, when you're considering a man or woman for a judicial appointment, you would like to know what that man or woman thinks, you look for a track record, and that means that you read any articles they've written, any opinions they've written. That part of the selection process is inevitable, and there's no reason to be upset about it." (District Lawyer 1985.)

"Teaching is very much like being a judge and you approach the Constitution in the same way." (Pittsburgh Television Interview 1986.)

"My own philosophy is interpretivist. But I must say that this puts me in a distinct minority among law professors. . . . By my count, there were in recent years perhaps five interpretivists on the faculties of the ten best-known law schools. And now the President has put four of them on courts of appeals. That is why faculty members who don't like much else about Ronald Reagan regard him as a great reformer of legal education." (National Review 1982.)

On the public accommodations and employment provisions of the Civil Rights Act of 1964:

"There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate. . . . The principle of such legislation is . . . a principle of unsurpassed ugliness." (New Republic 1963.)

"There are serious and substantial difficulties connected with the public accommodations and employment provisions. . . . The proposed public accommodations and employment practices laws, however, would . . . compel association even where it is not desired." (Chicago Tribune 1964.)

On the Supreme Court's decision in *Katzenbach* v. *Morgan* (1966), sustaining a section of the Voting Rights Act of 1965 barring literacy tests in English, and *Oregon* v. *Mitchell* (1970), sustaining a section of the Voting Rights Act of 1970 barring all literacy tests:

"These decisions represent a very bad and, indeed, pernicious constitutional law." (Senate Judiciary Committee 1981.)

On the Supreme Court's decision in *Shelley* v. *Kraemer* (1948), striking down racially restrictive covenants:

"Starting with an attempt to justify Shelley on grounds of neutral principles, the argument rather curiously arrives at a position in which neutrality in the derivation, definition and application of principle is impossible and the wrong institution is governing society." (Indiana Law Journal 1971.)

On the Supreme Court's decision in *Harper* v. *Virginia Board of Elections* (1966), striking down the poll tax:

"[T]hat case, an equal protection case, seemed to me wrongly decided. . . . As I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other." (Senate Judiciary Committee 1973.)

On the Supreme Court's decision in *University of California Regents* v. *Bakke* (1978) upholding affirmative action programs:

"Justice Powell's middle position—universities may not use raw racial quotas but may consider race among other factors, in the interest of diversity among the student body has been praised as a statesmanlike solution to an agonizing problem. It may be. Unfortunately, in constitutional terms, his argument is not ultimately persuasive. . . . As politics the argument may seem statesmanlike, but as constitutional argument, it leaves you hungry an hour later." (Wall Street Journal 1978.)

On the Supreme Court's decision in *Reynolds* v. *Sims* (1964), the reapportionment case establishing the one-man, one-vote standard for election districts:

"On no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed." (Fortune Magazine 1968.)

"The state legislative reapportionment cases were unsatisfactory, precisely because the Court attempted to apply a substantive equal protection approach. Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument." (Indiana Law Journal 1971.)

"I think one man, one vote was too much of a straight jacket. I do not think there is a theoretical basis for it." (Senate Judiciary Committee 1973.)

"I think this court stepped beyond its allowable boundaries when it imposed one man, one vote under the Equal Protection Clause." (United States Information Agency, June 10, 1987.)

On the application of the Equal Protection Clause to women:

"The equal protection clause . . . does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. . . . [C]lases of racial discrimination aside, it is always a mistake for the court to try to construct substantive individual rights under the due process clause or the equal protection clause." (Indiana Law Journal 1971.)

"This court winds up legislating in this area with . . . entirely made-up constitutional rights. This is a process that is going on. It happens with the extension of the Equal Protection Clause to groups that were never previously protected. When they begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them." (Federalist Society 1982.)

"It speaks volumes about the deterioration of the equal protection concept that it is even possible today to take seriously a challenge to the constitutionality of the male-only draft." (Seventh Circuit 1981.)

"Well, in this country, already our experience under the American Constitution is that for many years the Supreme Court of the United States struck down laws interfering with matters within states, on the grounds that they were not interstate commerce and that federal power extended only to interstate commerce. The political attitude of the country changed, and the country demanded more regulation—or the New Deal demanded more regulation. The court gave way. And the court has now almost completely abandoned that form of protection. It has now moved on [to the point]—and I think it's significant—that the most frequently used part of the Constitution now is the equal-protection clause, by which the court is enforcing the modern passion for equality. I wonder, given that kind of institutional history, whether any institutional innovation can save us, or whether it isn't really just an intellectual/political debate that will save us?" (UCLA Oral History Interview with Friedrich von Hayek 1978.)

"I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity. When the Supreme Court decided that having different drinking ages for young men and young women violated the Equal Protection Clause, I thought that . . . was to trivialize the Constitution and to spread it to areas it did not address." (United States Information Agency, June 10, 1987.)

On Sexual harrassment:

"Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as 'discrimination.' Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove. . . . [The court's] bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender." *Vinson* v. *Taylor* 1985.)

On the Supreme Court's early decisions on the right to privacy in *Meyer* v. *Nebraska* (1922) (striking down a state law prohibiting schools from teaching foreign languages) and *Pierce* v. *Society of Sisters* (1925) (striking down an anti-Catholic law prohibiting parents from sending their children to private schools):

"[These cases] were also wrongly decided . . . perhaps Pierce's result could be reached on acceptable grounds, but there is no justification for the Court's methods." (Indiana Law Journal 1971.)

On the Supreme Court's decision in *Skinner* v. *Oklahoma* (1942) striking down a law requiring sterilization of persons convicted of robbery hut not embezzlement:

"[The decision is] improper and as intellectually empty as *Griswold* v. *Connecticut*." (Indiana Law Journal 1971.)

"Well, I don't want to pursue this too far, but I'm reminded of a Supreme Court case which raised this in extreme terms. Oklahoma passed a statute which said, in effect, that criminals convicted for the third time for a crime of violence—a felony involving violence—should be sterilized. The theory was that it was genetic. Nobody knows. But the Supreme Court looked at that law and said, 'Well, a bank robber who robs for the third time will be sterilized, but an embezzler in the bank will not be.' Those people are alike; that's discriminatory; the law failed. That's my point. Once you give this power to define discrimination, that kind of thing will be done." (UCLA Oral History Interview with Friedrich von Hayek 1978.)

On the Supreme Court's decision in Griswold v. Connecticut, striking down a state law making it a crime for a married couple to use birth control:

"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 . . . Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two grounds. . . . 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. . . . Unless we can distinguish forms of gratification, the only course for a principled court is to let the majority have its way in both cases." (Indiana Law Journal 1971.)

"The most dramatic examples of noninterpretivist review in our history are Lochner, Griswold v. Connecticut, and Roe v. Wade, which struck down, respectively, a law providing maximum hours of work for bakers, a law prohibiting the use of contraceptives, and a law severely regulating abortions. In not one of those cases could the result have been reached by interpretation of the Constitution, and these, of course, are only a very small fraction of the cases about which that could be said." (Catholic University 1982.)

"I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision." (Conservative Digest 1985.)

On the Supreme Court's decision in Roe v. Wade (1973), establishing a constitutional right to abortion:

"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. . . . [It] is in the running for perhaps the worst example of constitutional reasoning I have ever read." (Senate Judiciary Committee 1981.)

"The public is coming to understand that decisions like Roe v. Wade rest on no constitutional foundation." (Seventh Circuit 1981.)

On the right of a divorced father to visit his minor child:

"I cannot agree that the Constitution of its own force establishes any such right for a non-custodial parent. . . . The [Supreme] Court has never enunciated a substantive right to so tenuous a relationship as visitation by a non-custodial parent. The reason for protecting the family and the institution of marriage is not merely that they are fundamental to our society but that our entire tradition is to encourage, support, and respect them. . . . That cannot be said of broken homes and dissolved marriages. In fact to throw substantive and not simply procedural constitutional protections around dissolved families will likely have a tendency further to undermine the institution of the intact marriage and may thus partially contradict the rationale for what the Supreme Court has been doing in this area." (Franz v. United States 1983.)

On the scope of the First Amendment's protection of free speech:

"Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." (Indiana Law Journal 1971.)

"But 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 capable of affecting political attitudes, but are not on that account immune from regulation. . . . I will be bold enough to suggest that any version of the First Amendment not built on the political speech core, and confined by, if not to, it will either prove intellectually incoherent or leave judges free to legislate as they will, both mortal sins in the law." (University of Michigan 1977.)

"There is much more freedom in the area of sexual permissiveness. There is much more freedom—if you want to call these things freedom—in the area of things that may be said or written or shown on film or shown on the stage. Now, I suppose the latter could be evidences of depravity rather than freedom, but I take it you think—" (UCLA Oral History Interview with Friedrich von Hayek 1978.)

"My views on the First Amendment [in the 1971 article], I think, have changed only to the extent that in an effort to find a bright line for judges to follow, I said the First Amendment really ought to protect only explicitly political speech. It now strikes me that I purchased a bright line at the expense of a rather more sensible approach. There is a lot of moral and scientific speech which feeds directly into the political process. . . . I cannot tell you much more than that there is a spectrum of, I think political speech—speech about public affairs and public officials—is the core of the amendment, but protection is going to spread out from there, as I say, in the moral speech and in the scientific speech, into fiction and so forth. There comes a point at which the speech no longer has any relation to those processes. It is purely a means for self-gratification. When it reaches that level, speech is really no different from any other human activity which produces self-gratification. Where you draw the line there, I cannot state with great precision." (United States Information Agency, June 10, 1987.)

On freedom of the press:

"[It] seems plain that the press has done quite well before the Burger Court. In Pentagon Papers the press was permitted to publish state secrets it knew to have been taken from the government without authorization. In Miami Herald Publishing Co. v. Tornillo the Court struck down a right-of-reply statute that had significant scholarly support. In Cox Broadcasting Corp. v. Cohn a statute prohibiting publication of a rape victim's name was held invalid. In Landmark Communication v. Virginia the State was held disabled from punishing publication of material wrongfully divulged to it about a secret inquiry into alleged judicial misconduct.

"In some of those cases, it is possible to believe, the press won more than perhaps it ought to have, though not many journalists are heard to express qualms. Surely, however, Pentagon Papers need not have been stampeded through to decision without either Court or counsel having time to learn what was at stake. The New York Times which had delayed publication for three months was able to convince the Court that its claims were so urgent, once it was ready to go, that the judicial process could not be given time to operate, even on an expedited basis. And one may doubt that press freedom requires permission to publish a rape victim's name or to publish the details of an investigation which the State may lawfully keep secret. These cases are instances of extreme deference to the press that is by no means essential or even important to its role." (University of Michigan 1977.)

On freedom of religion:

"One of those who spoke at Brookings in response to Bork said Bork essentially adopted Chief Justice William H. Rehnquist's dissent in an Alabama school prayer case in 1985. In that case, Rehnquist said the Founding Fathers intended only to ensure that one religious sect should not be favored over another, not that the government should be entirely neutral toward religion. Another member of the audience, the Rev. Kenneth Dean, pastor of the First Baptist Church of Rochester, N.Y., said he told Bork of his experience as a junior high school teacher in Florida where Bible reading began every school day. Dean said he told Bork of one occasion where he called upon a Jewish student to read from the New Testament but the boy declined, saying his parents did not want him to. Those who refused to read had the option of standing outside the classroom, he recalled. Dean said he felt he had treated the student badly by singling him out before his peers. Dean quoted Bork as responding, 'So what? I'm sure he got over it.' Bork, asked about Dean's account, said, 'I can't believe I would have said that.'" (Washington Post, July 28, 1987, referring to a dinner at the Brookings Institution for religious leaders in 1985.)

On the Supreme Court's decisions in Brandenburg v. Ohio (1969) and Hess v. Indiana (1973), establishing the clear and present danger test before political speech can be prohibited:

"There should, therefore, be no constitutional protection for any speech advocating the violation of law." (Indiana Law Journal 1971.)

"Hess and Brandenburg are fundamentally wrong interpretations of the First Amendment." (University of Michigan 1977.)

On the Holmes and Brandeis dissents in the Gitlow and Abrams cases, proposing the clear and present danger test:

"Actually, in those famous decisions, I thought the majority—I think it was Sanford, Justice Sanford—had a rather better logical argument than either Holmes or Brandeis. I don't think the clear and present danger test was an adequate test, no." (United States Information Agency, June 10, 1987.)

On Congress and antitrust law:

"Certain of the antitrust statutes, the Clayton Act and the Robinson-Patman Act, direct the courts' attention to specific suspect business practices. Though these practices are almost entirely beneficial, Congress has indicated its belief that they may—not always, but under circumstances deliberately left undefined—injure competition. Is a court that understands the economic theory free, in the face of such a legislative declaration, to reply that, for example, no vertical merger ever harms competition? The issue is not free from doubt, but I think the better answer is yes." (The Antitrust Paradox, p. 409-410, 1978.)

"It was, perhaps, never to be expected that Congress would create the details of a rational antitrust policy. As a body, it is capable of deciding questions that require a yes or no, of adopting correct broad general principles, or of writing codes reflecting detailed compromises; but whatever the merits of individual members, Congress as a whole is institutionally incapable of the sustained, rigorous and consistent thought that the fashioning of rational antitrust policy requires." (The Antitrust Paradox, p. 412, 1978.)

"[I]f everything said by the proponents of multiple goals, of political goals, of the antitrust laws, if all of that were true, it would not matter . . . if Congressmen explicitly said they wanted courts to weigh political values against the economic welfare of consumers, it would not matter. (Bar Association of the City of New York 1986.)

On horizontal mergers:

"[W]e are in an area of uncertainty when we ask whether mergers that would concentrate a market to only two firms of roughly equal size should be prohibited. My guess is that they should not and, therefore, that mergers up to 60 or 70 percent of the market should be permitted . . . Partly as a tactical concession to current oligopoly phobia and partly in recognition of Section 7's intended function of tightening the Sherman Act rule, I am willing to weaken that conclusion. Competititon in the sense of consumer welfare would be adequately protected and the mandate of Section 7 satisfactorily served if the statute were interpreted as making presumptively lawful all horizontal mergers up to market shares that would allow for other mergers of similar size in the industry and still leave three significant companies. In a fragmented market, this would indicate a maximum share attainable by merger of about 40 percent." (The Antitrust Paradox, pp. 221-222, 1978.)

On vertical mergers:

"These observations indicate that [v]ertical mergers are merely one means of creating a valuable form of integration and that there is no reason for the law to oppose such mergers." (The Antitrust Paradox, p. 231, 1978.)

On vertical price restraint (resale price maintenance):

"Analysis shows that every vertical restraint should be completely lawful." (The Antitrust Paradox, p. 288, 1978.)

"There is never a price discrimination that injures competition. . . . If the legislators tell a judge what to do, of course he has to do it, no matter what his personal views. But the Robinson-Patman Act does not do that. There is a theory that Congress did not mean what it said in the Robinson-Patman Act; that it said protect competition but really meant protect small business. That is the theory that Congress winked at when it enacted the statute. I do not think it is a judge's business to enforce a legislative wink." (Conference Board 1983.)

On conglomerate mergers:

"It seems quite clear that antitrust should never interfere with any conglomerate merger. Like the vertical merger, the conglomerate merger does not put together rivals, and so does not create or increase the ability to restrict output through an increase in market share. Whatever their other virtues or sins, conglomerates do not threaten competition, and they may contribute valuable efficiencies." (The Antitrust Paradox, p. 248, 1978.)

On executive power:

"I'm not sure that you would say that a system which is allowed to evolve freely will necessarily prevail over a system which operates on command and tyranny. That is, to the degree that the issue between the United States and the Soviet Union is still in doubt, a free system of law may not be conducive to the will and the military determination necessary—" (UCLA Oral History Interview with Friedrich von Hayek 1978.)

On the standing of members of Congress to bring actions in federal course to challenge unconstitutional actions by the President:

"We ought to renounce outright the whole notion of Congressional standing. . . . [W]hen federal courts approach the brink of general supervision of the government, as they do here, the eventual outcome may be even more calamitious than the loss of judicial protection of our liberties." (Barnes v. Kline 1985.)

On restrictions by Congress on the CIA:

"A substantive charter that says what will be prohibited and what will be allowed . . . would seem to be a congressional attempt to control the President's power in this respect. It verges upon unconstitutionality, and may well be unconstitutional, because the President has broad powers, as commander-in-chief and as the executive who conducts our foreign relations in this area." (American Enterprise Institute 1979.)

"[A charter is] not merely unworkable. I think such a code is indeed unconstitutional." (ABA Workshop 1979.)

On the Foreign Intelligence Surveillance Act of 1978, limiting the inherent national security power of the President by requiring court-ordered warrants for wiretapping and electronic surveillance of American citizens in the course of national security investigations:

"I believe that the plan of bringing the judiciary, a warrant requirement, and a criminal violation standard into the field of foreign intelligence is, when analyzed, a thoroughly bad idea, and almost certainly unconstitutional as well. . . . [T]he law is very probably a violation of both Articles II and III of the Constitution." (House Judiciary Committee 1978.)

On the invasion of Cambodia: "President Nixon had ample Constitutional authority to order the attack upon the sanctuaries in Cambodia seized by North Vietnamese and Viet Cong forces. . . . The real question in this situation is whether Congress has the Constitutional authority to limit the President's discretion with respect to this attack. Any detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trespass upon powers the Constitution reposes exclusively in the President." (American Journal of International Law 1971.)

On the War Powers Resolution:

"As expiation for Vietnam, we have the War Powers Resolution, an attempt by Congress to share in detailed decisions about the deployment of U.S. armed forces in the world. It is probably unconstitutional and certainly unworkable. But politically the resolution severely handicaps the President in responding to rapidly developing threats to our national interests abroad." (Wall Street Journal 1978.)

On Watergate and the firing of Archibald Cox:

"There was a lawsuit about whether the charter should have been revoked on Saturday night before he was fired, and whether therefore the firing was illegal under the charter until it was revoked. I regard that as an argument about a 36-hour period. The reason the charter was not revoked before he was fired was that there was no staff around to do the necessary work. Monday morning the charter was revoked."

"I do not think that issue of which order it should have come in and whether the thing was illegal for 36 hours is important."

"[T]here was never any possibility that that discharge of the Special Prosecutor would in any way hamper the investigation or the prosecutions of the Special Prosecutor's office."

"The next day after the discharge there was a meeting in my office on Sunday. I brought in Henry Peterson, who was then the head of the Criminal Division of the Department of Justice, and I brought in Mr. Cox's two deputies, Henry Ruth and Philip Lacovara. At that meeting I told them that I wanted them to continue as before with their investigations and with their prosecutions, that they would have complete independence, and that I would guard that independence, including their right to go to court to get the White House tapes or any other evidence they wanted. Therefore, I authorized them to do precisely what they had been doing under Mr. Cox." (Senate Judiciary Committee 1982.)

On court-appointed special prosecutors:

"The question is whether congressional legislation appointing a Special Prosecutor outside the executive branch or empowering courts to do so would be constitutionally valid and whether it would provide significant advantages that make it worth taking a constitutionally risky course. I am persuaded that such a course would almost certainly not be valid and would, in any event, pose more problems than it would solve." (House Judiciary Committee 1973.)

On campaign financing reform:

"We have, as atonement for illegalities in fund raising in the 1972 campaign, the Federal Election Campaign Act, which limits political expression and deforms the political process. The Supreme Court held that parts of this act violate the First Amendment and probably should have held that all of it does." (Wall Street Journal 1978.)

The PRESIDING OFFICER (Mr. GRAHAM). Does the Senator yield the floor?

Mr. KENNEDY. I do.

ROBERT BORK'S AMERICA

Mr. HATCH. Mr. President, after having heard Senator KENNEDY, I must respond. Some have expressed surprise at the intensity and sophistication of the special interests' gutter campaign to demolish Robert Bork—to assassinate his personal, professional, intellectual, and philosophical reputation.

I don't know why anyone was surprised. The tone for this sorry episode—this ugly blot on the long and

distinguished history of this body—was set right here within minutes after President Reagan announced the nomination. In a speech digested in this graphic (show graphic), one Senator employed extreme language to stir fears about Judge Bork's record.

That speech described a view of "Robert Bork's America"—an America of midnight police raids, back-alley abortions and segregated lunch counters; an America where school children are not taught evolution, where writers and artists are censored, where the courthouse doors are locked. In fact, these description were wholly imaginary—an absurd, bad dream. Nonetheless this speech and others planted seeds of fear that became very real.

It is time someone said a word about the real Robert Bork's America. It is our America. It is, first and foremost, an America where "We the People" make the choices that decide the future of our own neighborhoods, our communities, and—through those we elect to represent us—the future of our State and Nation.

It is not an America of fear, but it is an America in which we take the handcuffs off of our dedicated police officers and put them back on the criminals where they belong.

In Robert Bork's America, unelected Federal judges won't allow criminals to roam the streets preying on law-abiding Americans because a policeman made an innocent mistake in arresting a suspect.

In Robert Bork's America, unelected Federal judges won't tell States that the Constitution requires them to release criminals if they aren't given the amount of food, recreation, letters, and even razor blades these judges think the criminals are entitled to.

In Robert Bork's America, unelected Federal judges won't deny to the people the right to have juries consider the effect of a murderer's actions on his innocent victim's family.

It won't be an America of back-alley abortions, as Senator KENNEDY suggests, but perhaps it will be an America in which loving parents are afforded the opportunity to help their teenage children cope with the trauma of unwanted and unexpected pregnancies, rather than having such painful decisions made in lonely, court-enforced isolation.

In Robert Bork's America, the right to privacy which protects the sanctity of the home and the person against unreasonable searches and seizures will be vigorously protected, but unelected judges will not be licensed to manufacture privacy rights to use drugs or engage in prostitution or engage in homosexual conduct.

In Robert Bork's America, unelected judges won't declare a constitutional right to have an abortion at taxpayer expense.

In Robert Bork's America, unelected judges won't rule that the Constitution prohibits the Navy from firing an officer for having homosexual sex with an enlisted man or requires a high school to allow a homosexual boy to bring his male lover to the senior prom—both actual cases involving the so-called constitutional right to privacy.

I could go on and on, but the point is this: Robert Bork's America, as seen through the eyes of many fear-mongers is a fairy tale that would never come true because, in Robert Bork's America, the people would decide. In Professor Tribe's America, or special interests' America, real-life consequences of the ultraliberal agenda are, in many communities, only a court order away.

In one recent case, for example, an intruder broke into the home of an elderly couple, Irving and Rose Bronstein, bound and gagged them, and stabbed them over and over again. They suffered a horrible death. As you might expect, the brutal killings devastated the Bronstein's family—their son, daughter, and granddaughter. Under a Maryland law, the Bronstein's family told the jury the effect the crime had on them. But in the special interest groups' America, only the rights of criminals count and not the rights of the victims. The special interest groups opposed to Judge Bork argued, and successful I might add, that under the Constitution the harm caused to the victims' family was meaningless and couldn't be considered by the jury in deciding on the murderer's sentence. I wonder where they found that in the Constitution.

Another case in point: One of the groups opposing Judge Bork is now asking the Supreme Court to overturn a law passed by the people of the State of Illinois. That law merely says doctors must give parents 24 hours notice before performing abortions on their minor children. Does it make any sense for a 13-year-old girl to be able to get an abortion without her parents' consent when many States will not allow her to get her ears pierced without parental consent?

Let's look at the special interest groups' vision of America. In special interests' America, a jury could not consider evidence of illegal narcotics found in a backpack located in a suspect's car (*Colorado* v. *Bertine*, 106 S.Ct. 738; 1987).

In the special interests' America, law-abiding Americans may not own guns.

In the special interests' America, a high school student has the constitutional right to make what the Supreme Court called a "lewd and vulgar speech" to an assembly of fellow students, some as young as 14 years of age, free from disciplinary action (*Bethel School District* v. *Fraser*, 92 L.Ed. 2D 549; 1986).

In the special interests' America, a local community may not prevent a theater showing only pornography from locating next door from a church or a school (*City of Renton* v. *Playtime Theatres*, 472 U.S. 1006; 1986).

In the special interests' America, there would not be legislation forbidding the disclosure of the names of U.S. intelligence agents.

In the special interests' America, a State may not begin its legislative sessions with a prayer by a State-paid chaplain, a claim the Supreme Court rejected in *Marsh* v. *Chambers*, 103 S.Ct. 3330 (1983).

In the special interests' America, children who need some extra help will be deprived of remedial educational programs because their parents chose to send them to religious school (*Aguilar* v. *Felton*, 105 S.Ct. 3232; 1985).

In the special interests' America, we the people may not decide that children should begin their school day with a 1-minute period of silence for "meditation or voluntary prayer" (*Wallace* v. *Jaffree*, 472 U.S. 38; 1985).

In the special interests' America, unelected Federal judges determine who may or may not be the football coach of a high school (*Lee* v. *Atallah County School System*, 588 F.2D 499; 1979).

In the special interests' America, qualifications do not matter in determining promotions; racial quotas are used even where there is no prior history of discrimination (*Wygant* v. *Jackson Board of Education*, 106 S.Ct. 1842; 1986).

Some will say that this parade of horribles is a scare tactic, and that in Robert Bork's America, the Constitution does not afford sufficient protection to the American people from the government. The different is this; For the parade of horribles described by the liberal special interest groups to come true, we the people, and our democratically elected Representatives, would have to acquiesce in the repressive laws they describe. For the special interests' America to become our America, their high-priced lawyers need convince only one judge per Federal district, three judges per circuit, or five judges on the Supreme Court.

In conclusion, our future and the future of our children will be shaped by the decisions that are made in the Supreme Court on many important issues. If you believe those issues should be decided by unelected judges—appointed for life and answerable to no one—then you ought to let the special interests have their way. Cave in to their pressure. You don't want to live in Robert Bork's America.

But if you believe that free men and women should be able to decide the issues that affect their lives by elect-

ing local, State and national leaders who will faithfully reflect their values and views—if your constituents believe that—you have a duty to vote to confirm Judge Bork.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, Judge Robert Heron Bork is one of the most qualified nominees for the Supreme Court in recent history. Many Americans—and perhaps some of my colleagues—know only an evil portrait of this man. I would like to describe the whole man, as I know him to be.

Robert Bork was born on March 1, 1927 in Pittsburgh, PA, and attended elementary and high school there. He attended the University of Pittsburgh for a short time in 1944 and volunteered to serve in the Marine Corps in 1945 and served until 1946. He reentered the Marine Corps in 1950, serving until 1952, when he was honorably discharged. In between his tours of duty, he received a bachelor of arts degree from the University of Chicago in 1948. He was elected to Phi Beta Kappa. Subsequently, he began his studies at the University of Chicago Law School. He received his J.D. in 1953, having served as the managing editor of the law review.

He was also elected to the order of the COIF, a national honor society. In 1953, he was an associate at the law and economics project of the University of Chicago Law School where he worked with Prof. Aaron Director. In 1954, he joined a prominent New York law firm as an associate. In 1955, he became an associate at Kirkland and Ellis in Chicago where he practiced law until 1962.

Shortly after becoming a partner at that firm, he left to teach at Yale Law School. He was named a professor in 1965. In 1973, he again served his country—this time as Solicitor General of the United States. He was unanimously confirmed by the Senate to this post, the third-highest in the Justice Department. He rendered distinguished service in that position until 1977, when he returned to Yale Law School, where he occupied two endowed chairs: first that of Chancellor Kent Professor of Law from 1977 through 1979, and then that of Alexander Bickel Professor of Public Law from 1979 to 1981.

Judge Bork returned to Washington, DC, and to Kirkland and Ellis in 1981, where he practiced as a partner for 1 year. In 1982, President Reagan nominated him to be a judge on the Court of Appeals for the District of Columbia. He was confirmed a second time unanimously by the full Senate and has served with distinction since that time.

As former President Gerald R. Ford stated in introducing Judge Bork:

> There are four kinds of occupations that a lawyer can have: private practitioner, law professor, Government lawyer, and judge. Robert Bork has distinguished himself in not one, but all four endeavors. A renowned Federal Appeals Court judge, former Solicitor General of the United States, professor of law at Yale University, and twice a partner in one of the nation's leading law firms.
>
> Judge Robert Bork is uniquely qualified to sit on the United States Supreme Court.

Indeed, almost everyone agrees that Judge Bork excelled with respect to all the criteria normally considered in evaluating a nominee to the Supreme Court: integrity, judicial temperament, and judicial competence.

Those who testified on his behalf include former Chief Justice Warren Burger, seven former attorneys general, many highly respected academics, and former colleagues and members of the bar.

In addition, Justice John Paul Stevens took the unusual step of publicly endorsing Judge Bork's elevation to the Supreme Court. A sample of their praise reveals the truth of former Chief Justice Burger's statement—that Judge Bork is one of the best qualified candidates for the Supreme Court in 50 years.

Former Attorney General William French Smith called Judge Bork "a highly distinguished, fair-minded jurist and scholar of the highest professional integrity," with "all the earmarks of a great Supreme Court Justice," and "there is no one better qualified to sit on the Supreme Court." Former Attorney General Edward Levi, who has known Judge Bork for almost 40 years, said:

> In my experience with him, I would say that Judge Bork is an able person of honor, kindness, and fairness, and I would say with practical wisdom, which he has shown as an outstanding solicitor general, and an outstanding and eloquent judge, and for the sake of our country, I very much hope he will be confirmed.

Former Attorney General William P. Rogers said that "certainly, he could think of no nominees during his professional life who had been better qualified."

Judge Griffin Bell, former Attorney General during the Carter administration was among a number of prominent Democrats voicing support for Judge Bork, declaring that "if he were in the Senate he would vote for Judge Bork." Former Carter administration White House Chief Counsel Lloyd Cutler testified that:

> On the whole, I think he would come much closer as a sitting justice if he is confirmed, to a justice like Justice Powell and Justice Stevens—and I remind you that that is precisely what Justice Stevens himself said, that "you will find in Judge Bork's opinions a philosophy similar to that you will see in the opinions of Justice Stewart, Justice Powell, and some of the things that I * * * have written."

As Professor Paul Bator of the University of Chicago Law School said, "the country will be better off with Robert Bork on the Supreme Court than without him because he is a person of surpassing intellectual distinction, because of his outstanding integrity and intellectual honesty, and because of his commitment to the rule of law." Or as Professor Henry Monaghan of Columbia Law School said, "in my view, no more than a score of persons has ever been nominated to the Supreme Court with such surpassing credentials."

Dallin Oaks, dean of Brigham Young Law School, said that "Judge Bork is a man of integrity who has adhered to the highest standards of the legal profession."

These are but some of the comments praising Judge Bork's qualifications.

ABA RATING

Judge Bork also received the highest rating for a Supreme Court Justice given by the American Bar Association's standing committee on Federal Judiciary, "well qualified." This rating, in the committee's words, "is reserved for those who meet the highest standards of professional competence, judicial temperament, and integrity. The persons in this category must be among the best available for appointment for the Supreme Court.

In fact, the ABA also gave Judge Bork its highest rating in 1981, when it evaluated Judge Bork for a position on the Court of Appeals for the District of Columbia. The ABA then evaluated him as "exceptionally well qualified." Only about 5 percent of all nominees to the bench are so rated. How does a nominee receive that rating? According to the ABA:

> The prospective nominee must stand at the top of the legal profession in the community involved and have outstanding legal ability, wide experience, and the highest reputation for integrity and temperament. In addition to preeminence in the law, the prospective nominee should have a reputation as an outstanding citizen, having made important community and professional contributions in order to meet the sparingly awarded "exceptionally well qualified" evaluation.

Incredibly, 4 members out of 15 on the ABA's committee this time voted that Judge Bork was "not qualified." One voted not to oppose the nomination. These votes were certainly not cast by lawyers faithfully applying the stated ABA criteria, for there is no doubt that Judge Bork has the requisite judicial competence, integrity, and judicial temperament. The only explanation for these dissenting opinions is that they ignored the requirement that their review be restricted "primarily to issues bearing on professional qualification." They did what the committee states it does not do: 'investigate the prospective nominee's political or ideological philosophy." Even the committee acknowledges that this is not a legitimate consideration for those serving on the ABA's committee. The dissenting minority report must

be seen for what it is: a political gesture, pretending to be objective, but totally lacking in principle and fidelity to the ABA's stated criteria. How do we know that this is just plain old politics? Well, in contravention of its own rules, the ABA report at least four times discussed the opposition on political and ideological grounds of some of those interviewed on Judge Bork's nomination.

JUDGE BORK'S TESTIMONY

The consensus of the committee was that Judge Bork's testimony was the most candid, comprehensive of any Supreme Court nominee that had ever appeared before the Senate Judiciary Committee. All acknowledged that Judge Bork answered every question put to him by the committee.

Judge Bork testified in detail about his judicial philosophy, his views on how to interpret the Constitution; on stare decisis; on the first amendment; the equal protection clause of the fourteenth amendment; privacy rights; and the separation of powers. He explained in detail his prior criticisms of Supreme Court cases. He explained that respected jurists and scholars—including some of the greatest jurists of this century such as Black, Stewart, and Harlan—had strongly criticized each of these cases. He spoke about his views on the commerce clause, the legal tender cases, antitrust, and congressional standing. He addressed questions put to him about the War Powers Act, the Foreign Intelligence Surveillance Act, the Independent Special Prosecutor Act, and constitutionality of the pocket veto, and others.

In an unprecedented manner, Judge Bork fully explained in detail his views on these complex and difficult legal questions. Judge Bork's candid and informative testimony revealed that he is a thoughtful jurist and scholar of the highest order. He combines a rich and probing intellect with an intimate knowledge of the Constitution.

I think at this point some perspective is in order—lest the American people think the "inquisition" of Judge Bork is the normal practice in the Senate. The fact is that before 1925, no nominee for the Supreme Court ever came before the Senate to respond to questions. And it is only since the 1955 confirmation of Justice John Harlan that the Judiciary Committee began this tradition. We are a body steeped in tradition.

I make this point only to further highlight the unprecedented nature of the range of Judge Bork's testimony.

By any normal standard, Judge Bork is more than amply qualified to sit on the Supreme Court. Indeed, there was no serious question raised concerning Judge Bork's performance in those areas most relevant to assessing his fitness as a justice, namely, his record as Solicitor General of the United States and his record as Court of Appeals Judge for the District of Columbia Circuit. With little in Judge Bork's record of on-the-job performance to criticize, Judge Bork's opponents resort to scrutiny and censure of his writings as an academic and, what is worse, to distorting and mischaracterizing his record. Their goal is to scare and mislead the public. In doing so, they ignore the truth.

They ignore his undisputed record of fairness and evenhandedness as a judge. No credible witness questioned that Judge Bork in all cases sought fairly and impartially to apply the law to the facts in the case before him. Nor could any such question be raised.

Judge Bork's critics ignore his record as a vigorous defender of the right to free speech. Judge Bork has written such important opinions as Ollman versus Evans and Novak, Lebron versus Washington Metro Transit Authority, FTC versus Brown & Williamson, and Reuber versus United States. In Ollman, Judge Bork relied on the changing realities of libel litigation to conclude that it was necessary to have greater first amendment protections for the press. In Lebron, Judge Bork held that the Government had violated an artist's rights by refusing to let him display a poster extremely critical of President Reagan in space leased for advertisements on the inside of the Washington, DC subway.

They claim that Judge Bork will "reopen old wounds," will "return us to the days of segregated lunch counters," and will "turn back the clock on civil rights." His critics say he's an enemy of women. The fact is that Judge Bork's critics ignore his record in civil rights cases. He has consistently and forcefully defended the civil rights of the parties appearing before him. As a judge, he has ruled for the minority or female plaintiff in seven of eight cases involving substantive civil rights issues. This includes cases such as Emory versus Secretary of the Navy, where Judge Bork reversed a district court's decision dismissing a claim of racial discrimination against the U.S. Navy. His record includes Laffey versus Northwest Airlines where Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its women employees. It includes Palmer versus Schultz, where Bork held in favor of women Foreign Service officers alleging discrimination by the State Department. It includes Ososky versus Wick, where Judge Bork voted to reverse the district court and hold that the equal pay act applies to the Foreign Service's merit system. And it includes County Council of Sumter County, South Carolina versus United States, where he held that the county had failed to prove that its new voting system had "neither the purpose nor the effect of denying or abridging the right of black South Carolinians to vote." This decision held that inferences of intentional discrimination can be made based solely on statistical evidence, that title VII's statutory limitations should be liberally construed, and that female stewardesses may not be paid less than male pursers in the job that are only nominally different.

The P.R. campaign against Judge Bork charges that he is an "extremist" and "outside the mainstream." But Judge Bork's opponents ignore his record of collegiality and agreement with his colleagues on the D.C. circuit, even those appointed by a Democratic President. For example, Judge Bork voted with Judges Ginsburg, Mikva, Edwards, Wald, and Wright, respectively, in 91, 82, 80, 76, and 75 percent of cases in which they sat together.

Judge Bork's opponents ignore—and try to demean—his perfect record of nonreversal by the Supreme Court. Not one of the more than 400 opinions Judge Bork authored or joined has ever been reversed. Some suggested that this was irrelevant because the Supreme Court had never reviewed a majority opinion he has written. But witnesses from former Chief Justice Burger to Professor Laurence Tribe testified differently. First, that the Supreme Court has let every decision he has ever made stand as settled law, binding within its circuit, is highly significant. The Supreme Court rejected petitions for certiorari to review an additional 35 cases in which Judge Bork joined majority opinions, including 11 cases in which Judge Bork authored majority opinions. Judge Bork is the only active judge on the United States Court of Appeals for the District of Columbia circuit with at least 5 years tenure who has not had any of the majority opinions he joined or authored reversed on a grant of certiorari. One judge on that court with less tenure has already had at least two majority opinions reversed by the Supreme Court. Second, the Supreme Court has agreed with positions Judge Bork articulated in dissent. The Supreme Court has reviewed three cases in which Judge Bork authored or joined a dissenting opinion and in each of these cases it adopted the holding argued by the dissent. The Supreme Court agreed with three opinions written by Judge Bork dissenting from denial of rehearing en banc, as well as one other such dissent joined by Judge Bork. Finally, the Supreme Court has reviewed decisions he has joined, and always affirmed them, demonstrating conclusively—in fact I do not know how much more conclusively it can be demonstrated—that in those cases Judge Bork's understanding of the law was correct.

Judge Bork's opponents then go on to argue that 90 percent of all cases

are "non-ideological" and easy to decide, that Supreme Court precedent is controlling, and that this explains his perfect record. This argument is based on a fundamental misunderstanding of the role of the appellate judge. Appellate judges are not robots who mechanically apply the law. Judges have ample opportunity for latitude. There is, in fact, a great deal of discretion in deciding cases.

Judge Bork's critics ignore his exemplary record as a solicitor general. He forcefully led the fight against discrimination in employment, in education, in elections and in business. In 17 of 19 cases, Judge Bork supported the civil rights plaintiff or minority interest. These cases include a number of significant civil rights victories: Runyon versus McCrary, which affirmed that section 1981 applied to racially discriminatory private contracts; United Jewish Organizations versus Carey, which upheld race-conscious electoral redistricting to enhance minority voting strength; and Lau versus Nichols, which held that title VI, and possibly the fourteenth amendment, reached actions discriminatory in effect, though not in intent.

Judge Bork also demonstrated a deep personal sensitivity as a solicitor general. For example, Stewart Smith, former tax assistant to Solicitor General Bork, testified to Judge Bork's willingness to take the unusual step of confessing error to the Supreme Court. Mr. Smith had discovered that the Government's key witness had perjured himself to secure the conviction of a black man from Alabama on drug and income tax charges. Solicitor General Bork without hesitation followed Smith's recommendation. To those who contend that Solicitor General Bork was only doing the bidding of others, Mr. Smith said, "That is errant nonsense. That is not the way the Solicitor General's office behaved. I made the recommendation, but it was Robert Bork who ultimately made the decision." Former Deputy Solicitor General Jewell Lafontant testified that as the first black woman in her position, she had been excluded from many meetings, until she reported this to Solicitor General Bork, who rose in righteous anger and ended the discrimination against Ms. Lafontant.

POLITICAL CONSIDERATION

In short, Judge Bork is without question a man who possesses the intelligence, integrity, professional competence, and judicial temperament required for the job of Supreme Court Justice. He has been endorsed by a former Chief Justice, a sitting Justice of the Supreme Court, seven former Attorneys General, two top legal officers in the Carter administration, and a multitude of eminent legal scholars.

Ordinarily, this would be the end to the debate about Judge Bork's fitness to serve. However, politics and philosophical considerations were emphasized during this nomination. Some object to Judge Bork solely on the basis of political ideology.

In the words of former Carter White House Counsel Lloyd Cutler—a liberal Democrat—this amounts to a test of "rigid orthodoxy that bars the confirmation of any nominee who has sometimes been critical of one or more prevailing majority views."

Using such criteria is also mentally at odds with the Senate's role in the confirmation process. It will lead to a politicizing of the independent judiciary.

The history of the advise and consent clause in article II of the Constitution shows that the framers envisioned Senate confirmation as a tool for weighing the qualifications—not the ideology—of each candidate. As Alexander Hamilton explained in Federalist No. 76, Senate scrutiny "would be an excellent check upon a spirit of favoritism * * * and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." Hamilton made clear that merit was to be the Senate's basis for review in the confirmation process. The historical evidence reflects the framers' expectations that the President would exercise great discretion in choosing nominees, while limiting the Senate's role to rejecting nonmeritorious candidates. The recent confirmations of Chief Justice Rehnquist and Justice Scalia are illustrative. Although those nominations spawned more ideological opposition than any other Court nominees in history, each was confirmed easily.

The Senate's traditional role has been a limited one. Its recent standard of review has been a politically neutral and deferential one. The standard was aptly stated by members of the Judiciary Committee during the confirmation hearings of Sandra Day O'Connor, just 6 years ago.

As Senator—now chairman—BIDEN stated before Justice Sandra Day O'Connor:

> We are not attempting to determine whether or not the nominee agrees with all of us on each and every pressing social or legal issue of the day. Indeed, if that were the test, no one would pass by this committee, much less the full Senate.

Or, as Senator KENNEDY stated:

> It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential Justice must pass the litmus test of any single-issue interest group.

Or, as Senator METZENBAUM stated:

> I come to this hearing with no preconceived notions. If I happen to disagree with you on any specific issues, it will in no way affect my judgment of your abilities to serve on the court.

I agree with what my colleagues said on the O'Connor nomination, just 6 years ago. I just wonder: Why have they changed their minds now?

Why do they now have a special interest group litmus test?

Why do they now ask the Senate to become an enforcer of the liberal orthodoxy?

JUDICIAL PHILOSOPHY

In my judgment, the real debate over Judge Bork ought to be on a fundamental question: Who should govern America and how? Shall the most difficult, controversial, moral, and social issues of our time be decided by unelected judges without constitutional warrant or should they be decided by democratically elected representatives of the people?

Judge Bork continues in the long tradition of eminent jurists from John Marshall to Hugo Black to the two most recent appointees to the Supreme Court. He believes that judges may override the policy choices made by democratic bodies only if that choice conflicts with a right that can be fairly discerned from the text, history, and structure of the Constitution. Where the Constitution is silent—and it is deliberately silent on some of the most fundamental issues—those choices are reserved to the people through the democratic process. Judges have no right to impose their own version of "goodness" on legislatures.

A judge's personal opinion on the wisdom of legislation is entitled to no more weight than any other person's. Only the Constitution defines individual liberties that cannot be usurped by the majority.

Unless a judge can locate a right in the Constitution, then he has no legitimate basis for concluding that his personal preferences are superior to all others, and may thus be imposed on society.

When judges look outside the Constitution to decide cases, they usurp powers not given to them by the Constitution. They transform our representative democracy into a judicial autocracy, and abandon the "rule of law" based on the "consent of the governed." Judges who enforce values not found in the Constitution share in an activist mode of judical review that cannot legitimately take place in our Madisonian, constitutional democracy.

Of course, the judiciary must be "activist" in protecting values that can be found in the Constitution. The judiciary must actively apply those values to conditions that the framers did not foresee. So there is nothing to the charge that following the original understanding of the framers would lead to a "crabbed" view of constitutional values. The Constitution can always grow to protect modern developments. Judge Bork made this point quite elo-

quently, in the Ollman case, involving the first amendment:

The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. The judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs the provision of a sole, fair and reasonable meaning fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedom the framers specified are made effective in today's circumstances * * *. In a case like this, 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 [today in 1987].

Mr. President, I inserted something there, to emphasize.

He finally says: "The world changes in which unchanging values find their application."

However, the fact that a judge should give full scope to constitutional values in light of new threats to that value cannot and does not mean that judge is thereby free to invent and impose entirely new values. First, it is absurd to suggest that nine unelected, life-tenured judges are better able to decide the consensus values in a diverse, pluralistic society than people who are elected to do that. I ask my colleagues: Do you believe in representative democracy? Are you willing to assume the responsibility you were sent here to do and that obviously is to legislate?

To sanction lawmaking by the judiciary is to deprive our countrymen and women of perhaps the most fundamental right secured to them in the Constitution: the right to self government. The fact is that every time a court invents a new right, it diminishes the area of democratic choice. While some special interests may applaud this shrinking of democracy, this result can only be attained at the expense of democracy and the freedom of the American people.

Along this line I would like to quote from Hodding Carter, who was an official from the previous administration, when he candidly observed:

The nomination of Judge Bork forces liberals like me to confront a reality we don't want to confront, which is that we are depending in large part on the least democratic institution in government to defend what we are no longer able to win out there in the electorate.

The current judicial controversy over the constitutionality of the death penalty illustrates this distinction. Some sitting Supreme Court Justices take the liberal view that convicted murderers have a constitutional right not to be subject to capital punishment. Of course, the source of this right is not anywhere in our U.S. Constitution.

To the contrary, the Constitution expressly states the availability of capital punishment in at least four different places.

But some Justices today are willing to look beyond the Constitution to create some new right out of whole cloth. To them, the death penalty is inconsistent with what they might refer to as "evolving standards of decency that mark the progress of a maturing society." This, of course, is the so-called enlightened judicial philosophy to which Judge Bork's opponents insist he must subscribe. The capital punishment controversy perfectly illustrates why this philosophy is illegitimate in a government by the people. As Judge Bork has observed "a judge who looks outside the Constitution looks inside himself—and nowhere else."

As with all invented rights, a right to be free of capital punishment is not derived from any evolving moral standard of society, but only the judges' personal moral code. As with all invented rights, it does not enhance freedom but redistributes it. During the hearings, Senator SIMON argued that "when you expand the liberty of any of us, you expand the liberty of all of us." That is fine as a slogan but it is dubious as constitutional doctrine.

Inventing liberty rights for murderers denies rights to victims and, more important, the right of society to fix appropriate punishment.

Of course, inventing rights can be used to serve conservative, as well as liberal political ends. And those in this body ought to look to the future when some other appointee might come before us that some conservatives might oppose. For example, in the early part of this century, the Supreme Court used the vague language of the due process clause of the 14th amendment to strike down a host of economic and social legislation. Typical was the case of Lochner versus New York. Time after time, an activist Supreme Court used the due process clause to invalidate progressive social reform legislation. Everyone now agrees that this Supreme Court's use of so-called substantive due process, as a ruse for judicial legislating marked the worst era in Supreme Court history. Yet some of Judge Bork's strongest critics want to return to those dark ages.

Judge Bork disagrees. He has stated that the adoption of any extraconstitutional values through the due process clause is an illegitimate judicial arrogation of legislative authority. Judge Bork will not put his views ahead of the law by prohibiting States from adopting progressive social reform legislation. Nor will he not put the views of the special interests ahead of the law and recast the Constitution to accommodate their agenda.

What Judge Bork is all about is he will apply the Constitution and laws of the United States neutrally, without regard to the results. What more can we in a political branch of Government ask of a judge? What more can people who are part of the democratic process and attuned to that ask of a judge?

It is, therefore, impossible to find a principled or legitimate basis for opposing Judge Bork's confirmation. Surely, his opponents cannot be afraid of a judge who faithfully applies legislative intent. Surely, they cannot be afraid that the destruction of civil liberties will occur absent an activist judiciary. After all, if there is truly a societal consensus about a particular moral value, then legislators will act to promote that consensus. If those legislators will not act, then somehow we all know that they will soon be unemployed legislators.

But Judge Bork's critics deem fit only those judges who invent rights with which they agree. They would rather make an end run around the democratic process to produce results that the people do not want and that are rooted only in the conscience of the special interest groups. If this radical agenda becomes a litmus test for confirmation, the independent judiciary will be lost forever.

But let us be honest here. Judge Bork's critics do not care about principle or even democracy. To them, it is all a matter of what are the results. To them, law is just politics; judges some how they are just politicians in robes. To them, courts are just another political playing field for competing special interests. Those special interests then rank these judges just like politicians—according to the number of times they deliver for the special interest political agenda.

### A MAINSTREAM JURIST

From June 26, when Justice Lewis Powell announced his resignation—and even before President Reagan made his choice—Judge Bork's opponents have waged a war of irrelevence and distortion. Opponents of Judge Bork's confirmation say he is an extremist and outside the mainstream of constitutional thought. Why? Because he views the Constitution as law to be applied to modern circumstances. Not an open-ended warrant to be an unelected moral philosopher-king. Judge Bork's critics also argue that he will disrupt the delicate balance of the Supreme Court. These two charges, however, are wildly inconsistent. If Judge Bork is such an extremist, how will he obtain the four votes necessary to impose his will on the Supreme Court? By the same token, if he can command the votes necessary to craft a majority, that must mean that a majority of the Supreme Court is also outside the mainstream. I think it is fair to ask my colleagues, "Are the only people who are in the mainstream those who agree with you?"

Is Justice Scalia, confirmed 98-0 just last year by this body, outside the mainstream? Is Justice O'Conner, confirmed unanimously by the Senate in 1981, outside the mainstream? Is Justice White, an appointee of President John F. Kennedy, outside the mainstream? Is Chief Justice Rehnquist, twice confirmed to the Supreme Court by this Senate, outside the mainstream? Are all these distinguished members of the Supreme Court extremists? Of course not. Judge Bork's critics can't have it both ways. And it seems to me that that is exactly what they are trying to do.

The fact is that Judge Bork's judicial philosophy of interpreting, not making, the law—is well within the mainstream of constitutional thought. For example, Justice O'Connor, in her confirmation hearings, echoed Judge Bork's long-held views when she testified:

I do not believe it is the function of the judiciary to step in and change the law because the times have changed or the social mores have changed, but * * * I believe that on occasion the Court has reached changed results interpreting a given provision of the Constitution based on its research of what the true meaning of that provision is—based on the intent of the framers, (and) its research on the history of that provision.

Justice O'Connor has repeated this theme since her appointment to the Supreme Court. In her dissenting opinion in City of Akron versus Akron Center for Reproductive Health, a case invalidating certain abortion regulations, she wrote:

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."

If these views are not in the mainstream, it becomes very difficult to explain how Justice O'Connor was confirmed unanimously. It also becomes difficult to explain how she has built such an impressive record on the Supreme Court.

Justice Scalia, likewise, adheres to the philosophy that a judge's decisions must be guided by the original understanding of the Constitution. Significantly, as a circuit judge, Justice Scalia joined Judge Bork's opinion in Dronenburg versus Zech, which held that there was no privacy right to engage in homosexual conduct, and which attacked the Supreme Court's open-ended privacy decisions.

It's not surprising that Justice Scalia would share Judge Bork's view. After all, in their time together on the D.C. Circuit, they agreed in 98 percent of the cases decided by that court.

Indeed, if anything, Justice Scalia adheres to a stricter view of the degree to which a judge should follow the original meaning of the Constitution. One of the two cases in which Judges Bork and Scalia differed during their 4 years serving together on the D.C. Circuit was Ollman versus Evans and Novak. And I referred to that case several times in my remarks today. In this case, Judge Bork filed a concurring opinion stating that the increase in the number and size of libel claims required more judicial protection of libel defendants to ensure a free press. Judge Scalia sharply dissented, because he felt that Judge Bork was permitting too much evolution of the first amendment. If Judge Bork is outside the mainstream, it is difficult to understand why Judge Scalia's nomination to the Supreme Court just last year was approved.

Other sitting Justices have embraced the Bork view of judges interpreting—not making—the law. For example, in Bowers versus Hardwick, the 1986 Supreme Court case finding that there is no constitutional right to engage in homosexual conduct, Justice White, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, wrote:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the constitution.* * * There should be, therefore, great resistance to expand the substantive reach of [the due process] clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

I ask my colleagues: "Is Justice White outside the mainstream, too?"

Historically, many other Justices, from all over the ideological spectrum, have also shared the position that the original meaning of the text must control constitutional interpretation. For example, in recent times, the great Justice John Harlan said this about original intent in his separate opinion in Oregon versus Mitchell:

When the Court disregards the express intent and understanding of the framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which is its highest duty to protect.

In Reynolds versus Sims, the so-called one man, one vote case Judge Harlan reasoned that when the Supreme Court, "Ignores both the language and the history of the controlling provision of the Constitution," its "action amounts to nothing less than an exercise of the amending power." I quite agree with Justice Harlan—is he outside the mainstream?

The great civil libertarian, Justice Hugo Black—a Roosevelt appointee—also agreed. In his dissenting opinion in Griswold versus Connecticut, he articulated his belief that the Federal Courts have only the limited task of applying and interpreting the text of the Constitution, not enforcing values not found in the Constitution. He stated:

While I completely subscribe to the holding of Marbury versus Madison, * * * 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 to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notion of "civilized standards of conduct."

Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not the power to interpret them.

Later in the same opinion, Justice Black flatly rejected the notion of an open-ended ninth amendment. He forcefully 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 [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.

No one, not even the special interests who oppose Judge Bork, could seriously assert that this great justice is outside the mainstream.

Justice Robert Jackson, another Roosevelt appointee to the Supreme Court, also sharply criticized judicial activism. He served during a time marked by an aggressive use of the due process clause to invalidate social and economic regulations with which the Justices did not agree. As an Assistant Attorney General in 1937, Robert Jackson decried this activist trend. He stated:

Let us squarely face the fact that today we have two Constitutions. One was drawn and adopted by forefathers as an instrument of statesmanship and as a general guide to the distribution of powers and the organization of Government * * * year to year by the judges in their decisions * * * the due process clause has been the chief means by which the *Judges* have written a new Constitution and imposed it upon the American people.

Thus, Justices Harlan, Black, and Jackson, three of the truly outstanding Justices of our era, have decried the use of values not rooted in the constutitional text to invalidate popular legislation. Judge Bork is on "all fours" with this philosophy. If Robert Bork is outside the mainstream, so are these giants of 20th century jurisprudence.

Indeed, President Franklin Delano Roosevelt, the man who appointed Justices Black and Jackson, as well as such other great Supreme Court Justices as Stone, Frankfurter, and Douglas, himself spoke eloquently of the need for judges to look solely to the Constitution as law. In a radio address on March 9, 1937, President Roosevelt stated:

> I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized.

These words are no less true today than in 1937. Judicial restraint has long been recognized by great statesmen as essential to constitutional democracy. Judge Bork's adherence to this philosophy places him squarely within the mainstream.

This tradition of judicial restraint has deep roots—all the way back to the framers of the Constitution. For the framers, the fact that the Constitution was in writing was not incidental. They knew that a written Constitution provides the most stable basis for the rule of law—upon which justice and liberty depend. For example, James Madison, the most influential of the Constitution's framers declared:

> If the sense in which the Constitution was ratified by the Nation * * * be not the guide in expounding it, there can be no security * * * nor a faithful exercise of its powers.

Similarly, Thomas Jefferson, stated:

> Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.

Judge Bork has spent a lifetime urging this same philosophy. Is the Senate of 1987 prepared to say that the framers of 1787—Madison and Jefferson—could not serve on the Supreme Court? Just who is outside the mainstream here?

The Bork view of judicial restraint is also shared by the Legendary Justices in American history. Chief Justice Marshall, in Marbury versus Madison, the very case establishing the power of judicial review, emphasized the constraints imposed by a written text, and the judicial duty to respect this written text.

Justice Story—who served the Court for 33 years—likewise observed:

> That this court has a plain path of duty marked out for it, and that is, to administer the law as it finds it. We *cannot enter into political considerations*, on points of national policy.

Thus, the credo of judicial restraint adhered to by Judge Bork is not only within the mainstream, it allows him to stand with the giants of constitutional thought.

Mr. President, the Senate stands on the verge of its most monumental mistake in my lifetime. I hope its not too late to look beyond the special interest politics that have derailed this nomination. If we can, I know we will find Judge Robert Bork to be just the kind of qualified, principled, individual perfectly suited for the Supreme Court.

I do not know whether we will do that, Mr. President, but I surely hope that we will. Thank you very much. I yield the floor.

The PRESIDING OFFICER (Mr. DECONCINI). The Senator from Colorado.

Mr. ARMSTRONG. Mr. President, 105 or 110 days ago President Reagan submitted the name of Robert Bork to be a Justice of the Supreme Court and here we are, 3½ months later, finally getting down to the debate on the floor of the Senate on whether or not this man, who Mr. Reagan believes is the best qualified person to serve on the U.S. Supreme Court, should, in fact, be confirmed by the U.S. Senate.

The debate began 5 or 6 hours ago. The Chamber is already empty, the gallery is half-empty, the press has gone home and everybody assumes it is all over. Indeed, the distinguished Democratic leader suggested that this whole process of discussing, debating, weighing, sifting the qualifications of this nominee here on the floor of the Senate was in essence irrelevant.

I believe his suggestion, and I am not quoting directly but it is a fair and accurate paraphrase I think, his suggestion was that Judge Bork ought to withdraw his name in view of the fact that more than half of the Members of the Senate had already announced their opposition to his confirmation; that it would be convenient if Judge Bork just pulled his name down or if President Reagan took his nomination back and started over. I think he made some observation to the effect that this would put everybody out of their agony.

I would like to suggest, Mr. President, it would put everybody out of their agony if three or four Senators who had previously announced their intention to vote against Judge Bork would change their minds or take a walk or take a vacation; or if all the Senators would come back to the Chamber and begin to consider seriously issues which need to be addressed.

A number of our colleagues, those who are members of the Judiciary Committee, have really gone through an exercise on this and I compliment them for their patience and their stewardship. I disagree with the outcome of the committee vote, but at least they took the time and trouble to seriously consider the issue. For most of us, however, that debate has only begun today and I am sorry that most of my colleagues were not here to listen with the growing sense of admiration that I felt for the Senator from Iowa for his thoughful and scholarly statement, a statement which addresses in detail and in an exemplary manner, the real issues in this nomination and confirmation.

I wondered, as I listened to the statement of the Senator from Iowa, whether or not at this point it makes any difference since 53 or 54 Members of the Senate have said, "We are against him. We are going to vote him down."

Maybe we should all fold up and go home. Maybe the distinguished Democratic leader was correct, that this is an exercise in futility.

Mr. President, I do not believe that. I do not believe it is over until it is over. Every Senator has had the experience, I would expect, of winning a battle which somebody, the experts, their campaign managers, their wives, their families, said that they were going to lose. Maybe Senators have even had the experience of winning battles after they themselves thought it was already a lost cause.

I would not be surprised, Mr. President, if every Senator has had the experience somewhere along the line of fighting for a cause which in the end did not prevail, but nonetheless went home thinking it was a fight worth making.

It is in that spirit, believing that there is still a chance, though I am under no illusions, to use a phrase Judge Bork has used, I am under no illisions about the likely outcome. But I think it is a case that deserves to be made, a battle that deserves to be fought, a cause that is worth championing.

I am not referring just to the issue of confirming or denying confirmation to Judge Bork. I am referring to the issue of the honor and integrity of the U.S. Senate.

At some point in the next day or two or three I expect to seek recognition and discuss at some length the qualifications of Judge Bork to be a nominee for the U.S. Supreme Court.

But as the debate begins, I think, by gosh, somebody better step up to the plate and clear the air about this cloud of suspicion that hangs over this Chamber. I invite someone to come forward and do so.

I refer to the growing sense in this Chamber and throughout the country that Judge Bork has been the subject

of a savage, unfair, vicious, personal attack.

Because of the seriousness of this matter, Mr. President, I intend to address it in a dispassionate manner. I am going to at least attempt to avoid the temptation of arm waving or extreme or florid rhetoric, and I urge other Senators to do so as well.

Mr. President, I want to say with every ounce of earnestness that I can bring to bear on this subject that what is at stake here is not just the confirmation of Judge Bork, but, as I said a moment ago, the integrity and honor of this process, the reputation of the U.S. Senate. I fully believe that not only will Senators render a verdict upon Judge Bork but upon ourselves, and the country, the people we are sworn to serve will render a verdict upon us as well.

A few days ago, the chairman of the Judiciary Committee made a point which I think deserves to be a starting point in this debate. That is that Senators do not control the action, the words, the advertisements, the television commercials of those outside this Chamber who are in favor of or opposed to the nomination and confirmation of Robert Bork.

There is, unfortunately, a great deal of evidence to the contrary to be found in the public record, and it is to the public record that I wish to refer in the next few minutes.

I do not know the truthfulness of everything I am going to cite, but I am going to draw upon reputable established sources, newspaper accounts from papers all over the country, journalists whose judgment and integrity I have reason to trust, who say that that is not the case. At the right time, Mr. President, I intend to show why that is relevant, why the fact that the outside groups and the Senators did in fact closely, carefully, skillfully, coordinate their efforts being an important consideration in this debate.

It has been reported that one of the members of the Judiciary Committee actively orchestrated the interest-group effort against Judge Bork. This activity involved extensive communications with many outside forces: civil rights groups, organized labor groups, fundraisers for the Democratic Party, and many political figures in the South. By one account, this Senator "was the key to mobilizing public opposition to Judge Bork."

A member of the Judiciary Committee hired onto his personal staff an individual who has been the past president of perhaps the most vocal, indeed, the principal lobbying organization working against Judge Bork.

A Senator held a meeting with various outside political interest groups and promised them that the fight against Judge Bork would be his top priority.

A Senator personally phoned several southern Democratic Governors to round up outside opposition to Judge Bork.

Senators frequently sought information of Judge Bork from outside political groups; the anti-Bork outside interest groups worked closely with Senators on the Judiciary Committee, feeding them questions and information at key points during the confirmation hearings, consulting with Senators during breaks. Indeed, it has been reported—and let me stress this again, Mr. President, that I do not know any of this of my firsthand knowledge.

It has been reported by the television networks, the wire services, the newspapers, the people who say they are eye witnesses to all this that has happened. I would like to explain as I bring this into focus why that is important for Senators not part of that process to understand.

It is reported that a Senator made a room available in the Capitol to outside anti-Bork lobbying groups, becoming known as the war room, from which, to quote the New York Times, liberal lawyers, professors, lobbyists and others prepared information for members of the panel, referring to members of the Judiciary Committee.

Congressional aides have been most active in orchestrating and influencing debates outside the Senate on Judge Bork. Congressional Quarterly reported that one judiciary aide specifically counselled the National Abortion Rights Action League to "cool the rhetoric." The aide said:

> We need a symphony orchestra. All the instruments have to be played. All the chords have to be struck. Not everyone likes the violins.

Just this past weekend, the New York Times had a detailed account of how one Judiciary Committee aide made an effort to advise an individual who happened to be the only black university professor who intended to testify on Judge Bork's behalf. I do not know the truthfulness of the account of the New York Times report. I do know that it raises, as do other rumors which are circulating here on Capitol Hill, disturbing questions about the fairness of that process.

To continue, I would like to call to the attention of my colleagues a report on October 11 in the Boston Globe which detailed the activities of one Senator who was orchestrating the campaign against Judge Bork, who was, if I may use this metaphor, conducting the symphony orchestra. I quote:

> Through his statements, through hundreds of telephone calls throughout the summer, through the drawing power of his name, this Senator served as a prime mover in bringing the Bork nomination to its knees. In August the Senator hired Anthony Podesta, the founding president of People for the American Way, and a liberal lobbyist, to work on organizing the opposition. Podesta recalls going to the Senator's home and watching him call around the South.

The article mentions a number of people telephoned.

> At one point the Senator woke up Reverend Lowery at a hotel in New Orleans before the Southern Christian Leadership Conference's annual convention. After talking with (the Senator) Lowery turned the entire day's meeting into an anti-Bork session.
>
> The Senator called every one of the 31 executive members of the AFL-CIO and in September held a conference call with 40 State labor leaders throughout the country in which he spoke of Bork's record on organized labor.
>
> He called the former American Bar Association president, Robert Meserve, the former Secretary of Health and Human Services, Joseph Califano, and a host of prominent lawyers who subsequently became active in the fight through op-ed pieces and local organizing.

Now the report of New York Magazine. It also detailed the activities of the same Senator in hiring this same person to "help organize the opposition."

The Washington Post reported that one Senator "in a private meeting in his office promised civil rights lobbyists that he would lead the opposition to Bork and make the fight his top priority."

The Legal Times on September 21, 1987, reported in some detail on the close interaction and support activities of opposition groups and Senators on the Judiciary Committee.

The New York Times on September 25, 1987, reported on the war room set up by anti-Bork groups in the Russell Senate Office Building in a committee room which, I believe, though I am not certain, is in fact within the jurisdiction of the Judiciary Committee. I quote:

> Two floors below the Chambers where Judge Robert Bork's nomination to the U.S. Supreme Court is being debated, is an office some Senate staff members call the war room. The office, formerly designated room 115 of the Russell Senate Office Building, serves as a meeting ground for those opposing Judge Bork. Among them are . . .

And the article goes on.

The Wall Street Journal carried a report of this organized, orchestrated interactive effort between Senators and outside groups. The Washington Post as well as the Wall Street Journal commented on this.

What emerges from the public record is a skillful, highly organized, nationwide campaign to influence, some might say manipulate, public opinion.

The question that Senators ought to ask themselves, since there has been an effort to disavow, to disclaim, this relationship between Senators and the outside interest groups, the question we ought to start to ask, the threshold issue, is this: Is this wrong? Is there something morally reprehensible or

even unusual about Senators working with outside interest groups? The answer is of course not.

There is nothing wrong with that. It is the routine. It is the regular thing around here. We all do it. It is proper. It is part of the process. Then why, one might ask, are Senators so eager to disavow such an effort? Why is it that the very Senators who are widely believed to have been the leaders of this effort are so eager to disengage themselves? And why is that important to the Senate's consideration of this issue?

Mr. President, I do not claim to know for sure the answers, but there is at least two things that come to my mind. First of all, because it is widely believed—indeed, it has been reported on the front page of a Washington DC, newspaper—that it is the debate outside this Chamber that has been determinative of the outcome, not inside the Chamber, not in the Judiciary Committee but outside this Chamber. In fact, one of the papers—I do not happen to have it with me, but one of the newspapers carried an article in which one of our colleagues was reported to have sat around the dining room of the Senate pointing at Senators and saying, "I know how you are going to vote. I know how you are going to vote. I know how you are going to vote." And so the story says he made accurate predictions and the basis of his predictions had nothing to do with legal reasoning, qualifications, had nothing to do, as far as I can recall, with anything that even occurred in the Judiciary Committee, had nothing to do actually with the qualifications of Judge Bork.

According to this newspaper account, one of our colleagues was able to accurately predict the outcome of how each of several Senators would vote based upon an indication of political sentiment among a key voter group in the States represented by each of the Senators who were named in this article. In other words, it was the outside sentiment, it was the outside perception, it was television and news accounts, advertisements, commercials, letter writing, that was decisive—the very campaign from which the leaders of the anti-Bork opposition in this Chamber wish to disassociate themselves.

Now, why is it that they are so eager to run from this creature which they themselves have either created or with which they are closely associated according to the published accounts?

Mr. President, I think the reason might be because of the ugly, disfiguring, nasty nature of that public campaign, because it was outside this Chamber that things were said which no Senator, I believe, would rise to say in this Chamber, because at least in the opinion of thoughtful journalists, and I state this on the authority of their accounts, lies were told, reputations were damaged, a vicious, mean-spirited campaign was launched with which I guess no Senator would willingly associate himself. And yet, if we are to believe those who are the outside observers of this process, that is what is about to determine the outcome when the Senate votes tomorrow or the next day or the day after that.

Mr. President, as I think about this outside campaign, there are three issues which concern me very much. First of all, that this campaign has been characterized by the press perhaps unfairly, though I see no evidence that it is unfair, as a campaign of fear and political terrorism designed to do three things: First, to blacken the reputation of a distinguished jurist.

We have talked a lot in this Chamber, Mr. President, about negative advertising, but if there is one thing we have seen it is that it seems to work, that somehow if you run around saying awful things about a person, even a person of spotless reputation and decades of distinguished public and private service, pretty soon people begin to have some doubts about that person.

If you just say over and over again that somebody is a racist, that he is a bigot, that he is antihumanity, that he is antiwomen, that he is outside the mainstream, that he is an extremist, a nut, he is off the deep end, Mr. President, if you say that often enough about almost anybody, a lot of it begins to sink in, does it not? And I think of all the Senators who have trooped to the Senate to complain of how their opponents have done that to them in an election campaign and how unfair it is.

Our colleague from Massachusetts a couple of hours ago made the point that he thought it was just remarkable how little personal attack there had been on Judge Bork. Mr. President, that may be the view of some Senators, but it is not my view and it is certainly not the view of the New York Post, which wrote this in an editorial headlined "The Lies About Robert Bork," and I quote:

> Over the last several weeks Robert Bork has been the victim of one of the most extraordinary character assassination campaigns in recent history.

Some Senators may think it remarkable there had been so little personal attack against Judge Bork. That is not the view of the Wall Street Journal, which on October 4 wrote the following:

> 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.

The Providence Journal on August 18 called it, "The Vilification of Robert Bork." I quote:

> Unable to lay a finger on Mr. Bork on the basis of professional competence, his opponents have organized a multimillion dollar nationwide campaign to label him an extremist who stands outside the American mainstream. It is unconscionable that a distinguished legal scholar and jurist should be subjected to such a disreputable campaign of vilification.

The Chattanooga News Free Press summed it up this way. They called what has happened to Judge Bork "a vicious smear." I quote:

> A man who is surely one of the country's most able judges, a man of clearly proven qualifications, is under smear attack. Judge Bork deserves to win. If he does, justice will triumph. If he does not, justice will have suffered a serious blow that should be of concern to every thoughtful American.

The Chicago Tribune, talking not just about Judge Bork but more about the character and quality of the opposition to him—and that, Mr. President, is what I am addressing at the moment. I do not even intend to speak tonight to the merits of Judge Bork as a jurist. I want to come back to that at the right moment. But I want to get the record straight and the air clear about why there is a growing perception in this Chamber and among thoughtful journalists and people at home that this has been a rotten process.

The New York Post, September 2, 1987:

> The anti-Bork campaign has been disgraceful. It is one thing to take issue with a Presidential appointee on ideological grounds. It is quite another to read him out of civilized society.

I started to read from the Chicago Tribune. I would not want to pass that over.

> In fact, the rhetoric of opposition is getting so extreme and misshapen that it is threatening to disfigure not only the nominee but everyone involved.

Atlanta Journal: "A Judge Gets Borked."

> Bork's opponents are in a frenzy. Frenzied mortals amplify some facts and gloss over others. Let's just hope something enduring results for the justice to be like a new verb, "Borked." Dictionaries will say it is synonymous with "maligned."

Across the country, in the San Diego Union, on September 24, columnist Raymond Price wrote:

> Pressure group politics of the crassest sort, using one of the most vicious calculated campaigns of slander since the days of Joseph McCarthy.

Chicago Sun Times, October 5:

> Bork Inquisition Poisons the Process. By the savagery of their rhetoric many Bork opponents have generated an uneasiness among Americans as reflected in public opinion polls. They have lent respectability to the pernicious notion that polls should determine the makeup of the branch of

Government that is supposed to be the most insulated from mass pressure.

The Chattanooga News Free Press, October 1, under the headline, "Bork Hearing and Verdict," asked this question: "Why the controversy?"

It is because in the hearings and out he has been subjected to the worst inquisition, smear, and distortion campaign aimed at any judge in American history. Not only Judge Bork but the principle of government by law is under radical attack by smear, according to this newspaper in Chattanooga.

The Milwaukee Sentinel, a newspaper which so happens supports the nomination of Robert Bork, and not all of the papers that I have mentioned support confirmation of Judge Bork—it so happens that the Sentinel does—summed up their view of the handling of this nomination in the following words:

Such expressions, during days of otherwise provocative and highly pertinent dialog between committee members and legal scholars, lowered the level of the deliberations to what former Chief Justice Warren E. Burger called "hype" and "disinformation."

Under the headline "Judge Bork Stands Up To the Lynch Mob," William Safire wrote the following, and again I quote.

Bork has been strung up without fair process, savaged by the ACLU, AFL-CIO, NAACP, NOW powerhouse operating out of a Democratic "war room" in the Senate chamber. Campaign strategy was set, mailings made, opinion polls publicized, senators lobbied, the media manipulated to feed the bandwagon psychology.

The Wall Street Journal had it right. They headlined this "The Frankensteining of Bork."

And the list goes on, papers from Detroit to California. The Daily Breeze out in California wrote these words:

Sensationalist Bork-baiting, the modern equivalent of Joseph McCarthy's smear campaigns against liberal minded thinkers nearly four decades ago, has fomented a new hysteria on Capitol Hill.

The extreme distortions of Judge Bork's views by a battery of liberal special interests have mocked the Senate's constitutional responsibility to provide a fair hearing to the president's choice for the court.

Mr. President, this is the first point that I want to make. Among those who favor and those who are opposed in many cases to the Bork confirmation, there is a very widely and deeply held view that he has been the subject of an unfair, unprecedented, vicious, personal smear attack. Some Senators may think what has happened in the last 105 days is remarkable for its lack of personal attack. I think the thoughtful judgment of people who have watched it, who have not been members of the Judiciary Committee but who have just been other Senators or who have been observers at home or have written newspaper editorials is overwhelmingly to the contrary.

Mr. President, the second point I want to raise tonight is this: The campaign against Judge Bork has been untruthful and misleading. It would be bad enough if all of these nasty, vicious things had been said about him and they were more or less true. Of course, if they were true, it would be a great tragedy for the President of the United States to submit the nomination of a person who is of the sort of character as he has been described but the fact of the matter is there is real doubt as to the truthfulness of much of what has been said about Judge Bork.

A few days ago I shared with the Senate this newspaper advertisement sponsored by the People for the American Way, and I put into the RECORD at that time a list of 67 specific factual disagreements with this article which had been prepared by our colleague from Utah, Mr. HATCH. I think he has also spoken on this matter and it is not my purpose to rehash that since I put it in the RECORD earlier. I do not think there is any sense in going back over it. But I did not want to let it pass without at least noting again that this is the kind of thing which has set the tone for the public debate which in the opinion of many has been determinative of the outcome.

We are here in an empty Chamber almost as an afterthought because at least in the opinion of some cynical observers, and I am not one of them, the thing is already decided. It was decided when somebody sat around down in the dining room of the Senate and pointed at Senators and said I know how you are going to vote, and you and you, and you, because we have convinced or persuaded or bamboozled the voters at home with this campaign which has taken such a vicious turn.

The second point I want to make, Mr. President, is that it was an untruthful campaign. I do not want to go into this in great detail. Yet I would not be faithful to my purpose here tonight if I did not at least discuss some of the issues that have been raised against him and the response at least of some thoughtful observers. I do not know how Senators happened to see the article which appeared on Monday, October 19 by L. Gordon Crovitz, entitled "The Jim Crowing of Judge Bork." This is an article that asks the question: "Where was he, it is asked, during the recent civil rights victories?" Referring to Judge Bork. Where was he during the great civil rights victories? "Standing in front of the Supreme Court making winning arguments."

Mr. President, I would like to read briefly from this article because I found it enormously illuminating.

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.

So this article, Mr. President, goes on at some length to discuss his record as an appeals judge including the case of Emory versus the Secretary of the Navy, a case which I think has been discussed by others of our learned colleagues; also the case of Loffey versus Northwest Airlines. I believe I overheard the Senator from Utah discuss that issue in that case, as I recall, which had to do with discrimination on the grounds of sex. It so happened that this person who has opponents have wished to characterize in such uncomplimentary terms came down on the side of the woman in that issue, even though the people who have criticized him would indicate that would be far from his intention.

The article goes on to discuss his record as a Solicitor General, and it is at this point I would like to resume my reading from this informative article.

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 . . .

You know, Mr. President, when you get bifocals, it is almost impossible to read the newspaper. Let me start that sentence again.

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.

Mr. President, I think I will not go on and read further, but I hope that as they reflect upon the record of this proceeding that perhaps some of my colleagues, particularly those who are

deeply troubled about whether or not the confirmation of Robert Bork would mean putting on the U.S. Supreme Court a person who was less than fully committed to the ideals of racial justice and equality in this country, will read this article because it gives lie—unless this article is untrue; if it is, I hope someone will stand up and explain why it is not true—but unless there is something that is just plain dead wrong about this, it gives lie to the charge that somehow Judge Bork is antiblack or even that he has been less than vigorous in his public and private dealings with persons who are members of racial, sex, or ethnic minorities, religious minorities.

So, Mr. President, I send to the desk the article entitled "The Jim Crowing of Bork" and ask unanimous consent it be printed in the RECORD.

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

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 rules 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 politicans 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 cases 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* (1986) 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.

Mr. ARMSTRONG. I also ask as part of my remarks or perhaps if I may ask to have printed at the end of my remarks an article entitled "The Frankensteining of Bork." This goes to the question of whether or not Judge Bork is in fact the legal extremist which is described in the report of the Committee on the Judiciary.

I was on the floor when our friend, ORRIN HATCH, put into the RECORD or at least attempted to put into the RECORD a number of his objections to the characterizations and conclusions of the Judiciary Committee. I do not know whether he got permission to do that, but I certainly hope that in due course he will be granted permission to include those in the record, because I think it is important that his view be heard.

Mr. BIDEN. Mr. President, if the Senator will yield, I can answer the question.

The views have been put in the record. After the Senator read a few of them, I did not object to them all being put in.

Mr. ARMSTRONG. I thank the Senator for that clarification.

As I understand it, the views which have been put in the record deal in various ways and in various points with the question of whether or not Judge Bork is outside the mainstream. Some pretty distinguished members of the practicing bar say he is in the mainstream. A number of people whom I have admired for their service on the bench, including the former Chief Justice, including Colorado's distinguished contribution to the Court, Justice White, and a lot of other people, say he is in the mainstream. Some have gone so far as to suggest that he is not only in the mainstream; he is perhaps the most distinguished person to be nominated for the U.S. Supreme Court in living memory. But that issue of whether or not he is somehow a judicial extremist keeps coming up, and it is addressed in this article which I will ask to have printed in the RECORD. I should like to read the first paragraph, because it explains, at least in part, how this notion took root:

> 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.

Mr. President, all of what I am now trying to point out falls under the general heading of the untruthfulness of the campaign againt Judge Bork. But I want to point it out in a context of my larger concern, which is that, as at least a reported, deliberate, calculated strategy, those who oppose the nomination of Judge Bork sought to move the focus of the debate out of this Chamber, out of the Senate, into the public arena, and in doing so, listed outside allies, which I have already acknowledged is proper. What is not proper is the vicious personal nature of that attack and the untruthfulness of it.

So, Mr. President, I ask unanimous consent to have this article printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. ARMSTRONG. Mr. President, under those circumstances, is it any wonder that thoughtful people, like one writer in the Washington Post, have expressed concern about the way this matter has been handled?

One of them referred to the sort of twaddie—which I find to be an entertaining word. It is not something that comes up every day, in every conversation. He referred to the sort of twaddie which Adlai Stevenson used to call "white-collar McCarthyism." I think that is exactly what it is.

Writing in the Wall Street Journal, in an editorial, on October 13, he wrote that someone should send out a call for Margaret Chase Smith. I do not know if any of our colleagues on the floor ever served with Senator Smith. Here is what appeared in the Wall Street Journal article, and I think it is apt:

> Conservatives are angry not because they believe the country wants polarization, but precisely because, a la the late Senator Joe McCarthy, the Bork opponents have created a monumental miscarriage of justice. They have done this by totally misrepresenting Judge Bork in order to create a polarizing straw man as compensation for their own inability to win presidential elections.
>
> It is perhaps not impossible that there are still Senators, a la Margaret Chase Smith in the McCarthy era, who will break with the demagogues. Failing that, Judge Bork's decision to stay until there is a bona fide vote stands as a sobering event. At the least, it may help the Beltway sort out the voice of the people from the echo of its own shouting.

In the New York Post, a columnist wrote, under the headline "Now is the Time to Expose the Ugliness Behind the Anti-Bork Campaign," this summation:

> In short, there was nothing accidental about the astonishing onslaught against Robert Bork. The lies were precise and they were deliberate and designed to promote fear.

Mr. President, let me say again that I do not know whether this is all true. I know that a lot of people who watched the process think it is true. The people who watched the process, in summation, say this: That the nomination was delayed for a very long period of time, far longer, I am told, than any other nominee for the U.S. Supreme Court, so that a massive public campaign could be mounted. Surveys were taken to determine which issues would raise the most fear and dread among crucial voter groups at home who could be counted on, in some way, to influence their Senators. A large amount of money was made to mobilize that kind of public campaign, and now it may be on the verge of succeeding.

Mr. President, this brings me to the third issue, which deeply concerns me, and I think is of concern to thoughtful people outside this Chamber; and that is that in this way we have permitted the process to become so highly polarized that we really threaten the integrity of the whole judicial system.

I do not want to overstate my argument. I do not think the country will rise or fall on whether Robert Bork joins the Supreme Court. I do not believe that. This is a great, resilient country with a great deal of strength. But when we blatantly politicize an appointment to the highest court in the land, it raises the ugly possibility that, in the future, judges will be selected for standards of electability rather than legal reasoning, precisely the point made earlier this evening by our distinguished colleague from Utah.

Is it more important, I ask, that we have on the Court outstanding scholars or those whose appearance is pleasing on television? Is it more important that we have men and women who have made a great contribution to the advance of legal thought or those who have the ability to mount, or cause to be mounted, a nationwide political campaign?

Is it more important that we have great scholars and jurists who will faithfully, in a highly focused and pre-

cise way, interpret the Constitution, or is it important that we have people whose views we agree with?

That is really the bottom line here. Do we want to put on the Court just people we think agree with us on various political issues?

I thought about that very deeply, and it goes to the heart of what we think the judiciary is all about. I thought about it not just on this occasion but also when people have come before this body for confirmation whose views were different from mine.

It might surprise some Senators to know that I do not agree with Judge Bork on some of the issues which have proven to be controversial, just as a matter of legal reasoning. I want to make it clear, before anybody jumps down my throat, that I do not even pretend to be in the same league he is in, with respect to analysis and legal reasoning. I am not a lawyer. I am entitled to my opinion.

However, a question I have asked myself is this: Is it more important to me, as a citizen and as a Senator, to have a person of outstanding legal reasoning and ability, or is it better to have somebody whose views I share? That is the essence of whether we think the judiciary should be a political office, ultimately subject to popular will through a public opinion poll, through the kind of campaign we have seen mounted against Judge Bork. Or is it more important that the judiciary be the branch which is not, at least in the short-run, responsive to the public will? This is a very dangerous thing I am saying, or a least thinking about saying.

EXHIBIT 1

[From the Wall Street Journal, October 14, 1987]

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 group's 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 1984 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 resented. 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 he 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 in 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.

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

Mr. ARMSTRONG. I yield.

Mr. HATCH. Mr. President, I compliment the Senator, because I think he has done as good a job as anyone can do to point out the feelings of those around the country who are looking at this and starting to realize how serious and significant it is.

I also believe that the Senator has probably captured the kernel of the debate as well as anybody.

The fact of the matter is there is no judgeship nominee in this country with whom anybody in this body would totally agree.

There is no way that anyone is going to agree with another person in the field of law on every issue, it seems to me. It may occur, but it is very unlikely.

If we are going to stop judges from sitting on the bench because we disagree on this or that issue, I think it is going to be a deplorable day.

One of the things that I find very harmful and questionable about the majority report in this matter is that it seems to say that unless Judge Bork or anyone else agrees with them on interpretation of cases, and I think in some cases their interpretations are flawed, then they cannot sit on the Court. If that is not a form of court-packing, I do not know what that is.

When Ruth Bader Ginsburg came before this body and our Senate judiciary body, Ruth Bader Ginsburg has a reputation of being quite a liberal person. I can remember when she was brought in my office because she was held up and she was brought in by an eminent attorney from New York City who I knew and had a great deal of regard for, even though we disagree on a number of items. He said, "Orrin, I know that you are fair. Ruth Bader Ginsburg will make an excellent judge and even though you differ with her philosophically, she is an excellent person of high ethical standards, high legal capacity and would have good judicial demeanor and temperament and she would be fair."

And I did a lot of behind the scenes on that committee to make sure that she was treated fairly, and she became a member of the Circuit Court of Appeals for the District of Columbia even though I disagreed with Ruth Bader Ginsburg on a number of issues.

That is what bothered me about this particular debate and what is happening to Judge Bork. First of all, he is completely slandered and libeled by outside groups.

The Senator has indicated that some editorialists have indicated that some of the outside groups have been inspired by inside people. Whether that is true or not, I believe it to be true, and I think there is evidence that it is.

The fact of the matter is he has been vilified and libeled and badly treated and besmirched and the whole process is.

I am concerned because I do not think that we should impose upon the court system our own interpretations of cases and especially isolated cases at that, to determine whether a person is able to sit on the Federal courts, particularly the Supreme Court of the United States.

I think it smacks of court packing if you really, really do look and read some of the arguments that are made.

Finally, I would just like to say to the distinguished Senator from Colorado that I have listened to his remarks. He may not be an attorney. But he is right on as far as what is right and what is wrong, and I believe he has made as good a case for Judge Bork as could be made on this floor.

All I can say is that it is lucky for other attorneys that the Senator from Colorado is not an attorney because he would certainly have eclipsed a lot of very fine attorneys by his abilities.

Let me just say, and I am always very grateful to the kind of remarks he has expressed toward me and the views that I have expressed, I hope that this body does not come to the position of where these positions are always going to be decided on the basis of politics. If that is so, we are going to lose something very dear in this country and that is a free and independent judiciary, and it is going to mean we are not going to have the judges standing up on these tough issues like they should and taking on everybody and really what this debate comes down to is the way he has been treated and the process has been treated, and I might add the real debate over judicial restraint, over judicial activism, because this judge believes in restraint and I think there is much to commend him for that, and I believe the vast majority of people in the country would prefer to have judges interpreting the laws rather than making the laws, prefer to have them restrained rather than activists.

I mean, he has been the leading disciple of judicial restraint and really some say in the history of the country and certainly one of the leaders in the modern times.

I want to thank the Senator for his remarks and in particular for his kindness to me.

Mr. ARMSTRONG. Mr. President, I am grateful to the Senator from Utah for his observations.

Mr. BIDEN. A parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. ARMSTRONG. Do I have the floor?

Mr. BIDEN. I am making a parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Delaware will state his parliamentary inquiry.

Mr. BIDEN. Is an act of the Senator who has the floor to yield time to another Senator one that loses him the right to the floor or does he maintain the right to the floor?

The PRESIDING OFFICER. The Senator may only yield for a question.

Mr. BIDEN. That is what I thought, Mr. President——

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. I would be delighted to yield now. I would like at some point to be able to respond.

I understand the Senator from Colorado has not finished his statement and I have no intention of maintaining the floor myself at this moment.

But the Senator has raised some serious allegations that he strongly and deeply believes and I would like an opportunity to respond to them.

I just want to make sure that although I am not going to insist on maintaining the floor now when the Senator finishes I have an opportunity, if he is willing to respond to hopefully each and every point he raised before we move beyond these allegations so at least there is something for the RECORD.

I yield the floor.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. ARMSTRONG. Mr. President, the Senator from Delaware, the chairman of the Judiciary Committee, is mistaken in suggesting these are issues

which I have raised. From the first moment that I took the floor, I made it clear that I was reporting what had been brought to my attention by those who have observed the process.

I have been going about my business attending the Finance Committee, Budget Committee, and the Banking Committee. I have not been a party to the Judiciary Committee proceedings. I do not recall that I have seen as much as 60 seconds of the proceedings except as they have been summarized on the evening news.

I have been doing my job.

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

Mr. ARMSTRONG. What I presented here tonight are the observations of those who have written about it, have observed it, and I have suggested that if it is possible to clear the air and to show that these concerns are unfounded, then I think that is a proper and appropriate thing for the Senator to do and when he is ready to go forward on it, and I will be glad to be here, I am not trying to get the least work, although I might have another word.

Mr. BIDEN. Will the Senator yield for a question?

Mr. ARMSTRONG. Of course.

Mr. BIDEN. Does the Senator mind if at some point I respond to the assertions stated by the Senator from Colorado representing accurately statements made by the press persons and others with relationship both to hearings and the process? That is what I wish at some point to be able to respond to and hopefully, and I am not being facetious, enlighten the Senator from Colorado that there is at least another point of view both in the press and in this body and in the public at large.

Mr. ARMSTRONG. Mr. President, of course that is exactly what I am hopeful that the Senator will do and what this debate is intended to be about.

Mr. President, the Senator from Utah and I were discussing a point which I think ought not be lost. I would very much regret that this nomination had been so politicized and had been taken so far outside the normal confirmation process, even if the campaign against Judge Bork had been truthful, which many believe it was not, and indeed I am persuaded it had not been, even if it had been conducted at a high level and had not been bitterly and personally vindictive, which I believe it to be and that is the view that has been reported by those whose judgment I respect. Even if it had been conducted at a high level, I do not think making a confirmation of a Federal judge, least of all to the U.S. Supreme Court, ought to be a politicized process.

I want to come back to the point the Senator from Utah made because this is the nub of it.

We do not really need Federal judges to reflect the popular will. That is what we have Congress for. That is what we have the President for.

Every 2 years we have an opportunity to elect the whole Membership of the U.S. House of Representatives and although the Senate does not turn over that fast, there is absolutely no danger that the popular will, will lack spokesmen, advocacy, and champions and even on many occasions undeserved obsequience.

Very often people in public life who run for office use error on the side of giving in too much to popular opinion, in my judgment. Now, this is a country that believes in democracy. Popular opinion is important; finally, it is extremely important.

But part of the genius of our system is that there is a resort, a place of protection, a haven for those who are temporarily or permanently unpopular, for those persons or causes who do not enjoy popular favor, who may be even scorned and ridiculed, ideas and persons who are hated, who honestly could not win any kind of a referendum. And in our system, that place is the judiciary.

It is the protections afforded by the Bill of Rights. It is the system of jurisprudence which, at various times, has protected liberals and conservatives, Republicans and Democrats and in some places and some times blacks and whites, Protestants, Catholics, Jews. And at some time in our history almost every group and many different kinds of individuals have had to go to the Federal courts for the protection of rights which they could not protect through the ordinary political process.

Now, then, when we make judges, in effect, run for office, or at least be subject to a political process, we erode and, if we are not very careful, we will ultimately destroy that independence and that reliance on standards of legal reasoning rather than political popularity, which is the hallmark of our judicial system.

Out in Colorado, we used to have our judges run for office. That is what they did. I mean, Republicans nominated somebody to be a judge and Democrats nominated somebody to be a judge, and they went out to campaign. And I have been to a lot of chicken dinners with candidates who were running for judges. And we got some darn good judges out of the process. We really did. Some good Democrats; some good Republicans.

But, you know, we got to thinking about it maybe 20, 25 years ago and determined that this was not a good way for people to come to be judges; that, in the process of the rough and tumble of politics and of submitting themselves to an intensely political process, we compromised first the integrity of the judiciary, because we, in effect, put judges in a position of going out and at least impliedly saying how they were going to vote on things, what their attitude was toward issues, and it just put us in a bad position.

So, like a lot of other reform-minded States, Colorado took their judges out of politics. And it was a good decision. It was a decision about which I was somewhat skeptical, because I really trust the people. I think elections are a good thing. And, besides, I liked going to all of those chicken dinners for people who were running for judges. But it has worked out well.

And when we reverse the process here in the Federal judiciary, we put at risk something which is very precious and very, very important.

David Broder said it better than I can. He can say almost anything better than I can, Mr. President. In an article in the Washington Post, this distinguished journalist wrote:

> Candidates for elective office now routinely face battering by public emotions created by mass-media opinion manipulators. To subject judges and judicial appointees to the same propaganda torture test whether from the right or the left does terrible damage to the underlying values of this democracy and safeguards of our freedom. No one wins in such a game.

Well, Mr. President, before I close, I want to respond to something that came up an hour or 2 ago, when one of the Senators got up, as several have over the last few months, and said:

> By gosh, we are not against conservatives. We just don't happen to like Robert Bork. Why can't we have somebody like Lewis Powell? Now, there is a conservative's conservative. There is a man we can all trust. He is a good guy. If the President had sent us somebody like that, we would be fair minded enough, we would be open minded enough to vote for somebody like that, even though he might be a conservative and not necessarily to our liking.

In other words, there is an attempt to sort of make the case that Robert Bork is a different kind of creature; that, whereas Lewis Powell was a thoughtful, mainstream conservative, in fact, Robert Bork is something different.

Well, you know, we ought to reflect very carefully on that, because that is a significant argument. After all, Justice Powell is admired, and rightfully so, by Senators and lawyers and by people everywhere who know of his distinguished service to the U.S. Supreme Court. And when major interest groups and Senators come forward and say, "We would take another Lewis Powell, but this case is different," then I think we ought to submit that contention to the acid test of how do they act. And the truth of the matter is they were as bitterly opposed to Lewis Powell as they now are to Robert Bork.

Now, just think about that a minute. If you go back and read what they were saying nearly two decades ago when the nomination of Lewis Powell was sent up here, and then compare it with what they are now saying about Robert Bork, by gosh, you would think it was the same bunch of press releases and all they did was went through and crossed out the name Lewis Powell and wrote in Robert Bork.

Now, let me just cite that pretty exactly because Senators who are entertaining the idea that they can vote against Robert Bork and do so in somehow a tradition and a spirit that is consisent with what has happened before are really sadly mistaken. The only difference between the hue and cry that these same groups raised against Lewis Powell and what they are saying now in smearing Robert Bork is that they are on the verge of succeeding this time.

Let me take, for example, the comments of Ralph Neas, executive director of the Leadership Conference on Civil Rights. He said:

> Lewis Powell has been a fair and a distinguished Justice. He has been a true conservative, not a right-wing zealot. As a centrist on the Court he has helped reaffirm our basic civil rights laws and remedies.

That is from the New York Times, June 27, 1987.

On the other hand, Mr. Neas said that putting Judge Bork on the Supreme Court would "jeopardize the civil rights achievements of the past 30 years." That was in the Washington Post on July 6.

So, it sounds as if groups such as the Leadership Conference on Civil Rights have been long-time supporters of judges like Lewis Powell.

Well, listen to what they said in 1971. The Congressional Black Caucus commented:

> A fair examination of the evidence suggests that Lewis Powell, in this instance, certainly was no respecter of the decrees of the very Court for which his nomination is now being considered.

Does that have a familiar ring, Mr. President? Does that sound like exactly what they are saying about Judge Robert Bork?

The statement of the Congressional Black Caucus continued. The nominee's activities "are inconsistent with the kind of jurist needed for the Court" in the coming decades. "These considerations take on more weight when one considers the tremendous problems which our country will be facing during those decades."

What about the National Organization for Women? This is an organization which has bitterly opposed the nomination of Judge Robert Bork. If I recall correctly, that is the organization which allegedly, according to published accounts, was asked to mute its comments as being too shrill. As I recall what they were told—and again, according to the newspaper accounts—the National Organization for Women was told, "We've got to have a symphony orchestra here. We don't want the violins playing too loud."

Well, hear is how loud the violins were playing for the National Organization for Women when Lewis Powell's name was before the Senate:

> If the Senate confirms * * * Lewis F. Powell, Jr., for the U.S. Supreme Court, justice for women will be ignored or further delayed which means justice denied.

How about the National Lawyers Guild?

> In his political views, [the nominee]—

That means Lewis Powell—

> does not "bend" or "twist" the Constitution, to use the President's language. Rather, he totally ignores it.

Now, you talk about somebody that is outside the mainstream, somebody who ignores the Constitution, that is what they were saying about Lewis Powell.

The thing that is distressing and hauntingly familiar is it is almost the same words, certainly the cadences are the same, the idea is the same, as to what they are saying about Robert Bork here all these years later, forgetting, or at least hoping that Senators will forget, that they made the same accusations against Lewis Powell, the Justice who they now say has served with distinction and is the model for the kind of person who would be an acceptable choice if President Reagan would just send his name over.

How about the Americans For Democratic Action:

> * * * Mr. Powell claim[s] that the President is above the law, the Constitution, and the fourth amendment, * * *
>
> He has already taken sides with the executive branch. On the Court, he would be but their echo.
>
> The nominee has "been an eloquent spokesman for wiretapping and other insidious governmental techniques."

And on, and on, and on. These quotes sound as if they were taken from yesterday's newspaper. In fact, they were taken from the newspapers of nearly 20 years ago. Same tactics, same tone, same tenor as the observations that are being made about Robert Bork.

Mr. President, I have tried to make about four points according to good, solid reportorial evidence from people whose politics I do not know. I do not know whether these reporters and the authors of these editorials are Republicans or Democrats, liberals or conservatives. In most cases of the people I have quoted I do not know whether they are for or against the confirmation of Robert Bork. But based upon their evidence I have tried to make four points.

First, that Judge Bork has been the victim of a slanderous, unprincipled, vicious mean-spirited personal attack. Second, the attack in its essence has been untruthful. Third, that it is a great mistake, indeed a tragedy, if we permit the process of confirming judges to be politicized. It will be not a tragedy so much for Robert Bork, who will remain a judge of the circuit court who is not confirmed for the Supreme Court, but a tragedy for the Senate and for the country. And finally, that the arguments which are being used against Judge Bork are shopworn and tired and repetitious. They are the same arguments that have been used previously against nominees whose service on the Court is now applauded by the very groups who heavily criticized him at an earlier occasion.

Mr. President, we are going to render a verdict on Robert Bork and the people are going to render a verdict on us. If we do not find some way to put this matter back in perspective, to somehow apologize to Robert Bork for the way he has been handled, for the treatment he has been given, I believe that the verdict on the Senate will do us no honor.

At the right moment, I will be back. I hope I have another chance to comment on some other aspects that I find particularly disturbing and also to discuss as time permits Judge Bork's qualifications. But for the moment, I yield the floor and note the presence of the chairman of the Judiciary Committee who, I believe, wants to respond to the issues which have been raised and I look forward to his response.

Mr. BIDEN. Thank you, Mr. President.

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

Mr. BIDEN. I see my colleague from New Hampshire who has been extremely active in this debate and is a strong and articulate proponent of the Bork nomination is on the floor. I will try not to take too much time, because I know he is prepared to speak.

I will try at least to respond to, in part, all the points raised; all the four major points raised by my colleague from Colorado.

Mr. President, let me begin by suggesting and reiterating my point that, just as the junior Senator from New Hampshire stated yesterday in his discussion with the Senator from Arkansas, the junior Senator from Arkansas, about an ad campaign that was underway, he said, and I quote:

> I hope Senators are not going to hold this Senator responsible for every ad that is being published or every effort that is being made to support the nomination, with good taste or with bad taste, any more than this Senator would hope to hold Senators who are opponents of the nomination accountable for the ads of opponents.

That is from the CONGRESSIONAL RECORD, page S14573, October 20, 1987.

I am not suggesting that my friend from Colorado indicated that any particular Senator should be held respon-

sible for any of the ads. But he did make the point that there was a coordinated effort. At least alleged to have been a coordinated effort, as reported by some press accounts.

Mr. ARMSTRONG. Mr. President, would the Senator yield?

Mr. BIDEN. Surely, I will.

Mr. ARMSTRONG. I gather it is the intention of the chairman to go through the points I raised and to discuss each one of them. May I inquire, would it be his desire to have a dialog on each of them or would he like to respond to all of them and then have me seek recognition to go back?

Mr. BIDEN. What I think might be the most helpful is give me about 10 minutes to try to in broad stroke respond to all the major points and then to the extent the Senator from Colorado would like to enter into a dialog about specific points, the Senator from Delaware would be delighted to do that.

Mr. ARMSTRONG. I thank the Senator and I would be happy to do so.

Mr. BIDEN. First of all, with regard to the first major point that has been made by the Senator from Colorado, that he, Judge Bork, has been a victim of slander, vicious personal attacks, et cetera; that there has been an astonishing onslaught, I think the phrase was, against Judge Bork. And why would this have happened, this astonishing onslaught; and how much a victim of personal attacks has the nominee been?

Stating at the outset that I do not defend, nor is it my responsibility nor intention to defend, every single word uttered by everyone outside this Chamber or any Senator other than the Senator from Delaware, stating that at the outset, let me say that there is a reason why there was an astonishing onslaught of opposition to Judge Bork from the outset: because Judge Bork has astonishing views about the Constitution. Astonishing.

He is, whether you call it liberal or conservative, mainstream or nonmainstream, he is different and his views as expressed for the past 20 years in his writings and many of his cases, and subsequently in the hearings, are in many ways fundamentally different than those expressed by conservative jurists as well as liberal jurists over the past 70 years.

He has been, by the acknowledgment and admission of his strongest supporters, an articulate and prolific spokesperson for a different view. He has been known for his strident attacks upon the Court and his strong disagreement with where the Supreme Court has gone over the past 30 years, as some of my colleagues are strongly opposed to, "where the Warren Court has taken us."

In a sense, the reason why there was this astonishing onslaught was that this, in a sense, was a referendum on the past 30 years of the Supreme Court's rulings.

The President of the United States, who I will quote at length in a moment, has argued straightforwardly for the last 15 years of his political life at least, and the first 6 years of his administration, that the country disagrees, fundamentally, with where the Warren Court and the Burger Court—not Burger himself, but the Court—has taken us.

I rode down in the train this morning with the most distinguished, probably the best-known conservative and best-respected conservative columnist in America, a strong supporter and personal friend of Judge Bork, who pointed out to me that not only were the Warren Court decisions not overturned by the Burger Court, there was not a single significant decision during the Warren era that was overturned by the Burger Court. And that was the issue.

Should we, in fact, repudiate that by putting someone on the Court who repudiates the previous 30 years, or a large part of the landmark rulings of the previous 30 years, nominated by a President who straightforwardly has said from the outset that he wished to change the direction of the judiciary in America? From the outset, he has made no bones about it, which is his right.

So, the reason why there was this astonishing onslaught is everybody understood what is at stake here. This, in a sense, is a referendum on: Do we like what the Court did the last 30 years? Or do we dislike it?

I would respectfully suggest the vast majority of American people, liberal and conservative alike, say: We like what the Court did. Oh, we disagree with pieces but we do not want to turn back.

The Senator from Delaware has not, on a single occasion, suggested what the Court would look like with Judge Bork as a Justice, for none of us can make that judgment. Once a woman or a man dons those robes for life on the Court, a number of things happen. Obviously, President Eisenhower did not anticipate that you would have Earl Warren turn out to be the judge that he did. Obviously, the civil rights groups quoted a moment ago from 20 years ago, did not anticipate Powell to turn out as he did. But the Senator from Delaware has not on a single occasion suggested what Judge Bork would do on the Court.

But I have suggested, based on his record, 25, 28 years of writings, and on his testimony, that had he been on the Court the last 38 years, and had his view prevailed, Ronald Reagan is implicity correct. The Warren Court decisions and the Burger Court decisions would not have occurred.

So what we are arguing about here is basic principles.

For example, the right to privacy. Why are people upset about it? It is not a yuppie issue. Let us get the record clear. Judge Bork has a perfectly respectable, intellectually defensible, but practically unworkable view of privacy as it is protected or not protected in the Constitution. Every conservative Justice, which I will go into detail on before the night is over and tomorrow, who is quoted, everyone in the last 70 years, has crossed the Rubicon on privacy, and Judge Bork not only has not crossed but he has not even put a boat in the water.

Everyone has said that our unenumerated, translated not specifically delineated, rights that individuals have are protected by the Constitution—every one of them. The only debate among the conservative and liberal jurists over the last 70 years is how far would you cross the line of saying there is an unenumerated right of privacy. How far do you extend that right? Do you extend it beyond married couples to, as is a fear among everyone in this body, to consensual acts among homosexuals? To where do you extend it? That has been the debate. The Court, in my view, has rightly concluded not to extend it to its outer parameters. But every single Justice, everyone, has said, "I, Justice" so and so "find that there is a constitutional right to privacy."

Judge Bork, to his credit, has been intellectually consistent and honest. He has said, "I can find nowhere in the Constitution a generalized right to privacy that every other Justice has found at one time or another in the last 70 years."

So you ask why the astonishing onslaught? It is an astonishing view. It is different than Frankfurter, different than Black, different than the present Chief Justice, different—and I could go down the list.

Where has the judge stood on other great issues of the day? Keep in mind his position is defensible, intellectually honest, but wrongheaded in this Senator's view. But that is what the debate is and should be about.

Those who share Judge Bork's view not only on privacy but those who share Judge Bork's view on the role and standing of the Congress before the courts, those who share Judge Bork's views on antitrust and how it applies in the court—all respectable views. But one that has not been held by and large by the Court for the last 30 years.

Do we want to say Judge Bork says? And, by the way, this Senator, the present chairman of the Judiciary Committee, for 32 hours of Bork's testimony not only gave him every opportunity to speak and uninterruptedly so, but interrupted Senators on both sides of the aisle when he thought they were not giving Judge Bork

ample opportunity to answer. Judge Bork, being a man of principle, stood by his guns and he said, "Hey, there is no enumerated right to privacy; there is no generalized right to privacy." But no one, particularly the Senator from Delaware, ever suggested that Judge Bork wished the State of Oklahoma to sterilize a chicken thief. The *Skinner* case. No one in the committee suggested, and this Senator clearly did not, that Judge Bork thought it was a good law in Connecticut in the 1940's, 1950's, and 1960's, that said married couples could not, as a matter of law, seek the advice of and/or use birth control.

The Senator from Delaware believed then and now that Judge Bork thought that was a stupid law; that Judge Bork thought it would be wrong to sterilize a chicken thief under Oklahoma law. And on and on.

But what Judge Bork was honest enough to say is that the legal reasoning used in those cases to arrive at the conclusion the Supreme Court arrived at saying, "Oklahoma, you cannot sterilize a chicken thief," to Connecticut, "You cannot have a law that is going to put a doctor or a director of a clinic or a married couple or anyone in jail for using birth control not to have children," that is the reasoning with which he disagreed.

And when asked how would he arrive at a similar conclusion if he disagreed with the reasoning, could he, under the Constitution, tell us how he as a Justice or as a legal scholar could find the intellectual basis, the jurisprudential reasoning, to strike down the Connecticut law, his response was, "I have not undertaken that exercise to find such an answer and I have yet to find one."

Is that maligning Judge Bork to say that his jurisprudential view would result in a State being able to, if it wished to, prohibit birth control? The obvious answer is no. A State could not do that.

Even though I believe Judge Bork personally would not like that to happen, but, as a judge, a Justice of the Supreme Court, he would, by his testimony and his writings, be required, at least up to the point. We are not talking, by the way, about a 28-year-old law student; we are talking about a former Solicitor General, a tenured professor, a full partner in a prestigious law firm, a circuit court of appeals judge who is 60 years old, who has written more, thought more, and spoken more about the Constitution than 99.9 percent of all living Americans. Up to this point he has been unable to find a rationale protecting a couple's right in their bedroom under the Constitution to decide whether or not to have children.

That is why 40 percent of all the law professors in America who are presently teaching law—40 percent—signed letters, individually and collectively, saying, "Judge Bork is a brilliant man but do not put him on the Court." Forty percent of 2,000; 32 deans of the most prestigious law schools in America from Harvard to Georgetown, said, "Judge Bork is an honorable man but his constitutional theories do not belong on the Supreme Court."

Did they reach that conclusion because of Gregory Peck? Did they reach that conclusion—and I did not know this before the debate began. I said to go back and find all these groups you are talking about.

How much money did they all spend, radio, television, and newspaper ads? If I am not mistaken, and if my information is correct, they spent less than a total of $1 million. The ad that was most heavily criticized, the People for the American Way TV ad, narrated by Gregory Peck, ran a total of 86 times in America. It was a 60-second ad, and that means a total of 86 minutes Gregory Peck was on the air, and add to that the replay that the news organizations may have given it. Double it, triple it. Say it is 5 hours, which would be 2½ times what it was paid for to be. Are you telling me that that is going to force the dean of Harvard Law School to say Judge Bork should not be in the Court? Are you telling me that 2,000 law professors are going to sign a letter saying do not put Judge Bork on the Court? Are you telling me that 56 of the U.S. Senators are going to say, "Oh, my God, I heard from Gregory. Do not put Bork on the Court." Are you telling me that 32 law deans, are you telling me the former Secretary of Transportation, William Coleman, are you telling me that two distinguished former presidents of the ABA—as a matter of fact, three—the American Bar Association, are you telling me that Barbara Jordan, are you telling me that the 48 distinguished witnesses who testified against Judge Bork did it because Gregory Peck told them to?

Let us talk about the polls for a minute. A labor union ran a poll, spent $40,000 for it. But what everybody misses is the newspaper organizations independently ran polls. They were not paid for by any group. And what did they find? They found that prior to Judge Bork's testifying, there was doubt about whether he should be in the Court, but a clear majority of the American people said he probably should be. Then Judge Bork took the stand for 32 hours, and every one of my colleagues, I believe—let me be conservative—80 percent of my colleagues on the committee, including Judge Bork, said the hearings were totally fair, publicly unsolicited comments about how fairly they were conducted. When Judge Bork got finished testifying, guess what? The Scripps Howard ran a poll that they put in—I do not know who ran it, but it was printed in 26 newspapers. I will ask staff to tell me who ran the poll, the newspapers. The networks ran polls. And guess what? I did not have to tell anybody about the polls. Everybody in America who opened up their paper on Tuesday morning said, "Hey, guess what, the American people listened to Judge Bork." All the money spent on advertising "against Judge Bork," all of it spent could not have purchased, I am told, one-half of one-half of one-half of a day of the live television coverage that the networks gave to or CNN, and they covered everything Judge Bork did live and in color. I assume what I am told is correct. I am not a media expert, but I am told that tens of millions of people, Mr. President watched Judge Bork, unfiltered by Gregory Peck, unfiltered by NCPAC, unfiltered by any Senator, unfiltered by the news media, and drew a conclusion.

Now, I agree with the Senator from Colorado. These cameras in this Chamber probably have elongated debate on every issue that comes before this body, not this one necessarily. Obviously, what is radically different is that the networks or anyone else would come in and cover, whether it was Oliver North or Judge Bork or any other thing that happens. I can tell you from my own aborted Presidential effort television has changed things. They follow you everywhere. Everywhere. Everywhere.

Now, the Senator from Delaware did not make that happen. And I think the Senator from Colorado and the Senator from Delaware are justified in being concerned about what—as McClewen once said, the medium is the message—the medium has done to the process. But that is clearly beyond anybody's control in this Chamber, but for those cameras we voted to come into the Chamber.

Mr. President there was a Roper poll, then the Washington Post-CBS poll, Times-ABC poll, and I believe there was one which ran in 90 or 95 Southern newspapers. I thought it was Scripps Howard. The Roper poll Scripps Howard ran. To the best of my knowledge nobody left or right paid for these polls.

Now, another point I would like to make. Editorial writers are editorial writers. And God bless them all, the long, the short, and the tall. The fact is that those editorial writers had very different views. I think it will be a cold day in Heaven when the Senator from Delaware ever reads anything in an editorial page from the Wall Street Journal that is positive, which is their right. They are not known as the citadel of moderation. They are known as a conservative editorial page, just as some liberal newspapers. But let me just read from a couple since we are trading editorials here. I read from the

New York Times, a paper that in the recent past has not been my favorite paper and which I acknowledge does not all the time cover all the news and give you all the perspective, the whole story, but we live and die by what we say and do. Page 34, lead editorial, with the date cut off. October something. It is not on here. I will get the date for you.

Let me read from the end of it. It says: "Above all rose the merits of the Bork nomination as ventilated in fair, exhaustive, sometimes brilliant hearings. Far from settling the doubts of moderate Senators, these created new ones for one Senator after another. Whether or not one is comfortable with TV spots about the Supreme Court, to blame them for Judge Bork's evident fate confuses supposedly low blows with demonstrably hard ones."

In fact it was Tuesday, October 13.

I will submit for the RECORD several made editorials that I will not read at the moment.

Now, this Senator is not suggesting that we should look at the ads as a positive development. I for one have doubts about them. And quite frankly, as the Senator from Colorado knows, as well as the Senator from Delaware, it is awfully hard in 30 seconds or 60 seconds to not distort and get a point across. At some later point I will go into the ads. The fact is that the essence of what was said was accurate. I believe there were overstatements in the ads. I believe there were positions and statements made in the ads that I would not have made.

But keep it in perspective: Every single group named, every medium used to advertise, less than $1 million, and what impact did it have? Obviously, it was not helpful for Judge Bork, but I think to put it in the category of the thing that moved 56 or 54 or 50 or 47 or 20 Senators is going a little far.

So this first issue of fear and political terrorism I think is an unfounded—not an accusation by the Senator from Colorado since he is not making those statements, but a misreading by those who made those statements of what happened and what did not happen in the Bork nomination.

Let me point out several other points. At some point, I will take the time, which I will not now as I indicated, to go into it. I apologize for taking this much time, but there are some very serious issues raised by the Senator from Colorado; first is the right of privacy, his views on equal protection, the first amendment, the whole question of executive power—all of these things raised legitimate questions confirmed by the Judge's own testimony and not ethical questions.

I might point out, by the way, and I hope my colleagues will take note of the fact that unlike in many past years, this Senator, chairman of the Judiciary Committee, did not allow anyone else to see the FBI files which are generally cesspools of uncorroborated hearsay evidence—did not even allow the staff of the Judiciary Committee to follow up on several inflammatory things stated in the FBI report because I felt it was improper, and when there was leaked from somewhere an accusation about Judge Bork's person, it was the Senator from Delaware, not anyone else, who stood up and said, "I read the FBI file, and I find nothing but an honorable man in that file."

Unlike other protracted fights that occurred from the right in the past, and from the left in the past, there was not a single shred of personal attack on the Judge in the way we have traditionally used that phrase. To say it is personal, to suggest that the Judge does not believe that there is a generalized constitutional right of privacy, I find not personal. It is his view.

The whole question of the characterization of Judge Bork's record on civil rights is mentioned. So I will go back to civil rights for a moment.

It is true that as Solicitor General, and it is true as a judge that Judge Bork has not been hostile in the way his writings were on the civil rights issues. But it is also true that at the time the fights were raging Judge Bork was hostile. That does not mean that he was a bad man. There are other people in this body at the time before the Senator from Colorado and I got here, and I have been here 15 years, who were also hostile to the progress made on civil rights.

In 1963 and 1964, Judge Bork straightforwardly opposed the public accommodations bill. I will not read the quotes. You have all read them.

In 1971, he did in his neutral principles article. I will not go through it all now. I will at the time we debate the substance of this issue. Judge Bork, during the hearings seeking to undercut the significance of this criticism of Shelley, said:

> The case has never been applied again. It has not proved to be a precedent. It adopted a principle which the court has never again used. In fact, the court has applied Shelley in many later decisions.

Judge Bork conceded that he had no constitutional acceptable rationale for a decision banning school desegregation in the District of Columbia. That does not mean he is a racist. It means his constitutional view is one that he could not find a constitutional argument based on his theory of the Constitution outlawing segregation in the D.C. schools because the fifth amendment is not one that applies to the District of Columbia. I mean the 14th amendment does not apply to the District of Columbia, and the fifth amendment, the due process clause of the fifth amendment in equal protection, the argument that the fifth amendment which was used to outlaw segregation was not an appropriate application. No one is saying, this Senator is not saying he is a racist. But I want to tell you, I imagine it does worry black folks that he could not find a rationale, a constitutional rationale. I do not think they are hysterical to worry about that. And I do not think for a moment that Judge Bork has a racist bone in his body. I do not think for a moment Judge Bork is not a man of sympathy.

All you have to do is look at how he handled his personal life. All you have to do is look at how he dealt with, stood by his close friend, Alexander Bickel, when he was dying. But to say that his constitutional theories produce results that although he does not like the result, he feels obliged to reach, and that that result is one that is not acceptable in 1987 America, is that maligning the Judge?

I said I will go back to the substance of these things. Let me talk about the third point, the politicization, if I may, for a minute.

I said earlier President Reagan has indicated with great eloquence, with no little vehemence over the years that the judiciary has—many of my conservative friends believe—become sort of a seat of despotism, a world unto its own, overruling, taking legislative initiatives into their own hands. A legitimate argument; a fundamental difference that in a general sense separates these aisles, and in a specific sense, separates me from the Senator from New Hampshire. The reason I know that is he and I heard each other expound on this for 12 days in the hearings with legitimate debate. But who politicized whom in what?

The Reagan administration has for years, which is their right, politicized the selection process by screening all its judicial choices. Let me read:

> Ideology has always played a part in the judicial selecting in past administrations, but the Reagan administration has made judicial ideologies and philosophy their number one priority.

Reported USA Today. I am going to quote like the Senator did. I cannot attest to whether this is true or not. But let me tell you what the folks are saying. USA Today, November 14, 1985.

> The administration is making a greater concentrated effort to ideologically screen people considered for the judiciary than any time since Franklin Roosevelt's first term. It is not as important to them to achieve the blessing of the professional organizations on whether they are placing the very best minds on the bench.

"Reagan Transformed the Federal Judiciary," Washington Post, March 31, 1985.

> Is Reagan doing something differently? Yes. The administration is being more meticulous in its concern about judicial philosophy than other Presidents. A President

who fails to scrutinize the legal philosophy of Federal judicial nominees courts frustration of his own policy agenda.

It is thus imperative that President Reagan scrupulously examine the philosophies of his nominees to vindicate many of the pledges he made to the American people in 1980 and 1984." Bruce Fein, former Reagan Administration official, involved in Judicial Selection (now at Heritage Foundation) ("Conservatives Pressing to Reshape Judiciary," Congressional Quarterly, September 7, 1985).

B. President Reagan & conservatives see judges as vehicle for implementing their social agenda.

"The appointment of two justices to the Supreme Court could do more to advance the social agenda . . . than anything Congress can accomplish in 20 years." Patrick Buchanan, director White Houe Communications ("Conservatives' Goals Tied to Judicial Appointments," LA Times March 18, 1986).

"Asked if he agreed with a statement by Pat Buchanan, the director of White House Communications, that the Administration's court appointments, and not legislative initiatives, were the key to advancing the social agenda of conservatives, the President replied, 'yes' ". ("President Says Abortion is 'Murder'," New York Times, June 24, 1986).

"It became evident after the first term that there was no way to make legislative gains in many areas of social and civil rights. . . . The President has to do it by changing the jurisprudence." Bruce Fein ("Judging the Judges," Newsweek, October 14, 1985).

"By packing the Supreme Court, President Reagan would be acting within the mainstream of American traditions to make the federal judiciary partially answerable to contemporary political influences." Bruce Fein ("Conservatives Must Learn to Use and Influence the Power of the Media," Human Events, July 8, 1987).

C. President Reagan himself was the first to politicize the judicial appointment process by making the 1986 elections a referendum on his judicial philosophy and selections.

"The real loser [of the Bork battle] and the man who created the political challenge in the first place was Reagan, who insisted on trying to 'nationalize' the 1986 midterm election and make its outcome a test of his policies and judicial appointments. . . . In speech after speech Reagan made his judicial philosophy a litmus test of the election and said that . . . ' we don't need a bunch of sociology majors on the bench.

Ronald Reagan is right to do that, to attempt to do that, to politicize:

What we need are strong judges who will aggressively use their authority to protect our families, communities and our way of life. . . . And since coming to Washington we've been putting just such people on the bench.

Southern senators declaring opposition to the nomination were from Texas, Alabama, and North Carolina, "all states in which Reagan had given speeches denouncing judicial permissiveness and attacking by name the two Democratic senators . . .

Including this Democratic Senator, which is his right:

. . . Edward M. Kennedy (Mass.) and Joseph R. Biden Jr. (Del.), who led the fight against Bork's confirmation. Speaking in Columbus, Ga., last Oct. 28, Reagan extolled Sen. Mack Mattingly as a man who 'can make all the difference' on judicial appointments. 'Without him and the Republican majority in the Senate, we'll find liberals like Joe Biden and a certain fellow from Massachusetts deciding who our judges are.' Mattingly also lost. ("Spotlight on a Weakened President and Divided Administration," Washington Post, October 8, 1987.

II. With Powell resignation, it became obvious immediately that conservative groups and conservatives within administration would see this as opportunity to change the direction of Supreme Court.

A. Headlines said it all on day after Powell resignation (June 27):

"Powell leaves high court . . . President gains chance to shape the future of the Court" New York Times.

"White House search for a [new Supreme Court] Justice; new balance on Court is sought;" mid-text highlight read: "Ideology and politics are factors in choice," New York Times.

"Justice Powell quits, opens way for conservative Court" LA Times.

"Reagan get his chance to tilt High Court" New York Times (June 28).

B. New York Times editorial on July 2 accurately summarized the situation:

" . . . The Supreme Court remains gingerly balanced on matters of civil rights, civil liberties, church-state relations and personal liberty. . . ."

"One vote on the Court could make as big a difference as a change of President or control of Congress."

I will not take the time, but there is another——

Mr. ARMSTRONG. Mr. President, if the Senator will yield, I urge him to put all those in the RECORD.

Mr. BIDEN. There are 11 pages. I ask unanimous consent to have them printed in the RECORD.

The PRESIDING OFFICER. If the Senator from Colorado wishes to address the Senator from Delaware, he should do so through the Chair.

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

POLITICIZATION BY THE ADMINISTRATION AND CONSERVATIVE GROUPS IN THE SELECTION OF ROBERT BORK AND THE SUBSEQUENT CONFIRMATION STRUGGLE: A CHRONOLOGY

I. This administration politicized the judicial selection process years ago. Remember context of Bork selection—an administration obsessed with political ideology in selection of judges and using judicial selection to advance its social agenda.

A. Reagan Administration has for years politicized selection process by screening all its judicial choices for ideology.

"Ideology has always played a part (in judicial selection by past administrations) . . . But the Reagan administration has made judicial ideology and philosophy their number one priority". Prof. Sheldon Goldman. Univ. of Mass. national expert on judicial selection ("Reagan plants imprint in USA courthouses," USA Today. 11/14/85)

"This administration is making a greater concerted effort to ideologically screen the people considered for the judiciary than any time since Franklin D. Roosevelt's first term. It is not as important to them to achieve the blessing of the professional organizations on whether they are placing the very best minds on the bench." Prof. Goldman ("Reagan Transforms the Federal Judiciary." Washington Post 3/31/85)

"Is Reagan doing something different? Yes, the administration is being more meticulous in its concern about judicial philosophy than other presidents." . . . "A president who fails to scrutinize the legal philosophy of federal judicial nominees courts frustration of his own policy agenda. . . . It is thus imperative that President Reagan scrupulously examine the philosophies of his nominees to vindicate many of the pledges he made to the American people in 1980 and 1984." Bruce Fein former Reagan Administration official involved in Judicial Selection (now at Heritage Foundation) ("Conservatives Pressing to Reshape Judiciary." Congressional Quarterly 9/7/85)

Research and Education Foundation, ("Judges with Their Minds Right," Time 11/4/85)

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"It became evident after the first term that there was no way to make legislative gains in many areas of social and civil rights. . . . The President has to do it by changing the jurisprudence." Bruce Fein ("Judging the Judges," Newsweek, 10/14/85)

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C. President Reagan himself was the first to politicize the judicial appointment process by making the 1986 elections a referendum on his judicial philosophy and selections.

"The real loser [of the Bork battle] and the man who created the political challenge in the first place was Reagan, who insisted on trying to 'nationalize' the 1986 midterm election and make its outcome a test of his policies and judicial appointments. . . . In speech after speech Reagan made his judicial philosophy a litmut test of the election and said that . . . 'we don't need a bunch of sociology majors on the bench. What we need are strong judges who will aggressively use their authority to protect our families, communities and our way of life. . . . And since coming to Washington we've been putting just such people on the bench.' "

Southern senators declaring opposition to the nomination were from Texas, Alabama, and North Carolina, "all states in which Reagan had given speeches denouncing judicial permissiveness and attacking by name the two Democratic senators, Edward M. Kennedy (Mass.) and Joseph R. Biden Jr. (Del.), who led the fight against Bork's confirmation. Speaking in Columbus, Ga., last Oct. 28, Reagan extolled Sen. Mack Mattingly as a man who 'can make all the difference' on judicial appointments. 'Without

him and the Republican majority in the Senate, we'll find liberals like Joe Biden and a certain fellow from Massachusetts deciding who our judges are.' Mattingly also lost." ("Spotlight on a Weakened President and Divided Administration," Washington Post, 10/8/87)

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B. New York Times editorial on July 2 accurately summarized the situation:

". . . The Supreme Court remains gingerly balanced on matters of civil rights, civil liberties, church-state relations and personal liberty . . . One vote on the Court could make as big a difference as a change of President or control of Congress."

III. Administration ignores plea by Senate leadership to avoid confrontation. Instead appears to politicize selection process by appearing to select Bork because of his views.

A. June 28 1987 Chairman Biden suggests to White House Chief of Staff Baker that there be consultations on nomination to avoid confrontation so that vacancy would be filled before Supreme Court term begins.

B. June 30, 1987 Baker and A.G. Meese meet with Republican Senate leadership and Democratic Senate leadership (Biden & majority leader Byrd). Baker & Meese present list of 15 names, among them Bork's, Biden and Byrd indicate some names could be confirmed quickly but that Bork would be the most controversial and would thus prompt a divisive fight and considerable delay.

C. July 1, 1987—less than 24 hours later—Bork nomination announced. Consultations were obviously a sham.

IV. Conservative groups are ecstatic with choice and make it clear that they will organize for Bork because of his views.

"Conservatives have waited for over 30 years for this day . . . This is the most exciting news for conservatives since President Reagan's reelection." New Right activist and fund-raiser Richard Viguerie ("Reagan Nominates Appeals Judge Bork for Supreme Court," Washington Post, 7/2/87)

"We have the opportunity now to roll back 30 years of social and political activism by the Supreme Court." Daniel Popeo, founder of conservative Washington Legal Foundation (Lou Cannon, "Bork and the True Believers," Washington Post, 7/6/87)

"Bork has a constituency that will be easy to activate. This is very exciting." Pat McGuigan of conservative Free Congress Foundation ("He's waited, campaigned for the job," USA Today 7/2/87)

V. Conservative groups begin with an aggressive campaign of organization and direct mail.

S. Groups coordinate closely among themselves and with the White House.

Patrick McGuigan of the Coalitions for America: "The meetings of conservative leaders to brainstorm and begin to start action were the very next morning." ("Lobbying Groups Gather Steam For Bork Confirmation Battle," Washington Post, 7/7/87)

"Conservative hard-liners in the Justice Department and pragmatists in the White House disagreed from the start about strategy; at one point in August, the divisions were so bad that Edwin Fuelner, president of the conservative Heritage Foundation, took it upon himself to convene a peace conference at his offices for top White House and Justice Department officials." ("How Reagan's Forces Botched the Campaign for Approval of Bork," Wall Street Journal, 10/7/87)

B. Existing groups swing into action with the rhetoric of an election campaign, promising that Judge Bork's confirmation would produce new political results on specific, litmus-test issues of the New Right, and ending with funding-raising appeals.

"The American Conservative Union sent its top 1,000 contributors what Executive Director Dan Casey described as a "here-we-go again letter," asking them to send contributions to support the Bork effort and to urge their Senators to back Bork. Casey said the group would send another 40,000 to 60,000 letters to supporters by the end of the month. Casey said "This is an issue that will fund itself because it's what they would say in the direct-mail world is a "hot button" issue.'" (Lobbying Groups Gather Steam," Washington Post, 7/7/87)

Citizens for Decency Through Law, July, 1987: "CDL has borrowed $140,000 from Peter to pay Paul for a massive counter campaign. Please help us defray our educational and media costs in this campaign to seat an upstanding individual—Judge Robert Bork—in the nation's highest court. . . . Your gift will block the efforts of the liberals who have had too much influence for too long."

Christian Voice, July 27, 1987: This is your one chance to help make history and to ensure a conservative America—even after President Reagan leaves the White House in 1988. . . . Now we have a prime opportunity to give the Supreme Court its first conservative majority since the 1930s. . . . Schoolchildren can't even say a silent prayer let alone study creationism. Bork could help correct this. . . . Your $10 or $20 gifts or whatever you can manage to Christian Voice goes entirely to the work of this organization. Please help me carry this load! In 10 years of operation this is the most critical battle we've fought and I need financial support today."

Jerry Falwell/Moral Majority, Inc.: "I am issuing the most important "call-to-arms" in the history of the Moral Majority . . . our efforts have always stalled at the door of the U.S. Supreme Court. . . . President Reagan has chosen Judge Robert Bork . . . a pivotal person in getting the Supreme Court back on course. . . . I need your gift of $50 or $25 immediately. Time is short."

American Life League, Inc.: Judge Robert Bork has been nominated. . . . This is going to be a long and bitter battle. It will be the most massive, most critical and most expensive efforts you and I have ever undertaken. . . . I need your gift of $18 or $25 or $50—or whatever you can afford to help restore the paramount right to life."

Beverly LaHaye, Concerned Women for America: "We have prayed for an opening on the Supreme Court for many years, and now it is time to commit our efforts and money to back up our prayers. It will take pressure on the Senate and it will cost money to win the Bork nomination . . . [A] plan we have developed involves the use of advertising to reach the American public. . . . With your contribution of $25 per advertising inch. . . . we can be successful. . . ."

C. New groups and others jump in.

On July 21, Bill Roberts—a long-time Reagan supporter in California—held a press conference to announce the formation of "We The People," a pro-Bork group that sought to raise $2 million in 60 days ("Nationwide committee to Support Confirmation of Judge Robert Bork to U.S. Supreme Court Announced," news release by The Dolphin Group, 7/22/87).

Jack Kemp For President sent out mailings in mid-August asking recipients to send a postcard to Judiciary Committee Chairman Joseph Biden "to help President Reagan's Supreme Court nominee be confirmed," and as "a special favor, . . . Help me replenish my campaign funds." ("Kemp's Bork Two-fer," Washington Post 8/23/87)

D. Kemp for President organizes pro-Bork, anti-Biden political rally/demonstration in New Hampshire ("Caught in the Middle," Delaware State News, 7/12/87)

VI. Right-wing groups then expanded into planning a full-scale media assault, the same of visible, election campaign-like effort that President Reagan and the Republicans now claim is dangerous and improper on judicial appointments.

A. In above direct mailings, see references to:

"media . . . campaign" (Citizens for Decency Through Law)

"Through your gift of $25 to CWA, you will enable us to purchase an average of one square inch of advertising space in a major newspaper . . . . If 16 people give $25 each, we will have enough money to purchase an eighth of a page in a newspaper which will encourage hundreds of people to voice their support for Judge Bork," (Beverly LaHaye, Concerned Women for America)

Concerned Women for America writes its "area leaders" nationwide to activate "phone banks" in support of the nomination ("Lobbying Groups Gather Steam," Washington Post, 7/7/87)

Through the "Liberty Report" newspaper, lobbying on Capital Hill and a media blitz, we can make a difference." (Jerry Falwell/Moral Majority)

B. Public statements about plans for right-wing political campaigns for Bork

"You can surmise that whatever the liberals have, we're going to have—radio, television, newspaper ads." Richard Viguerie, ("Lobbying Groups Gather Steam," Washington Post 7/7/87)

"We're going in with newspaper ads, with television ads, with radio spots." Bill Roberts, on CBS Evening News, 7/23/87

C. Public statements restating right-wing expectations about how their political interests would benefit from placing Judge Bork on the Supreme Court

"This is the transition nomination. . . . The nomination has the potential not to institutionalize Reaganism, but to institutionalize the shift in political gravity—to the right." Patrick McGuigan, Coalitions for America, Transcript of the NBC Nightly News September 14, 1987

"Conservatives have hired the New Right fundraising organization of Richard Vigerie to launch a huge direct-mail campaign. It's aimed at putting pressure on undecided senators who must vote on Bork's nomination.

For the moment the campaigning is aimed at three undecided senators of the 14 member Judiciary Committee: Republican Arlen Specter of Pennsylvania, and Democrats Howell Heflin of Alabama and Dennis DeConcini of Arizona."

(The segment included film of a fundraising letter from The Conservative Caucus, Inc. and a group of people phone banking.)

("Grass roots groups in frenzy over Bork," Christian Science Monitor, 9/2/87)

"Conservatives didn't work all these years to get a Ronald Reagan elected to have a centrist, a moderate appointed to the Supreme Court. We're interested in having someone with Ronald Reagan's views [appointed], and Bork is . . . right out of Ronald Reagan's ideology." Richard Viguerie ("Drawing Lightning," National Journal, 9/12/87)

D. Right-wing advertising starts.

Coalitions for America runs pro-Bork radio spots in Washington, D.C. ("Groups Unlimber Media Campaigns Over Bork," Washington Post, 8/4/87)

Concerned Women for America run print ads in Alabama and Pennsylvania in support of Bork nomination ("Groups Unlimber Media Campaigns Over Bork," Washington Post, 8/4/87)

Coalition for America given free air time on three radio stations under Fairness Doctrine to reply to anti-Bork radio ads ("Washington Talk, Bork and Fairness," New York Times, 8/11/87)

Free the Court (conservative group) hires airplane to fly over Iowa State Fair with "banner denouncing 'Bork Bashers' and 'liberal lap dogs'." ("Grass-root groups in frenzy over Bork," Christian Science Monitor, 9/2/87)

VII. The administration and President Reagan campaign for Bork—and participate in the attack on Judiciary Committee Chairman Biden.

White House releases lengthy, unprecedented "briefing book" in support of Bork's nomination, July 27 (see table of contents page)

President Reagan addresses National Law Enforcement Council at White House, saying "that, if you want someone with Justice Powell's detachment and statesmanship, you can't do better than Judge Bork" ("Confirm Bork, Reagan Urges," Washington Post, 7/30/87)

Nationally televised address by President Reagan on August 12 ("Democrats Agree to Drop Iran-Contra Issue," Washington Post, 8/14/87)

Talk in Nebraska by President Reagan on August 13

("Latin Peace is Priority for Reagan," Washington Post, 8/14/87)

President Reagan lobbies leaders of National Law Enforcement Council to support nomination on August 28 ("Police, Prosecutors Meet With Reagan on Bork," Washington Post, 8/29/87)

"Republican sources revealed that low- and mid-level White House officials privately distributed anti-Biden information to several GOP political consultants weeks before the Bork hearings began. The material . . . was given to the consultants to distance President Reagan and his top aides from suggestions they were orchestrating a smear campaign. . . . Among the consultants is former White House political director Mitch Daniels. He pressed reporters last week to contact former Biden political foes who told the White House they had 'files' on Biden." ("White House aides 'helped sink Biden,'" Boston Herald, 9/25/87)

Interior Secretary Donald Hodel the featured speaker at a pro-Bork rally sponsored by the conservative Coalition for America at Risk on September 10, five days before the opening of hearings ("Bork Rally," Washington Times, 9/10/87)

Speech to convention of Concerned Women for America by President Reagan on September 25 ("Reagan Reasserts Support for Contras," Washington Post, 9/26/87)

VIII. As the nomination proves unacceptable to the Senate and the American People, the administration and the right wing intensify their political campaign of advertising, phone banks, direct-mail fund raising, and distortion, continuing their summer-long view of the nomination as a political election campaign.

A. The right wing media campaign turns to fear-mongering and character assassination.

"We the People" runs a full-page ad in USA Today seeking to fill its coffers (ad includes coupon to send contributions from $25 to $100) by a personal smear of four named members of the Senate Judiciary Committee (USA Today, 10/6)

American Conservative Union runs radio ads in Alabama, Mississippi, Georgia, Louisiana, Nebraska, and Vermont, "pressuring announced opponents to switch their position," according to ACU chairman Dan Casey. ("Conservatives fighting now for next nominee," Washington Times, 10/12)

B. President Reagan uses increasingly intemperate rhetoric.

After Judiciary Committee sends nomination to full Senate with a 9-5 unfavorable recommendation, President Reagan declares, "I think it has become a disgraceful situation because I think the process of confirming a Supreme Court nominee has been reduced to a political, partisan struggle." ("President Determined to Battle On for Bork; Some Officials See Loss," Washington Post, 10/2/87)

President Reagan announces that the Bork nomination will fail in committee "over my dead body." ("Reagan spurns Call to Drop Bork as Likelihood of Defeat Grows," Washington Post, 10/6/87)

President Reagan says he will not withdraw the nomination because "it would be impossible for me to give up in the face of a lynch mob." ("President Says Decision Is Up to Bork," Washington Post. 10/9/87)

President Reagan stated that "What's at issue is that we make sure that the process of appointing and confirming judges never again is turned into such a political joke. And if I have to appoint another one, I'll try to find one that they'll object to as much as they did to this one." ("Reagan Resumes Attack on Bork's Senate Foes," Washington Post, 10/14/87)

C. Right wing phone banks and direct mail companies take advantage of the political and financial bonanza of the Bork nomination's impending defeat, and right-wing groups set up their political litmus tests for the next nominee.

"Urgent! The Bork Supreme Court nomination is now in trouble. . . . I am now committing money to a last-minute lobbying effort. . . . Your gift of $30 or $15 makes the overall outreach of Moral Majority a reality in these critical times—and could make the difference in Judge Bork's confirmation." (Jerry Falwell/Moral Majority mailgram, 9/24/87)

"New Right fund-raiser Richard A. Viguerie has eagerly drummed up support for Supreme Court nominee Robert H. Bork. But . . . . the White House recently got an urgent call seeking reassurance that Bork's nomination would not be withdrawn in the face of a negative committee vote. "I've got a million dollars' worth of "Save Bork" letters that I'm mailing out Monday morning [Oct. 5],'

Viguerie reportedly explained, inquiring, 'You're not going to pull the rug out from under him, are you?' He was told, 'Go ahead and mail them, pal.'" ("Prudent Passion," National Journal, 10/10/87)

". . . the battle over Robert Bork's nomination to the Supreme Court . . . a battle of the concerned, patriotic citizens of America versus every narrow, self-serving liberal special-interest group that's come down the pike! . . . I'm enclosing my contribution to help CMC support Robert Bork and President Reagan's goal of a healthy, strong, safe, and secure America. [check boxes for $15, $25, $50, $100]" ("In re Robert Bork," advertisement of Congressional Majority Committee in the Washington Times, 10/15/87)

"'I think the time to start the 1988 election is right now,' said conservative strategist and direct-mail executive Richard Viguerie. Within 15 minutes after Judge Bork announced Friday that he would not ask President Reagan to withdraw his nomination, conservative political action groups mailed 350,000 letters on the Supreme Court issue 'to raise money for 1988 campaign ads,' Mr. Viguerie said." ("Conservatives fighting now for next nominee," Washington Times, 10/12/87)

". . . we strongly urge that you advise the President against the nomination of Patrick Higginbotham . . . advise the President to pick from among the sizeable pool of distinguished jurists who share the philosophy of judicial restraint, rather than seizing upon a nominee who has already demonstrated a disregard for the most defenseless members of the human family, and who would engender intense opposition from the right-to-life movement." Letter to Attorney General Meese from the Directors of the National Right to Life Committee, Inc., October 4, 1987.

D. NCPAC and a United States Senator hold the Senate's vote on Bork hostage to the timing of their fund-raising campaign.

"Next week, NCPAC will generate 500,000 telephone calls to votes in states where at least one senator has not expressed a position on the Supreme Court nominee." ("Conservative ire," Washington Times, 10/9/87)

"Continued Republican delays in scheduling a vote on Robert Bork's Supreme Court nomination appear tied to a conservative group's lobbying and fund-raising effort, Senate Democrats charge. Sen. Dennis DeConcini of Arizona accused a fellow senator of using the delay to help the National Conservative Political Action Committee work computerized telephone lobbying and fund-raising tactics against him. The Republican senator was identified as Gordon Humphrey of New Hampshire, the arch-conservative honorary chairman of NCPAC, who is heard on telephone recordings along with President Reagan. . . . DeConcini spokesman Bob Maines said Humphrey had led the Republicans pushing to delay the vote to at least Tuesday, coinciding with the scheduled end of the NCPAC effort, and he called the delay a 'gross distortion of the process. If the two are connected, then the Senate is being held up by a fund-raising effort for an extremist group." ("Senate

Democrats charge NCPAC delaying Bork vote," UPI wire, 10/16/87)

Mr. BIDEN. Mr. President, I make the same point that the Senator from Colorado made. I cannot vouch for the accuracy of every one of these, but it seems to me that America and editorial writers and newspapers have spoken as loudly about the politicization of the process by this administration over the last almost 7 years as instances the Senator has referred to.

So this idea of who struck John, who politicized what—in the first speech I made on the floor of this body, engaging in debate, several months ago, on the role of the U.S. Senate, I pointed out then, and I will point out again, and be presumptuous enough to refer my colleagues to my statement at that time, on the role of the Senate.

Mr. President, I pointed out then that there has been an uneasy truce, but nonetheless a truce, over the past 3 years. When the President has chosen not to politicize the process, the Senate has, by and large, gone along with the nomination—the last 45 years. When the President has chosen to politicize, as President Roosevelt did and as this President did, the Senate has engaged on those grounds. When the President sets ideology and impact on the Court as his rationale, which is his right, for choosing a person, the Senate has done the same.

It is unfortunate, and it is not always good for the Senate to respond, and is almost always bad for a President of either party to initiate it in bold and blatant terms.

I point out to my colleagues that the White House was kind enough to come and meet with the leadership in both parties 12 or 14 hours prior to sending up Judge Bork's name. They met with Senator DOLE and with Senator THURMOND, and they walked across the hall and met with Senator BYRD and the Senator from Delaware, Senator BIDEN.

They submitted a list of 15 people and they said: "Every one of these people is under active consideration—every one. None has a greater preference at this point than any other. Would you give us your opinion?"

Not whether they should or should not sit on the Court, but what the reaction of the Senate would be if any or all of them are sent forward.

The majority leader turned to the Senator from Delaware, as chairman, and he said, "You answer that question."

One of the persons there was Senator Baker, who knows the Senate better than the Senator from Delaware does. He served here as long, was majority leader and minority leader. The other was the Attorney General of the United States of America, Mr. Meese.

"What do you think, JOE?" That is my name, "JOE."

And I said, "Well, if you want my opinion, I will give it to you."

At least a half-dozen of these 15 people, all by the way card-carrying conservatives, for whom the Senator from Colorado would be proud, at least half of these people would go through the Senate, I think the phrase they used was, "like a hot knife through butter." And I indicated which ones I thought they were, not who I approved or did not approve of. That is not my role.

I said, "There are several others who I do not know anything about, I can't even give you an opinion even though you are asking for one. And there are two or three, two or whom were colleagues in the Congress who I do not know what the outcome would be. But there are three who will generate a fire storm," I believe was my phrase, "and first among them is Judge Bork."

They asked why.

Now keep in mind, Mr. President, I did not call and say "I don't want you to send Judge Bork." That is not my role. I was asked. They said why. I said, "Because Judge Bork has such distinctive and different views on how to interpret the Constitution. He is one of the best-known jurists in America whose views are extremely controversial, evidence the fact that 40 percent of the law professors in America said, "Don't put him on the bench" and his colleagues at Yale with whom he spoke, with whom he taught, a significant portion of them said, "We love him, we taught with him; don't put him on the bench," the Supreme Court to be more precise.

Fourteen hours later, as the Senator from Delaware got off a plane in Houston, TX, I was told by a staff person, "The President has sent up Judge Bork," which is his right.

But to go back to the original point why the astonished onslaught. Everybody knew what was at stake. Everybody knew. Every major newspaper in America for and against Judge Bork had a headline the day Judge Powell resigned and the day that Bork was named that this was going to be a bruising battle. They did not say that about Scalia, for whom I voted. They did not say that about Justice O'Connor, for whom I voted. Why did they say it about Judge Bork? Was it because interest groups had spoken? Not a word, to the best of this Senator's knowledge, came from a single Senator or anyone else the day Judge Powell resigned about Judge Bork.

Without needing a single utterance or quote from any Member of this body, every major newspaper in America and not some major newspaper in America knew exactly what was at stake.

The debate had been engaged, one of principles. That is the reason why—because Judge Bork is the best at what he believes. He articulates best what he believes.

Now, one of the points made by one of my colleagues, not by the Senator from Colorado, is that you may end up having a person with the same exact views as Judge Bork slide through this place and never be questioned. I acknowledge that is possible. You may get someone we do not know anything about who has written nothing, who has spoken about nothing, but who in his head adheres to the same exact views.

So some have said to me, "Wouldn't you rather have the real, the general McCoy? At least you acknowledge, BIDEN, this guy is brilliant, this guy is honorable, this guy is principled, which he is."

My answer to that is I cannot defer or deny the debate that is in front of me because of the prospect that someone if that person goes down may be worse. I cannot do that.

There is an old expression. I am very careful to quote every source these days. There is an expression that I am not sure who is responsible for, but it goes something like this: "Better the devil you know than one you don't."

Well Judge Bork is no devil. But it is not better in this Senator's view to pick someone who has a view so totally different in my view than what I think the mainstream views on fundamental issues of privacy and other issues are because we may get someone who has the same views but who is not as principled, honorable, or decent a man as Judge Bork.

The last point I will generally respond to is this issue about Judge Bork and Judge Powell and the groups who the Senator from Colorado accurately points out spoke against Judge Powell 20-some years ago—I am not sure of the date—but several decades ago, and later were somewhat gratuitously talking about what a great man Justice Powell was who they opposed.

Well, without defending or criticizing "the groups" let me just say this: I think the example given by the Senator from Colorado of the groups who were critical of Powell, and then complimentary to Powell and now critical of Bork is evidence of the point that I have been trying to make, and that is when they were critical of Powell, of whom by their own admission they were wrong in retrospect, the Senate did not listen. It confirmed Powell. When they were critical of Bork, the Senate apparently is listening.

Now, is it listening to the groups or are they listening to Bork? Are they making their own independent judgment about Bork like they did about Powell? Or are these groups so almighty and powerful that they can dictate what happens on the floor of the U.S. Senate?

I would argue they were unable to dictate to Powell because they were wrong and the fact that the majority of the Senate appears to agree with the essence of their criticism of Bork does not make them right or wrong. It demonstrates the independence of this body.

And at some point I will speak to the selective comparisons that are being made now by my friends who support Judge Bork just as there are comparisons made by the groups. I suspect the Senator from Colorado, and I am not being facetious when I say this, understandably has been busy with his own duties on very important committees. I know myself—I quite frankly have been so preoccupied with my responsibilities on this committee and the Foreign Relations Committee I do not know enough what has been happening on the Budget Committee and the Finance Committee. So I acknowledge I do not expect the Senate to know this. But the supporters of Judge Bork have been arguing from the beginning. I will send you a copy of the White House document that was sent out in the summer, making the case that Judge Bork is a moderate just like Powell. The White House and my colleagues on the committee who support Judge Bork have been saying this is really a Judge Powell. If you look at the record, and they selectively compare—they, for example, in the minority report cite—I think it is in the report—approvingly of Justice Powell, as joining in Bower versus Hardwick, which you heard discussed on the floor, suggesting that his views on Bower were just like Judge Bork's blanket rejection at the right of privacy, minority report at page 233. The complete stories differ. Judge Powell did not join the majority in Bower. He concurred in the separate opinion that nowhere rejects the right of privacy. He simply concludes that the right does not protect individuals on the facts presented in that case. Judge Bork rejects the existence of the right of privacy.

Judge Powell wrote an opinion in Moore versus City of East Cleveland. That is one of the finest articulations of the right of privacy in modern times.

And Judge Bork does not share that view.

Later, when the minority report cites Justice O'Connor's dissent in Thornburgh versus American College of Obstetricians as demonstrative evidence of her likeness to Judge Bork, they omit to mention Justice Powell joined the majority opinion in Thornburgh. Thus, they cannot claim that Judge Bork is, at the same time, both the same as O'Connor and the same as Justice Powell.

Justice Jackson—we all hear about the conservative Justice Jackson and how he is just like Jackson.

The minority report cites criticism by Justice Jackson of decisions of the Supreme Court reached under the due process clause, concluding that Justice Jackson "decried the use of values not rooted in the constitutional text to invalidate popular legislation."

It argues that if Judge Bork is out of the mainstream, so is Justice Jackson—page 235.

Well, the complete story is—and I am not suggesting it misrepresents, I think it misunderstands—the complete story is the Jackson quotation cited is a criticism of the Lochner era due process clause, not the modern right of privacy cases.

In fact, Justice Jackson joined the unanimous court in Skinner versus Oklahoma usually cited as the first modern right-of-privacy case, on which Judge Bork criticized the reasoning. That is the sterilization case. He is not for sterilization. Let me make that clear. But he says the reasoning by which the Court outlawed the right of Oklahoma to sterilize is wrong. Justice Jackson says it was right. He is no Justice Jackson.

Justice Harlan, another revered conservative on the bench, selective comparison again. The minority report cites Justice Harlan's dissent in Oregon versus Mitchell, quoting the statement that "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which is its highest duty to protect." The report makes it sound as though Justice Harlan endorses Justice Bork's particular brand of original intent.

Well, from this Senator's perspective, let me give the complete story. The report omits the sentence in Justice Harlan's opinion immediately preceding the one quoted. Justice Harlan says: "It must be recognized, of course, that the judiciary has long been entrusted with the task of applying the Constitution to changing circumstances, and as conditions change the Constitution in a sense changes as well."

The report also omits mention of Justice Harlan's concurrence in Griswold—that is the case about people being able to use birth control—in Griswold and in his dissenting opinion in Poe versus Ullman, where he clearly notes the judiciary's responsibility to interpret the due process clause as part of a living tradition of constitutional interpretation. Justice Harlan is a far cry from Judge Bork on matters of constitutional interpretation.

Justice O'Connor—and I will stop with this. I can go on. The minority report cites Justice O'Connor's dissent in Thornburgh versus American College of Obstetricians, a decision dealing with a State statute directing physicians to convey specified information to women seeking abortions, and her assertion that "the Court's abortion decisions have already worked a major distortion in the Constitution."

It goes on to say "Justice O'Connor has never endorsed any application of a right of privacy in any context." Page 257 of the report.

The complete story is that this is unintentionally wrong on several counts. First, Justice O'Connor has indeed criticized Roe versus Wade, and especially its trimester scheme for determining when regulation is permissible. Almost every other conclusion the minority draws or suggest is wrong, however. The comparison between O'Connor and Bork as based on criticizing Roe, I think, is mistaken.

In Akron versus Akron Center for Reproductive Health, a 1983 case, Justice O'Connor said the problem with the majority in that case was that its opinion is "inconsistent both with the methods employed in previous cases dealing with abortion, and the Court's approach to fundamental rights in other areas." In Akron, Justice O'Connor expressly acknowledged a "fundamental right" to seek an abortion. She criticized Roe because she prefers a unitary test that would ask whether this fundamental right is being "unduly burdened."

She acknowledges the right. She doesn't say she is right, but she acknowledges the right. Comparing her to Judge Bork is not accurate, in my view.

Justice O'Connor wrote the opinion for the Court in Turner versus Safley, a 1987 case, where she said: "The decision to marry is a fundamental right." To claim Justice O'Connor has never recognized a right of privacy is, quite frankly, wrong, as is any claimed similarity in those issues between Judge Bork and Justice O'Connor.

I have, at the appropriate time, comparisons to other Justices.

Let me just give you this and ask unanimous consent that this table be printed in the RECORD.

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

BACKGROUND ON POSITIONS OF JUSTICES BLACK, HARLAN AND STEWART IN KEY CASES BORK HAS ATTACKED

Of the Landmark decisions that Bork has attacked.

Justice Black participated in 13, and agreed with Bork on 4.

Justice Harlan participated in 11, and agreed with Bork on 5.

Justice Stewart participated in 20, and agreed with Bork on 8.

THE CASES

| Civil Rights | Agreed with the Court | Agreed with Bork |
|---|---|---|
| Shelley v. Kramer | Black | |
| Reitman v. Mulkey | | Black, Harlan, Stewart. |
| Katzenbach v. Morgan | Black | Harlan, Stewart. |

THE CASES—Continued

| Civil Rights | Agreed with the Court | Agreed with Bork |
| --- | --- | --- |
| Oregon v. Mitchell | Black, Harlan, Stewart | |
| **Privacy** | | |
| Skinner v. Oklahoma | Black | |
| Griswold v. Connecticut | Harlan | Black, Stewart. |
| Roe v. Wade | | Stewart. |
| **Speech/Press** | | |
| Pentagon Papers (New York Times v. U.S.). | Black, Harlan, Stewart | |
| Cohen v. California | Harlan, Stewart | Black. |
| Brandenburg v. Ohio | Black, Harlan, Stewart | |
| Hess v. Indiana | Stewart | |
| Virginia Board of Pharmacy v. Virginia Citizens Coun.. | Stewart | |
| Bates v. Ariz. State Bar | | Stewart. |
| Landmark Comm. v. Virginia. | Stewart | |
| Cox Broadcasting v. Cohn. | Stewart | |
| Buckley v. Valeo | Stewart | |
| **Religion** | | |
| Engel v. Vitale | Black, Harlan | Stewart. |
| Lemon v. Kurtzman | Black, Harlan, Stewart | |
| Aguilar v. Felton | Stewart | |
| **Voting Rights** | | |
| Reynolds v. Sims | Black | Harlan, Stewart. |
| Harper v. Virginia St. Board of Elections. | | Black, Harlan, Stewart. |

Mr. BIDEN. These are landmark decisions that Justice Bork has attacked. You see, let me put this in context for my friend from Colorado, throughout the hearing, Justice Bork acknowledged that he attacked some very landmark decisions and he disagreed with the reasons. Again, not because he wanted to sterilize people, not because he wanted to segregate lunch counters, not because he wanted to keep black folks from voting, not because of any of these things, but because his judicial philosophy would not allow him to find the rationale in the text of the constitution the conclusion that was arrived at.

As that debate went on between Judge Bork and me and others, my friends, particularly the articulate Senator from Wyoming, Senator SIMPSON, the Senator from Utah, equally as forceful, and the Senator from New Hampshire, they all came back and said: "But Judge Bork is just like Black, Harlan, and Stewart."

We just went and took the landmark decisions that Judge Bork had attacked and looked at each of those Justices. He cites, if I am not mistaken, a total 28 cases where he attacked them.

In 28 cases that he attacked, Bork attacked—attack sounds perjorative—that he took strong disagreement with the reasoning, Justice Black participated in 13 of those 28 decisions. He agreed with Judge Bork in 4 of the 13 in which he participated.

Justice Harlan, another great conservative jurist, participated in 11 of those 28—I am sorry. I want to be precise here. It was 20. I am sorry.

Justice Black participated in 13 of the 20 decisions Judge Bork took issue with. He agreed with Bork in 4 of the 13 in which Black participated.

Justice Harlan participated in 11 of those 20 landmark decisions that Judge Bork criticized. He only agrees with Judge Bork on 5 of the 11 that he criticizes.

Justice Stewart participated in all 20 and he agreed with Judge Bork on 8.

In no instance did any of these conservative Justices cited by my colleagues as a bellweather of mainstream conservatism, in no instance did they, any one of them, ever agree with Bork as much as 50 percent of the time.

There is much, much more to say and I am sure we are going to get a chance to say it in the next day or so.

I thank my colleague from Colorado for his indulgence and I would be happy now, if he wishes, to try to respond more specifically to issues that he has raised.

Mr. ARMSTRONG. Mr. President, if the Senator would yield——

Mr. BIDEN. I yield the floor to my colleague from Colorado.

Mr. ARMSTRONG. I thank the Senator.

The PRESIDING OFFICER. The Senator from Colorado is recognized. I think it was set very straight, earlier in this legislative day, that we were going to try to keep the process as it should be and the Senator from Colorado can only ask the Senator from Delaware a question. The Senator from Delaware can answer that question. Beyond that, he will have to yield the floor.

Mr. BIDEN. The Senator from Delaware yields the floor.

The PRESIDING OFFICER. The Senator is recognized in his own right. The Senator from Colorado.

Mr. ARMSTRONG. Mr. President, I listened with a growing sense of admiration for the rhetorical skill of the chairman of Judiciary Committee.

If any Senator wonders why JOE BIDEN is regarded as one of the most skillful, if not the most skillful, orators in the country, I hope they will go back and look at the videotape of tonight's presentation. I mean, he is good. Let us face it.

Mr. BIDEN. Mr. President, if the Senator would yield? I think that means I am in trouble.

The PRESIDING OFFICER. I do not know what the Senator from Colorado's answer to that question will be.

Mr. ARMSTRONG. Mr. President, the Senator from Colorado would not quarrel with the assertion of the Senator from Delaware. You see the problem, Mr. President, with what the Senator from Delaware has said is that it does not address the issues which I sought to raise. Not to say that the points he has made are unworthy but he has very skillfully changed the subject.

I made the point that thoughtful observers felt that there had been a vicious, vindictive, mean spirited, slanderous campaign of personal vilification against Judge Bork and the response which the Senator made to that was: Well, do not blame me.

Of course, no one was attempting to blame him. In fact, it is not my purpose, then or now to assess the blame. That is not the issue at all.

The point that I sought to raise, as the first issue that I wanted to bring before the Senate as we begin the consideration of the Bork nomination, is that Judge Bork has been the target of a campaign of personal vilification which is not precedented by the way we have handled previous nominess and is not a good precedent and it is not the practice that we ought to follow in this or in the future.

In response to that, I submitted a number of articles precisely because I did not want to get personal about it. I did not want to be in a position of standing up here and pointing my finger at other Senators or at interest groups and saying you said that, you said that, you said that, you said that; I think it is wrong and I am upset.

That is not the issue here. I quote quite deliberately a large number of thoughtful observers in print media, primarily, who said that this has been a rotten deal.

In response to that the Senator from Delaware says: Well, there are newspaper editorials on both sides of the question. And he quoted a bunch of editorial writers who were against Judge Bork.

I did not hear any quotes that said this has been fair. I did not hear any quotes that said the process has been dignified.

I heard a lot of quotations of one kind or another and arguments that, in fact, people disagreed with Judge Bork and that is their privilege.

The point I was making in the first instance is that the nature of the attack demeans the process and I do not think there is a darned thing that has been said that disputes that.

I did not hear anybody say that when the Gregory Peck commercials came on and directly said that Judge Bork opposed—well, favored poll taxes and literacy tests and it turned out that was not true, at least according to an article which was published subsequently in the New York Times, I did not hear anybody say that that is fair campaigning.

There was a comment to the effect that, after all, the groups involved did not spend very much money. Well, so what? That is not the point. You know, if you are repeating an untrue charge the fact that you only do it on a limited budget does not make it right and if it is an inflammatory enough charge, you do not have to

spend any money. In fact, if you just whisper something which is really dreadful, something that is really scurrilous, you only have to say it once to one person and it is all over the country in an instant.

You know, the Senator from Delaware was good enough not to attack me personally, and I am not going to attack him personally, but if we really did we could make the kind of news here tonight that would spread all over the country. We would not have to spend a million dollars or even a thousand dollars.

When anybody in public life is subject to a really vicious attack, it spreads. It just does. And when black people get the idea that somebody who is up before the Supreme Court as a potential nominee or comes before the Senate as a nominee is against them—and that is exactly what black people have been told—you do not have to spend a lot of money to spread it.

I made the point, quoting those who observed the process, that some polls were taken. I never suggested and do not suggest now that that is improper. But the response of the Senator from Delaware was that: So what; a lot of people took polls.

Well, of course. The point I was making was a little different. That, according to the published accounts, the Senators and outside groups got together and took polls to determine what were the issues by which they could most inflame the public opinion; by which they could most leverage the interest groups. One of them evidently that came out of that polling—I do not know—but evidently one of them was this issue of the poll tax and literacy tests.

Let me just quote briefly from a recent article, the 15th of October, in the Los Angeles Times. "In that 60-second advertisement televised nationally at a cost of about $200,000, Peck"—referring to the actor Gregory Peck—"charged that Bork has a strange idea of what justice is. He defended poll taxes and literacy tests which kept many Americans from voting. He opposed the civil rights law that ended "Whites Only" signs at lunch counters.'"

The article points out—and I do send it to the desk in hopes it will be printed in the RECORD—that that just is not true; that Judge Bork did not do that.

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

[From the Los Angeles Times, Oct. 15, 1987]

SUPPORTERS TO ATTACK 3 CHARGES IN PECK'S ANTI-BORK TV AD AS BLATANT DISTORTIONS

(By David Lauter)

WASHINGTON.—When the full Senate finally debates the Supreme Court nomination of Robert H. Bork later this week or early next, senators will spend much of their time debating the words of an unlikely figure—actor Gregory Peck.

It was Peck who narrated a controversial television advertisement that was a key component of the lobbying campaign against Bork, a campaign that President Reagan on Wednesday branded as one of "distortion and disinformation."

In that 60-second advertisement televised nationally at a cost of about $200,000, Peck charged that Bork "has a strange idea of what justice is. He defended poll taxes and literacy tests which kept many Americans from voting. He opposed the civil rights law that ended 'whites only' signs at lunch counters."

CHARGES CALLED DISTORTIONS

Those three charges, according to Bork's supporters, are three of the most blatant distortions of Bork's record. Altogether, they have identified six major points on which they accuse Bork's opposition of twisting the record to suit its purpose.

On two of the points, including Bork's stand on literacy tests, his supporters appear to have a strong case. But on two others—poll taxes and the 1964 Civil Rights Act—the record appears strongly to support the charges against Bork. On two other allegations, the evidence is mixed.

Peck's advertisement is sure to receive special attention in the Senate. Officials of People for the American Way, the ad's sponsor, say they are confident it will pass scrutiny.

Their biggest problem involves Bork's position on literacy tests.

In 1965, Congress prohibited states from requiring people to pass reading and writing tests before registering to vote. The high court in 1959 had ruled that such tests did not automatically violate the Constitution, but in 1966 the court upheld Congress' power to ban the practice.

Bork said in congressional testimony in 1982 that Congress' action exceeded its power and the court decision upholding that action was "very bad, indeed pernicious, constitutional law."

Did that amount to defending literacy tests, as the ad charged? Melanne Verveer, People for the American Way's director of public policy, said it did, because Bork opposed the way Congress acted to end the tests. But, she conceded, Bork never directly spoke out in favor of the tests.

On poll taxes, however, the charge against Bork has considerably more evidence behind it.

Bork, in congressional testimony in 1973, clearly disagreed with the high court's 1966 decision eliminating poll taxes. The Virginia tax challenged in the case "was a very small poll tax," he said. "I doubt that it had much impact on the welfare of the nation one way or the other."

What upsets Bork's supporters, said Sen. Alan K. Simpson (R-Wyo.), is the suggestion in the People for the American Way ad that Bork's position constituted "racism." The Virginia case "had nothing to do with race," Simpson said.

The challenged advertisement, however, never mentioned race. It said only that the tax "kept many Americans from voting."

The advertisement's third charge—that Bork opposed the 1964 Civil Rights Act, which ended segregated public accommodations—accurately reflects a position Bork took at the time. Bork's supporters argue that the charge distorts Bork's view because he later changed his mind.

Three other issues not mentioned in the Peck advertisement have also been frequent targets for Bork's allies. On two of those questions—a controversial decision Bork wrote as a judge on the federal appeals court in Washington and his role in the Watergate scandal—the evidence remains inconclusive.

In 1984, Bork, joined by two other judges, wrote an opinion upholding the right of American Cyanamid, a chemical company, to tell female workers in one of its factories that they must either be sterilized or lose their jobs because high levels of lead in the factory air could cause birth defects. Sen. Howard M. Metzenbaum (D-Ohio), one of Bork's main opponents, said during Bork's hearings that the decision was "shocking."

Simpson and other Bork defenders say that Bork had no choice in his ruling because the company had no way to solve its lead problem. A federal safety official who reviewed the case before it reached Bork's court took the same position.

But officials at the federal Labor Department and the union representing the women argued that the court could have directed the company to spend more money on safety. Evidence exists on both sides of that question.

On Watergate, the evidence on Bork's actions is similarly inconclusive. The major question is how quickly he moved to find a new special prosecutor after firing Archibald Cox. Some witnesses, including Bork himself, say he acted "immediately." Other witnesses say Bork acted only in the face of mounting public protest.

On one final issue, Bork's supporters have a relatively clear case. Metzenbaum repeatedly challenged Bork's views of antitrust law, saying they would lead to higher prices for consumers. Bork disagrees, and most specialists accept Bork's position.

Bork's supporters insist that their emphasis on the distortions in Bork's record will pay off. Sen. John C. Danforth (R-Mo.), a Bork supporter who studied under Bork at Yale Law School, told reporters Wednesday that "the American people were frightened . . . because of the way Bork was characterized" by his opponents. Voters "will react against that," he predicted, if Bork's supporters can show he was smeared in the lobbying campaign against him.

FOES DEFEND CHARGES

Bork's opponents not only defend the charges they leveled against the nominee but insist that pro-Bork forces have themselves resorted to exaggerations and underhanded tactics.

Bork supporters concede the point. A pro-Bork ad leveling personal allegations against four anti-Bork senators "cost us three votes," Bork supporter Orrin G. Hatch (R-Utah) said Wednesday. The ad was sponsored by We the People, a Los Angeles-based pro-Bork group founded by Republican political consultant Bill Roberts, who could not be reached for comment.

In fact, midway through the article Melanne Verveer, People for the American Way's Director of Public Policy, conceded that Bork never directly spoke out in favor of the test.

I mean that is the point I was making and the reason why I thought the point relevant was not because vicious attacks are unprecedented or because in any way I think that Senators approve vicious attacks of that there is any attempt to hold them accounta-

ble, though I will return to that in just a moment.

The whole process is being transformed in a way that I think seriously threatens the integrity of the judiciary and that is to defocus from issues of the qualifications and ability and skill and scholarship of the nominees and, instead, to have a political referendum on the issues that come before the Court.

In fact, the Senator from Delaware spent most of the last hour verifying that my concern was true. He said in a very eloquent way and at length in citing many authorities, that he disagrees with Judge Bork on the issues. I want to return to that, but I did not want to focus on that without at least noting that he really did not deny the first part of my concern, which is that it was a vicious attack.

He said do not blame him. I do not blame him.

I said that it focused attention outside this Chamber and that the decisions were not reached by Senators based upon what happened in the Chamber or in the Judiciary Committee but on public opinion and the skillful manipulation of it.

That is not just an opinion I got tonight from listening to what has been said. I got that from, well, really from a lot of sources. One of them, for instance, was a Washington Post article which relates a claim by a leader of a special interest group in one State where the Senator said he was not sure how he was going to vote.

Here is what the article said:

> The special interest groups left no room for disagreement with their position. One special interest group leader said, "We must let our Senators know that a vote against Mr. Bork is a prerequisite for our vote in the next election."

Fair enough; that is their right. Is it good for the process? I do not think so.

Does it add to the quality of people that we will attract to the Supreme Court? I do not think so. Does it politicize the process in a potentially dangerous way? I think it does.

The Senator from Delaware wants to know do I think or does anybody think that 56 Senators suddenly decided to come out against Judge Bork because Gregory Peck told them? And the answer to that of course is "No." The reason that they did it, at least some of them, again according to published accounts, is because the people at home heard from Gregory Peck and others in a way which, as it turns out from this article in the L.A. Times, is not exactly truthful. In fact it is not approximately truthful.

Mr. BIDEN. Will the Senator yield for a question?

Mr. ARMSTRONG. Certainly. In fact, I do not intend to draw this out tonight. I will be happy to yield for a question, but I want to make a couple of other summary remarks. Then my thought was we might pick up tomorrow. It is almost 10 o'clock. I would plan to come back sometime during the day and respond in some detail to the points made by the Senator. But I am happy to yield.

Mr. BIDEN. My question is somewhat mooted by that reply. I will wait until I gain the floor in my own right.

Mr. ARMSTRONG. Mr. President, the hour is late and I do not intend to draw this out, but the conclusion I draw is this: I am persuaded that the process has not been fair, and that is too bad for Judge Bork and his family and so on, and if he is not confirmed it will be too bad for the country. But what is worse is that we are starting down the road from which I think we ought to retreat very promptly. That is this notion of politicizing the judiciary.

You know, the statement which the Senator has made tonight really validates and emphasizes that concern because what he said, and I am not quoting directly but I believe I am accurately paraphrasing, is this: he said Judge Bork is honorable, intellectually talented. He is just wrong on the issues.

In other words, he disagrees on certain key issues.

My question is this: Do we really want to subject our Court appointees to a detailed test of that kind, a political test, the kind of test which David Broder pointed out has momentous and undesirable consequences if we politicize these appointments?

I think not. I think what we are seeing here in this confirmation process is a radical and serious departure from past practice.

I am not saying we have never seen anything like this, and I am certainly not saying that there have never been politics in the process. But I do not think to excuse that by saying somebody else started it, President Reagan came down to Georgia and campaigned for Mack Mattingly and Mack Mattingly got defeated, that is what we were told, that there that justifies the kind of process we have seen. I just do not buy that. It does not wash. Other Senators will have to make their own decision.

The thing that I really think is significant, however, and then I am ready to rest my case for the night and pick up where we left off tomorrow, is this: It is the results test which the Senator from Delaware has emphasized. Nor does the case in point follow the precedent, nor does it follow the intent of the Constitution, nor is it based on solid legal reasoning, but do the results—his word, not mine—do the results square with somebody's idea of what the right outcome is?

If that is going to be the test of the courts, then you really have what amounts to exactly what the Senator said, a referendum on the last 30 years of the Court. I think that is a fair issue, a fair issue for us to debate. I think it would be a pity if we decide that is what we want, but that is a very different point than the one which I started out to make and which I believe stands proven or at least not very vigorously disputed at this point. That is that Judge Bork has been maligned.

When I seek recognition tomorrow, I shall attempt to go into the legal issues involved in greater detail and to explain in more detail why it appears to me that by politicizing this, by making judicial nominations the pawn of interest group politics, that we are really setting the stage for a disastrous turn in America's judiciary.

Before I yield the floor, I cannot resist one additional reference, just a footnote.

The Senator from Delaware said that when our dear friend Howard Baker came over—well, what you said was you predicted that all this was going to happen. I think that is right. In fact, I think in large measure you made it happen.

And that is your right. But it seems to me that delaying the hearing for a long period of time, according to published accounts, again, so that outside groups would have the opportunity to mount this campaign of fear and slander, is exactly what set the stage for all of this. I regret it. However, the Bork nomination turns out, and I stress I am not under any illusions, I hope this is not the start of the path and we are not going to see it again. I do not think it is good for the Senate and I do not think it is good for the country.

Mr. President, there is a lot more to be said and I may have more to say about it tomorrow and the next day. In the meantime, I thank the Chair for being patient and my colleagues for their patience.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, I will press just a little longer on the patience of the Chair because I would like to respond specifically to several statements recently made.

First of all, the Senator from Delaware is flattered, is flattered to realize what oratorical skills he has and what phenomenal power and effectiveness he has. In my past political incarnation I had a hard time seeking people and the press to believe that I was effective. I wish the Senator from Colorado was there to vouch for my effectiveness.

And my oratorical skills. I demure. I do not believe I have those skills attributed to me. But let us assume for the moment that I do. To suggest that one can only be either oratorically "brilliant," as the Senator from Colorado, or substantively right, I suggest

it is possible to be both, and I would rather be the latter than the former I suggest that I am.

Let me talk about the delay that the Senator from Colorado referred to, and let me quote Senator DOLE. By that I mean the suggestion that the Senator from Delaware orchestrated the delay.

When the hearings opened up on September 15, Senator DOLE, our minority leader, said, "Now it has been some time since the nomination was made. I would say at the outset some of us were critical of that, but I would guess in retrospect that it may have taken that much time with the August recess to prepare for this very important hearing."

That is the minority leader, the leading Republican in the Senate, acknowledging the necessity because of the August recess, or at least if not the necessity the wisdom of not starting sooner.

With regard to the assertion made that the Senator from Delaware is arguing for the results test, it is the exact opposite. The Senator from Delaware obviously does not have the oratorical skills attributed to him because obviously I did not communicate my message clearly to the Senator from Colorado.

My point is that Judge Bork consistently has been an exaggeration. In a great number of cases and with great vehemence he disagrees with the rationale that conservative as well as moderate as well as liberal Justices on the Supreme Court have adopted for the past 20 years, 30 years. He argues, and I will not take the time to quote now, Judge Bork argues and says, "I agree with the result." Not BIDEN; Bork. "But the rationale is what I disagree with. I quite frankly do not know how to get to the result that I admit I personally like with that rationale or any other."

Skinner? He agrees with the result in Skinner, that you should not sterilize chicken thieves. He disagrees with the rationale that allows the Court to strike down the law.

In the Griswold case, a married couple's right to use birth control. He agrees with the result. He says "It is a crazy law." I forget his exact words. "A nutty law." But, he says, "The rationale is wrong." He says, "Gentlemen, I cannot think of any rationale to outlaw that nutty law."

So it is Judge Bork not Senator BIDEN who is looking for a rational standard, not a result standard.

Now with regard to my alleged unwillingness to quote people about whether or not the process was vicious, I will do more of it tomorrow, but let me just give you a flavor tonight.

Judge Bork had a Judiciary Committee hearing with unprecedented care and thoughtfulness and a fair chance to answer every criticism.

The New York Times.

Well, I will not take the time now, but there are plenty of assertions which I will put into the RECORD, where people attest how fairly the judge was treated, where he was not vilified, where he was not the victim of slander. Although I think David Broder is a great man, sometimes even he is wrong about what happened.

Lastly, with regard to the honesty of the ads, I did not take the time but I will just take a moment now.

The Senator from Colorado says the assertion that Judge Bork has been against the civil rights laws, and I forget the exact wording that he had, he says is wrong; that he favors a poll tax and literacy test is a distortion of the highest degree.

The fact is, and the point I was trying to make earlier I will make again as clearly as I can, Judge Bork in my view does not personally favor a literacy test. He does not personally favor a poll tax. But he argues that the Congress did not have the right to pass a law outlawing literacy tests. Are you with me? Rationale. He says there is no constitutional rationale for the Congress to pass a law denying Oregon or Washington or Delaware or anywhere else the right to have a literacy test. He is not for a literacy test. He is not for a literacy test, but the action the Congress took back in the 1960's to say nobody under any circumstances in any State, in any election, can insist on a literacy test, Judge Bork says that is bad law. That is a usurpation of constitutional prerogative, authority. He says the States should be able to do that if they want to, even though he did not say he supported that. So technically the ad was wrong, saying Judge Bork supported literacy. The more accurate ad would have been to quote him. If they had more time, they should have just quoted him. It would have been more damaging to him. "Judge Bork says Congress cannot constitutionally pass laws saying there will be no literacy test." Would it make him happier if the ad said that? Maybe if they had 3 minutes, they would have said it that way. They were technically wrong. He personally did not say, "I want a literacy test." But he personally did say if a State wants to have a literacy test, I cannot figure out how to stop them and the Congress has no right to stop them.

I think that is a distinction without much of a difference.

The poll tax. Judge Bork did not say, "Poll taxes are great, I am for poll taxes." But in the famous Virginia poll tax case he said, do you know what, when the Supreme Court struck down the Virginia poll tax, they should not have done that. He said that was wrong. Their rationale, their constitutional reasoning was wrong because he said that the Virginia poll tax—and keep in mind what happened here. This was the Harper decision. The Supreme Court held that the Virginia poll tax was unconstitutional under the equal protection clause of the 14th amendment on the ground that it denied a fundamental right to vote to those "unable to pay a fee to vote."

Judge Bork said he did not say, "I'm for poll taxes." He said the Supreme Court is wrong in telling Virginia it cannot have that poll tax. And why were they wrong? He says—let me find the exact quote.

> as an equal protection case it seems wrongly decided. As I recall it was a very small poll tax. It was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or another.

He said that in 1973 as Solicitor General. Then he went on to say:

> The Court frequently reached highly controversial results which it made no attempt to justify in terms of the historic Constitution or in terms of any other preferred basis for constitutional decisionmaking. I offer a simple example. In Harper the Court struck down a poll tax used in State elections. It was clear that the poll tax had always been constitutional if not enacted in racially discriminatory ways.

In 1985 Judge Bork said that.

Judge Bork defended these views in the hearings saying:

> There is no allegation of discrimination and the court did not discuss the case in terms of keeping blacks from voting.

Now, where was Judge Bork, the 60-year-old man, during the 1940's, 1950's and 1960's when the State of Kentucky and the State of Delaware were not really crazy about black people voting, when Virginia was not real crazy about it, when the South was not? Where was he? In a cocoon? How did we stop black people from voting? We said poll taxes.

Now, admittedly the Virginia poll tax, if it were in place today, would only be $5, counting inflation, roughly. And it is arguable whether or not that is going to discourage blacks from voting. Judge Bork did not say, "I am for poll taxes." He said that a little one is not bad. So technically the ad referred to may be wrong. But he did say that the case which outlawed poll taxes of any kind was wrongly decided. So technically the ad was wrong.

Do you think they would have been happier, all the black people, in the State of Kentucky, all the black people in the State of Delaware, all the black people in the State of Alabama if there was an ad run on television saying, "It was really a very small tax. It was not discriminatory and I doubt whether it had much impact on the welfare of the Nation one way or another?"

Do you think black people listening to that would say, "Oh, that's OK. I understand that. That is a good thing.

That is great. No problem there. I'm with him."

So technically he did not say, "I'm for poll taxes." But he did say that little ones are not bad. If they are small enough, they are not discriminatory. Therefore, they are constitutional.

Now, how do you prove what is constitutional? How do you prove what is discriminatory? A 70-year-old black woman who all her life had to pay a poll tax, knows there is still one in effect, but it is a small one. Do you think that does not discourage her from going to vote? Do you think that does not discourage her from thinking maybe the people do not want me to participate?

Where has he been? Again, I do not believe that he is racist. I do not believe he wants poll taxes. But I do believe that his view to those folks who used to have to pay those taxes, which means they could not come and vote, at a minimum is discouraging.

The last point I will make and I will stop, Judge Bork in the ad allegedly—I forget what the Senator said precisely about what the ad said about lunch counters, or integrating lunch counters I think the ad mentioned or something to that effect.

Technically they are wrong. I do not think he wants segregated lunch counters.

The public accommodations bill, as the Senator presiding knows as well as the Senator from Delaware, was a bill that denied lunch counter owners, the Lester Maddoxes of the world, from being able to deny black people to sit down and have a cup of coffee at their counter, deny people the right to go in and rent a room. When they traveled from my State through Pennsylvania to get to the Senator's State of Kentucky they had to call ahead to figure out where they could stay. And this law came in and said, "Hey, unless you are Mrs. Murphy, you can't stop that black person from staying at the Holiday Inn in lower Delaware or in Maryland or in Virginia." They had to call ahead. They had to find out if there was any room in the inn at places that only allowed black people.

I do not think Judge Bork liked that. I do not think Judge Bork said that is good, that black people cannot stay where white people stay. He has a basic philosophy. He believed, as he says in his libertarian phase, that it was even worse to tell an individual who they have to rent a room to or who they have to serve a cup of coffee to because that infringed on their individual rights, just as the wrong was being done to the person who was being refused the cup of coffee, or being refused the room.

A lot of Senators in this body at that time took that position. Would Judge Bork be happier had the ads run that said "The public accommodations bill is an unsurpassed ugliness," that "serious constitutional problems exist with the Public Accommodations Act and it should be opposed because it compels association even where it is not desired"? That was what he said in the Chicago Tribune in 1964. Would they have been happier in Los Angeles if every black person in Watts turned on the TV and Gregory Peck said or the ad read "Judge Bork, when the Public Accommodations Act was being debated said"—and I quote—"to compel association even where it is not desired is a bad thing?" It would have been precisely accurate then. So true: they gave shorthand, and they were technically incorrect.

But to suggest that his is vilifying, making out of whole cloth, maligning Judge Bork belies the record. It was not inappropriate for Judge Bork to hold the view he held and other constitutional scholars held a similar view. It is not inappropriate as my friends in the committee point out, and other constitutional scholars argue that the poll tax in Virginia was constitutional. It is not inappropriate for him to have an argument that the Congress cannot outlaw illiteracy tests. Other constitutional scholars have so argued. But to suggest that he did not hold those basic views I think is misreading the record.

Mr. President, I will conclude by asking unanimous consent to insert in the RECORD, and I have not read this yet, a letter from former Member of Congress John H. Buchanan, Jr., to me, a rebuttal of the 67 flaws in the ad. You know the argument made, the 67 flaws in the ad? I ask unanimous consent that the rebuttal to that be placed in the RECORD at the request of those who wrote the ads.

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

PEOPLE FOR THE AMERICAN WAY,
*Washington, DC, October 19, 1987.*

DEAR SENATOR: The full Senate will shortly consider the nomination of Robert Bork to the United States Supreme Court. If the discussions on the Senate Floor last week presage this week's debate, we can anticipate that Bork's supporters will devote much of their effort to attacks on groups like People For the American Way which have vigorously opposed the nomination, and they will divert attention from the issue of Judge Bork's restrictive view of constitutional rights considered at the hearings.

In fact, the attacks on Bork's opponents began during the Judiciary Committee hearings and have grown increasingly strident as it has become apparent that a majority of the Senate, reflecting the view of a majority of Americans, will vote to reject the nomination. We have been excoriated as "narrow special interest groups" out to undermine the independent judiciary. We have been accused of conducting a campaign of "distortion" and "disinformation." On the other hand, the White House has called groups supporting the nomination "grassroots supporters" and "citizen action groups."

Before the debate proceeds further, it might be well to look at the nature of these groups under attack. Civil rights organizations do have a special interest in defending the rights of significant minorities of the people who have been victims of massive and sustained injustice. Women's groups have a special interest in the rights and welfare of that majority of the population which happens to be female. Consumer groups represent consumers, which we all are. Environmental groups defend the environment, which we all share. The group which we represent has a special interest in protecting the constitutional rights and liberties of every American citizen, including those of our most strident critics.

Our critics seek to place full responsibility for Judge Bork's defeat in the hands of these "special interests." People For has been singled out as having "distorted" Bork's record in a public education campaign of print and TV ads produced by our Action Fund. These ads were part of a larger educational effort which included several lengthy analyses of Judge Bork's record published before and after the hearings.

Senator Hatch set the tone when he attacked our print ad claiming that the ad contained "67 flaws." His list of the "falsehoods" is an invective against us and contains his own false characterizations of Judge Bork's record. The accusation of distortion is itself a distortion, as we hope the enclosed materials will make plain. Since People For's public education campaign has been attacked, we have prepared documentation for the TV ad narrated by Gregory Peck and a response to Senator Hatch's charges. We hope that these materials will set the record straight.

If disinformation exists in this debate, it is in the false charge that Judge Bork is the victim of special interest groups. He is, instead, the victim of his own record, his own testimony in more than thirty hours of televised hearings, and his own misreading of the Constitution and of the role of the Court in protecting the constitutional rights of all Americans.

We are grateful to you for your defense of the constitutional rights and liberties of the American people and your opposition to this nomination. As the Senate debate goes forward, it should focus on Judge Bork's record—nothing more, nothing less.

Sincerely,

JOHN H. BUCHANAN, Jr.,
*Chairman,*
ARTHUR J. KROPP,
*Executive Director.*

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[From the Atlanta Constitution, Oct. 16, 1987]

REAGAN SHOULD LOWER HIS VOICE ON BORK

Last week, as Robert Bork vowed to fight on, he made this eloquent plea: "The deliberative process must be restored. In the days remaining I ask only that voices be lowered . . . ."

Funny thing, though. The decibel level has hit new heights since then—and the sound and fury comes not from Bork's enemies but from his friends. As his Supreme Court nomination limps to a certain coup de grace in the Senate, the balderdash is flying more frantically than ever.

President Reagan lobbed a large chunk of it on Wednesday when he decried the "campaign of distortion and disinformation" that supposedly doomed the nomination. If the effort succeeds, the president warned, it will

"permanently diminish the sum total of American democracy."

He needs to calm down Americans have not suddenly invented a political crucible for every Supreme Court nominee who comes along. The Bork nomination is unusual for several reasons. The court has reached an ideological crossroads. As Reagan proposes to replace the conservative Lewis Powell with a man of the far right, he seeks to turn its ideological balance sharply to the right.

Is that what the nation wants? This is a political question, and the man who posed it was Ronald Reagan. It is a proper subject for public debate. No less an authority than the U.S. Constitution instructs the Senate to sign off on judicial nominees. That the Senate is ready to reject Reagan's choice will not diminish American democracy. Such rejections—for good reasons and bad—have happened many times in our history. The republic has managed to survive.

Ah, but what about the distortions of Judge Bork's record? They are unfortunate; they are also beside the point. There are plenty of legitimate reasons to vote "no." It is highly unlikely that key senators such as Howell Heflin (D-Ala.) or Dennis DeConcini (D-Ariz.) were reacting to public hysteria when they cast thumbs-down committee votes on Bork. Rather, having scrutinized Bork's record, most were worried about the kind of court his confirmation would allow.

The system is working. And no amount of disinformation and distortion from the White House can change that pleasant fact.

HATCH'S "67 FLAWS": FLAWED

On September 29th Senator Orrin Hatch took time during the confirmation hearings of Judge Robert H. Bork to denounce an advertisement produced by the People For The American Way Action Fund. He submitted for the record a list entitled "67 Flaws of the Bork Ad." Each item was labeled a "falsehood." These so-called falsehoods included the name of our organization (#63), a direct quote from Judge Bork (#23), and a citation to a book he authored (#53).

When Senator HATCH first launched his attack, we felt it was too ludicrous to deserve a response. In the intervening weeks, the charges that we and other public interest organizations have "distorted" Judge Bork's record have multiplied in the media. Vague allegations of "distortions" often appear without specific references by Administration spokespeople or Senators to exactly what they think has been distorted. We believe that these charges are themselves deliberate distortions designed to lower the Bork nomination debate from the high level at which it has been conducted. We have prepared the following response to Senator HATCH is an effort to reveal exactly how extreme and ill-founded the attack on Judge Bork's opponents has been.

First, we quote Senator HATCH's charge and then give our response. In cases where Senator HATCH disputes our facts, we cite the documentation for our factual statements. In cases where he disputes our conclusions or opinions, we cite the basis for our conclusions. While Senator HATCH certainly is entitled to his own opinion on all of these matters, he is wrong to label people who disagree with him as engaging in distortions or, in some cases, even lies.

(1) HATCH: The title. "Bork vs. the People" grossly misleads and misconstrues his philosophy. More than any other jurist in modern history Bork would sustain the people's right to govern themselves. The title should fairly be: Bork and the People vs. The Special Interests.

Facts: Professor Philip Kurland, a leading conservative constitutional law scholar, expressed well why Bork's philosophy is "vs. the people":

Bork, although frequently prating about the Constitution and original intent as he has taken to the hustings around the country, has woefully missed what he should have learned from the Constitutional Convention of 1787 and the events surrounding it.

The watchword of the people and the constitutional ratifying conventions was "liberty." They were intent on framing a government to guarantee liberty to the individuals within the new nation's domain. The liberty of which they spoke was not Bork's liberty of a parliamentary majority to impose its will on everyone with regard to everything. No such elaborate structure as that which emerged was necessary for that.

The liberty of which they spoke and wrote and for which they fought was the liberty of the individual, in "substance," as Judge Learned Hand once put it, "the possibility of individual expression of life on the terms of him who has to live it." (*Chicago Tribune*, August 18, 1987)

(2) HATCH: Controversy based on "good reason." Judge Bork is eminently qualified and centrist in his views. The controversy is generated by those who do not want President Reagan to make another appointment.

Facts: The Raleigh News and Observer in an editorial opposing Judge Bork summarized the "good reasons" to be troubled about the Bork nomination:

. . . Rather, [the concerns rest] on the whole pattern of his professional life, as a professor, as solicitor general, as a judge.

His has been a career of constant criticism of most of the key decisions of the Supreme Court over the past generation. A man of strong moral and philosophical convictions, he has sought with great intellectual vigor to pour issues through a narrow legal funnel of his own making.

In doing so, however, he has been out of sync with history and with the legal consensus that was preserved and extended the rights Americans enjoy as a free people. (*The Raleigh News and Observer*, September 27, 1987)

(3) HATCH: "Extremist." Those calling him "extremist" would not know a judicial mainstream from a judicial jet stream. Six recent Attornies [sic] General from both parties testified. None of them considered him extreme, but endorsed him.

Facts: Bork's long written and spoken record testifies to his extremist view of the Constitution. As Professor Tribe stated:

Not one of the 105 past and present Justices of the Supreme Court has ever taken a view a consistently radical as Judge Bork's on the concept of "liberty"—or lack of it—underlying the Constitution. (Tribe testimony, p. 14, September 22, 1987)

HATCH tries to give the impression that all the former attorneys general who testified before the Committee endorsed Bork, when in fact, Nicholas deB. Katzenbach strongly opposed him.

(4) HATCH: "Consistently taken positions against constitutional rights." In fact, he has strongly defended the rights of average Americans to govern themselves. He has consistently sustained every right found in the Constitution and opposed judges who tried to interpret the Constitution to fit their own views.

Facts: The letter from the deans of 32 law schools who oppose Judge Bork's nomination provides the best answer to this charge:

Judge Bork has developed and repeatedly expressed a comprehensive and fixed view of the Constitution that is at odds with most of the pivotal decisions protecting civil rights and liberties that the Supreme Court has rendered over the past four decades. (Comm. Print Draft, Part 2, pp. 92-97)

(5) HATCH: "Sterilizing workers." Judge Bork did not force any sterilization.

Facts: Judge Bork's opinion in the *Cyanamid* case upheld the company's sterilization policy.

(6) HATCH: "Company was pumping so much lead." This creates a false impression. It is not mentioned that an administrative law judge had found that there was no way to eliminate the lead levels sufficient to eliminate the risk. Judge Bork was bound by that finding.

Facts: The Secretary of Labor issued a citation to Cyanamid alleging violation of the Occupational Health and Safety Act because Cyanamid failed to provide a workplace free of recognized health hazards. Further, an administrative law judge said it was technically feasible, although not economical, to reduce the high lead levels. (ACLU Memorandum and Analysis; Comm. Print Draft, Part 1, p. 649)

(7) HATCH: "The company ordered all women workers to be sterilized or lose their jobs." In fact, the company offered the women a choice. Due to the hazard, fertile women could not work in the plant. Rather than release the women outright, they were offered a choice. The women themselves made a very difficult decision.

Facts: Our statement stands; the choice was surgical sterilization or loss of their jobs. The Judiciary Committee received a letter from a woman who submitted to sterilization rather than lose her job. The letter emphasized Judge Bork's insensitivity to the terrible plight of the women confronted with the choice offered by the company:

I had surgery because I had to have the job and felt that I had no choice. If I lost my job I would have lost my home and also needed it to help support my parents. . . . During this time we were harassed, embarrassed and humiliated by some supervisors and some fellow workers . . . they told us we were branded for life. (Comm. Print Draft, Part 1, p. 654)

(8) HATCH: "When the union took the company to court." This is only part truth. It is never mentioned that the OSHA Review Commission, the expert government agency, had already found the company could offer the women a choice.

Facts: As previously noted, the Secretary of Labor, who enforces the OSHA Act, found the company's policy in violation of the law. Both the union and the Secretary provided evidence to the Commission that alternatives to the sterilization policy were available. In the OSHA Review Commission's proceedings, however, a factual record developing such alternatives was not made.

(9) HATCH: "Judge Bork ruled in favor of the company." This sounds like Judge Bork approved the "unhappy choice" the women had to make. In fact, he deployed it.

Facts: Judge Bork did rule in favor of the company. During his testimony, he said the company "offered a choice to the women. Some of them, I guess, did not want to have children." In later testimony, he added: "I suppose the five women who chose to stay on that job with higher pay and chose sterilization—I suppose that they were glad to

have the choice—apparently they were—that the company give them." (Comm. Print Draft, Part 1, p. 450)

(10) HATCH: "Judge Bork ruled in favor of the company." This is political falsehooding at its worst. Judge Bork is solely blamed. It is not mentioned that the court was unanimous. One of the other judges voting to uphold the law as written was Judge, now Justice, Scalia. Indeed the rest of the Circuit Judges refused to overturn the unanimous court ruling.

Facts: Judge Bork wrote the opinion. He is the nominee.

(11) HATCH: "Judge Bork ruled in favor of the company." Blatant sensationalism. It is not mentioned that the law as written by Congress did not include this situation as a "hazard" within the terms of the OSHA Act. To the extent that failure to anticipate this regrettable situation is cause for blame, Congress caused it and should correct it by legislation.

Facts: Wrong. The D.C. Circuit had previously found the exclusion of fertile women from the workplace actionable under the OSHA Act. *United States Steelworkers of America v. Marshall*, 647 F.2d 1189, 1238 n.74 (D.C. Cir. 1980).

(12) HATCH: "Billing consumers." This is incorrect. Neither Bork nor the court could bill or authorize the billing of any consumer. That was FERC's responsibility.

Facts: "Judge Bork's opinion ordered FERC to hold a hearing and to promptly grant a rate increase if Jersey Central's factual contentions are borne out by the record created by the hearing." (Public Citizen Litigation Group, *The Judicial Record of Judge Robert H. Bork*, p.18)

(13) HATCH: "Bork supported an electric utility." This is incorrect. In 1984, the date cited by this account, Judge Bork specifically voted against the utility and sustained the Commission.

Facts: The case cite was mistakenly dated 1984. It should have read 1985 and 1987.

(14) HATCH: "Bork supported an electric utility." Deliberate misleading information. Even in the 1985 and 1987 rehearings of this issue, Judge Bork did not rule on the merits of whether consumers could be billed, but only determined that the FERC had not adequately responded to the evidence of the case.

Facts: The ad does not state on what grounds Bork made his ruling. (See FACTS #12)

(15) HATCH: "Thanks to Judge Bork." Hyperbole. Judge Bork is blamed for a decision of the majority of the D.C. Circuit. This overlooks that the court was unanimous in 1984 in favor of FERC, that the court voted 2-1 in 1985 against FERC, and that the court voted 5-4 in 1987 against FERC. Judge Bork was joined by at least a majority of his colleagues on the Circuit Court.

Facts: See Facts #12.

(16) HATCH: "(. . . 1984)." As noted earlier, this citation ignores that these facts were subject to three separate judicial rulings.

Facts: "When Jersey Central's challenge to FERC's decision first came before the Court, Judge Bork, writing for a unanimous court, rejected all the utility's arguments. 730 F2d. 816 (1984). After Jersey Central asked the court to reconsider its decision, however, Judge Bork switched his position and wrote two opinions siding with the utility, one on behalf of a regular panel of the D.C. Circuit, 768 F.2d 1500 (1985), and a second one on behalf of the full court, 810 F.2d 1168 (1987)." (Public Citizen Litigation Group, *The Judicial Record of Judge Robert H. Bork*, p.18)

(17) HATCH: "No privacy." Misleading. Judge Bork does not oppose "privacy," either per se or as a constitutional value. As a matter of personal preference, he expressed great respect for privacy. He states, for instance, that the 1st, 4th, and 5th Amendments, among others, specifically protect privacy interests.

Facts: While Judge Bork, for example, recognizes that the Fourth Amendment protects against unreasonable searches and seizures, one form of a right to privacy, at his confirmation hearing he reiterated his long-held view that neither the Constitution nor the Bill of Rights provides any general right to privacy: "I do not have available a constitutional theory which would support a general defined right [of privacy]." (Comm. Draft Print, Part 1, p. 266). Judge Bork's "personal preferences" are not the issue; his judicial philosophy is.

(18) HATCH: "Right to privacy in the Constitution." No one else found one either until 1965 when some judges discovered it in the "penumbras of the emanations" of some constitutional phrases. This overlooks that the word "privacy" nowhere appears in the Constitution and that the judicial creation of this undefined right was controversial in 1965 and remains controversial today.

Justices Black and Stewart found no such right at the time. Professors of all backgrounds, from Bickel to Kurland, have likewise criticized the reasoning in this case.

Facts: Wrong. For 75 years, the Supreme Court has relied on privacy rights in the Constitution to protect individuals:

Right "to marry, establish a home and bring up children." (*Meyer v. Nebraska*, 262 U.S. 390 (1923))

Government prohibited from making it a crime to send children to private school. (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925))

Government prohibited from sterilizing a selected group of criminals. (*Skinner v. Oklahoma*, 316 U.S. 535 (1942))

Government cannot prohibit the use of birth control by married couples. (*Griswold v. Connecticut*, 381 U.S. 479 (1965))

Government cannot interfere with the right to raise families in an extended family fashion despite neighbor's disapproval. (*Moore v. City of East Cleveland*, 431 U.S. 494 (1977))

(19) HATCH: "Right to privacy in the Constitution." This overlooks the impossibility of defining a broad constitutional privacy right. As Judge Bork asked, Does this mean privacy to take drugs in your own home, privacy to fix prices in your own home, privacy to abuse a spouse in your own home? Of course not.

Facts: As professor Kathleen Sullivan noted in her testimony:

. . . Justice Harlan long ago gave the most eloquent imaginable answer to Judge Bork's objection that the right of privacy is too broad, capacious, and undefined; he wrote:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . [Our] "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to 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.

*Poe vs. Ullman*, 367 U.S. 497, 542-43 (Harlan, J. Dissenting). And as Justice Powell echoed more recently, the right of privacy is not to be "cut[ ] off . . . at the first conventient, if arbitrary boundary"; rather judges must elaborate that right through "careful 'respect for the teaching of history [and] solid recognition of basic values that underlie our society.'" *Moore v. East Cleveland*, 431 U.S. at 503 (plurality opinion). (Comm. Print Draft, Part 3, pp. 1612-1613)

(20) HATCH: "Supreme Court was wrong." Judge Bork faults the reasoning of the Court, i.e., the invention of unwritten rights, but he called the Connecticut contraceptive law "nutty."

Facts: Judge Bork criticized the *Griswold* decision in a 1971 *Indiana Law Journal* article:

*Griswold* . . . is an unprincipled decision. . . The truth is that the Court could not reach its result in *Griswold* through principle." (Robert Bork, "Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* 1, 8-9 (1971))

(21) HATCH: "Use of contraceptives by married couples a punishable crime." This leaves the impression that married couples were convicted of such a crime. As Judge Bork mentioned, the "nutty" Connecticut statute was never used to punish a married couple for use of contraceptives.

Facts: The Judiciary Committee received a letter from one of the attorneys in *Griswold* who explained that the statute at issue had indeed been enforced in the years prior to the decision in *Griswold*:

There is a decision of the Connecticut Supreme Court of Errors, dated March 6, 1940. . . . [T]here was a prosecution of two doctors and a nurse in violation of the Connecticut statute against the use of contraceptives.

. . . [A]s a result of this decision, nine Planned Parenthood clinics which had been providing contraceptive services until they were closed, remained closed until the decision of the United States Supreme Court in *Griswold* v. *Connecticut* in 1965. (Comm. Print Draft, Part 1, 572)

(22) HATCH: "Turn back the clock on civil rights." Unfounded slander. Judge Bork has advanced civil rights in all his public service capacities. He has never "turned back the clock." Robert Bork has never advocated (as Solicitor General) or rendered a judicial decision (on the D.C. Circuit) that was less sympathetic to minority or female plaintiffs than a majority of the Supreme Court. As S.G., Judge Bork won several significant advances for civil rights, including prohibition of private discriminatory contracts (*Runyon* v. *McCrary*) and redistricting to enhance minority voting strength (*United Jewish* v. *Cary*).

Facts: In writing and speeches, Bork opposed major laws and landmark Supreme Court decisions protecting civil rights. For example, he criticized the outlawing of discrimination in public accommodations and employment, decisions banning racially restrictive convenants, state poll taxes and literacy tests, and the decision mandating "one man, one vote." Bork has never written contemporaneously in support of any civil rights advance. When nominated to be Solicitor General, he testified about the constraints on his role: "I view it as a part of being the attorney for the Government, . . . I will enforce the policy of the Government." He was also asked if he "could sign a brief that was inconsistent with [his] personal views," to which he responded, "I think I can, Senator, and I know I have." (Solicitor General Hearings, January 17, 1973). As a judge on the D.C. Circuit Court,

Judge Bork was constitutionally bound to uphold Supreme Court precedent.

(23) HATCH: "Ugliness." "Ugliness" was indeed the word Professor Bork used to describe coercion of private accommodations owners, but "ugliness" was also the exact word used in the same article to castigate all forms of racial discrimination. Professor Bork's position, even though later recanted, should not be portrayed in a light that appears insensitive to racial prejudice.

Facts: Former Attorney General Nicholas de B. Katzenbach said this in testifying before the Judiciary Committee on Judge Bork's opposition to legislation banning discrimination in public accommodations:

"His 1963 article in the New Republic . . . is one that I remember very well. It was then, and is now, absolutely inconceivable to me that a man of intelligence and perception and feeling could have opposed that legislation on the grounds that it deprived people of a feedom of association.

It meant and it could have only meant, that he valued the right of people in public situations to discriminate against blacks if that is what they chose to do.

What kind of judgment does that demonstrate? (Comm. Print Draft, Part 1, p. 870)

(24) HATCH: "How Professor Bork described a law." Selective quoting out of entire context. This 1963 statement was recanted over fourteen years ago. Judge Bork's admission of error is well-known, yet nowhere mentioned in this tabloid.

Facts: We said that he opposed the law, which is true, Bork publicly changed his mind on the law 10 years later. But he did so only when asked at his confirmation hearings for Solicitor General and on grounds (that the law had worked and been accepted) that fell far short of his original criticisms. Bork's supporters note that some Senators like Senator Thurmond also opposed the public accommodations law. But, as William Coleman and others pointed out, those Senators were responding to the demands of a constituency that Robert Bork did not have.

(25) HATCH: "Criticized decisions that stopped states from using poll taxes." Half truth. Judge Bork personally opposes poll taxes; he criticized only the reasoning by which the Court reached its result—position shared by Justices Harlan, Stewart, Frankfurter, Jackson, Brandeis, Cardozo, and Black, not to mention a broad array of constitutional scholars.

Facts: For decades poll taxes were used to keep poor people, mostly minorities, from voting. Judge Bork called the poll tax "a very small tax, it was not discriminatory and I doubt that it had much impact on the welfare of the nation one way or the other." (Senate Hearings to be Solicitor General, January 17, 1973, p.17)

At his recent hearing, he reiterated: "It was just a $1.50 poll tax." (Comm. Print Draft, Part 1, p.129)

(26) HATCH: "Criticized decision that stopped states from using . . . literacy tests." Half truth. Judge Bork personally opposes literacy tests; he criticized only the reasoning by which the Court reached its result—a position shared by Justices Harlan, Stewart, Burger, Black, Blackmun, and Powell, not to mention a broad array of constitutional scholars.

Facts: Bork characterized the decisions upholding Congressional authority to ban literacy tests as "very bad, indeed pernicious law." Under his theory, the courts and Congress would be prevented from taking effective action to ban literacy tests, and the only remedy would be through a constitutional amendment.

(27) HATCH: "Poll taxes . . . to keep minorities from voting." This is incorrect. This misstates the Supreme Court case in question. The Court in *Harper* pointedly mentions that the case involved no evidence of racial discrimination.

Facts: In its 1966 decision in *Harper*, the Supreme Court expressly noted that the "Virginia poll tax was born of a desire to disenfranchise the Negro." (383 U.S. at 666 n.6) The Court decided that the tax, which had a disproportionately adverse impact on black citizens, was a form of wealth discrimination that violated the Fourteenth Amendment.

(28) HATCH: "Poll taxes . . . to keep minorities from voting." This is a grossly unfair characterization. Judge Bork stated that if the *Harper* decision had involved racial discrimination, he would not have criticized it. He would vote to strike down any discriminatory poll tax.

Facts: As noted in Facts #27 above, the poll tax in the *Harper* case arose from a desire to disenfranchise blacks. But even if that were not the case, Bork's view that a $1.50 tax should be permissible demonstrates insensitivity to the impact of *any* tax on poor voters. In this country, the basic right to vote should not be conditioned on one's ability to pay a poll tax, no matter how small.

(29) HATCH: "Literacy tests . . . to keep minorities from voting." This is incorrect. This misstates the Supreme Court case in question. The Court in *Katzenbach* pointedly mentions that the case involved no evidence of racial discrimination.

Facts: The impact of the literacy tests was to keep minorities from voting, in this case U.S. citizens educated in Puerto Rico.

(30) HATCH: "Literacy tests . . . to keep minorities from voting." This is a grossly unfair characterization. Judge Bork stated that if the *Katzenbach* decision had involved racial discrimination, he would not have criticized it. He would vote to strike down any discriminatory literacy test.

Facts: The point of the Voting Rights Acts upheld in *Katzenbach* was to establish an effective means for enfranchising minorities. Racial discrimination in voting had been unlawful since adoption of the Fourteenth and Fifteenth Amendment. Judge Bork's statement that he opposed literacy tests is irrelevant to whether he would allow effective ways to eliminate unlawful practices, such as literacy tests that disenfranchised thousands of voters prior to passage of the 1965 Voting Rights Act.

(31) HATCH: "Opposed the decision that made all Americans equal at the ballot box—'one man-one vote.'" This is ambiguous and incorrect. It seems only to imply that Judge Bork opposed the outcome in *Baker* v. *Carr*, the landmark case that made reapportionment decisions justiciable. In fact, Judge Bork agrees with *Baker*.

Facts: Judge Bork called "one man-one vote" a "too much of a straightjacket" and said, "I do not think there is a theoretical basis for it." (Solicitor General Hearings, January 17, 1973, p.13). He also said that it "does not come out of anything in the Contitution." (Comm. Print Draft, part 1, p.131)

(32) HATCH: "Opposed the decision that made all Americans equal at the ballot box—'one man-one vote.'" If this language refers to Judge Bork's questions about the need for mathematical perfection in apportionment decisons, it is incorrect to refer to this concern as opposition to "the decision" because there were many such decisions (e.g., *Preisler* (1969), *Karcher* (1983)).

Facts: Our language refers to the fact that Bork opposed the landmark decision (*Reynolds v. Sims*) that established the principle of "one man, one vote." We make no reference to the many decisions implementing that principle, which Judge Bork presumably opposed as well. Bork continued to oppose the principle of "one man, one vote" at his confirmation hearings:

[I]f the people of this country accept one man, one vote, that is fine. They can enact it any time they want to. I have no desire to go running around trying to overturn that decision. But as an original matter, it does not come out of anything in the Constitution and if the people of this country want it, they can adopt that apportionment at any time they want to. (Comm. Print Draft, Part 1, p.131)

(33) HATCH: "Opposed the decision that made all Americans equal at the ballot box—'one man-one vote.'" It is unfair to suggest that Judge Bork opposes fairness "at the ballot box." Judge Bork endorses the position of Justices Stewart, White, Rehnquist, and Burger which would sustain a rational state plan that does not frustrate the majority will—a very fair alternative to mathematical perfection.

Facts: Judge Bork fails to see the impact of malapportioned legislatures on minority rights. Barbara Jordan, in her testimony before the Committee, movingly described the impact of Bork's view in real terms on her own attempts to gain political office in Texas where the legislature was malappropriated. Not until the Supreme Court decision establishing one man-one vote, was Texas required to reapportion. She says of Judge Bork's inability to find a "theoretical basis" for one man-one vote:

Maybe there is no theoretical basis for one person, one vote, but I will tell you this much. There is a common sense, natural, rational basis for all votes counting equally." (Comm. Print Draft, Part 1, p.786)

(34) HATCH: "Should America go back." If you repeat a falsehood often enough, someone will believe it. Once again this suggests that Judge Bork, who advanced nearly every significant civil right, would somehow send America back.

Facts: There is only one misstatement above—Senator Hatch's statement that Judge Bork "advanced nearly every significant civil right."

(35) HATCH: "And refight settled civil rights battles." Judge Bork would not reopen "settled civil rights battles." In fact, he approves of *Brown v. Board* and testified repeatedly that he would respect and sustain precedents in this area.

Facts: *Brown v. Board of Education* is not the issue. As Senator Lloyd Bentsen (D-Tex.) put it: "As far as I can determine, in virtually every case where he has taken a position, Judge Bork has opposed the advancement of civil rights over the past 25 years. . . . We do not need any more narrow legal debate on what is right and just for America when it comes to civil rights. We have already answered those questions."

(36) HATCH: "If Robert Bork is on the Court, we may have to." This ignores his record on the Circuit Court—the best indicator of his performance on the Supreme Court. As a judge, he sustained every civil rights law he faced. He struck down a South Carolina voting plan that might have been discriminatory (*Sumter County*), applied the Equal Pay Act to the foreign service (*Ososky, Palmer*), permitted a discrimina-

tion case against the Navy (*Emory*), and punished discrimination against stewardesses (*Laffey*).

Facts: As a judge on the Circuit Court, he was bound by precedent. On the Supreme Court he would not be so constrained. Bork himself acknowledged this in a speech to Canisius College in 1985:

I don't think that in the field of constitutional law, precedent is all that important. . . . [I]f you become convinced that a prior Court has misread the Constitution, I think it's your duty to go back and correct it. . . . I think the importance is what the Framers were driving at, and to go back to that.

See study by National Women's Law Center, "Setting the Record Straight: Judge Bork and the Future of Women's Rights," and the NAACP Legal Defense and Education Fund, Inc.'s study on Judge Bork's views on race discrimination, which document Judge Bork's troubling record regarding minority and women's rights.

(37) HATCH: "No day in Court." This creates the erroneous impression that Judge Bork will deny access to meritorious claims. To the contrary, he has granted court access to the extent possible under constitutional and statutory doctrines of justiciability.

Facts: The headline refers to a conclusion from Public Citizen Litigation Group's study analyzing cases in which Judge Bork participated and there was dissent. See *The Judicial Record of Judge Robert H. Bork*, pp. 49-60.

(38) HATCH: "Bork has long believed that courts should not hear certain kinds of cases." This falsely suggests that Judge Bork has a "hit-list" of worthy claims he will not hear. In fact, he will hear any kind of case that is justiciable. This also creates the impression that Judge Bork alone has this peculiar "hit-list" when the Supreme Court has cited his *Vander Jagt* standing opinion with approval. He agrees with the Supreme Court. It is his critics who have the false list of cases.

Facts: Judge Bork has gone to such extremes in denying access to the courts that he has evoked strong responses from his judicial colleagues. For example, when Judge Bork dissented in *Bartlett v. Bowen*, a case that allowed a constitutional challenge under the Medicare Act, Judge Harry Edwards wrote:

The dissent's sovereign immunity theory in effect concludes that the doctrine of sovereign immunity trumps every other aspect of the Constitution. . . . If we follow the reasoning of the dissent to its logical conclusion, Congress would have the power to enact a welfare law authorizing benefits to be available to white claimants only and to immunize that enactment from judicial scrutiny by including a provision precluding judicial review of benefits claims. . . . we see no evidence that *any* court, including the Supreme Court, would subscribe to the dissent's theory in such a case. (Slip opinion at 32-33, emphasis in original)

In several speeches, including an April 1987 address to the Brookings Institution, Judge Bork has called for the removal of many kinds of cases from Article III courts to Article I tribunals. The kinds of cases that Bork says do not merit the attention of Article III courts include those resulting from "a vast network of legislation and regulation about clean air, clean water, fuel, electric power, medicines, food, education, safety, health, assistance to the poor, the unemployed, the disabled, and so on." (Alternatives to Continued Growth, April 11, 1987, p. 9). Expounding on the same theme in 1976, Judge Bork wrote, "Some cases might require rigorous procedural and evidentiary rules as well as the assistance of counsel, but that degree of rigor could perhaps be dispensed with, for example in the ordinary social security case." ("Dealing with the Overload in Article III Courts," The Pound Conference, 70 F.R.D. 231, 239)

(39) HATCH: "In 14 out of 14." Selective statistics. By selecting the right 14 cases, you can get 100% for any proposition. The question this ought to raise is who selected the 14 cases, not the 100% conclusion.

Facts: The fourteen cases were all of Judge Bork's split decision cases involving standing as cited in the Public Citizen Litigation Group study.

(40) HATCH: "Controversial cases." Falsehood statistics. The only cases chosen are nonunanimous or split decision. These are less than 10% of Judge Bork's court cases. There is no support for the conclusion that clear legal outcomes are required in unanimous cases. Split decisions are coincidental because three-judge panels are chosen randomly.

Facts: Actually, 14% of the cases Judge Bork was involved in were nonunanimous. There is a consensus that nonunanimous decisions generally involve important legal principles more often than do unanimous. Most of the unanimous decisions involve relatively simple, straight-forward and noncontroversial issues.

(41) HATCH: "Controversial cases." The analysis of 14 cases is skewed to reach a particular result. Even some nonunanimous cases are left out of the sample to ensure the preconceived result. Some unanimous cases are included for the same purpose. For example, *Haitian Refugee Center*, a unanimous affirmance is included because one judge had a different rationale.

Facts: Contrary to the Hatch commentary, Judge Edwards identified his opinion in *Haitian Refugee Center*, 809 F.2d 794 (1987), as a dissent. A reading of the opinion makes it clear that Judges Bork and Edwards disagreed on the issue of standing.

(42) HATCH: "Controversial cases." Categorizing cases, regardless of legal issues, based on the characteristics of the winners and the losers is illegitimate and misleading. One example. In the *Norfolk & Western* case, Judge Bork grants a railroad access to the courts to sue, but instead this case is classified as a "pro-business" case and not included in the "no day in court" category. This categorization is skewed to serve the interests of the muckraker.

Facts: The *Norfolk & Western* case was classified as "pro-business" by Public Citizen Litigation Group because the Court was split on the regulatory issue and not on the standing issue.

(43) HATCH: "Controversial cases." This creates the false impression that Judge Bork always decides cases one way. In fact, he agreed with Carter-appointee Ginzburg [sic] 91% of the time, with Carter-appointee Mikva (an avowed liberal) 82% of the time.

Facts: In assessing the Hatch statistics, one must remember that nearly 90% of the docket in the D.C. Circuit Court involves little, if any, controversy or disagreement among the judges. However, in nonunanimous cases Judge Bork sided with the five most liberal members of the D.C. Circuit 6-19% of the time.

(44) HATCH: "Social security, military veterans, minorities, the handicapped, and the homeless." False impression. This list of sympathetic groups creates the impression that Judge Bork customarily rules against minorities and disadvantaged. In fact, Judge Bork has ruled in favor of women (*Palmer, Ososky, Laffey*), homosexuals (*Doe*), blacks, (*Emory, Sumter County*), and has never taken a position less sympathetic to these groups that [sic] the Supreme Court.

Facts: All of the examples cites in the Hatch commentary are unanimous cases. This information does not address any of the points in the ad regarding the issue of standing.

(45) HATCH: "Big business is always right." Repeat a lie often enough. Judge Bork's record is one of great sympathy for minorities and women.

Facts: Bork's record in nonunanimous cases favors business over individuals and government. See Public Citizen Litigation Group study.

(46) HATCH: "Bork has already made up his mind." Character assassination. Judge Bork is accused of having a closed mind at this point. Later in the same article, he is accused of being too open to change. Both cannot be true.

Facts: Judge Bork's judicial philosophy has led to a clear pattern of results. For example, Judge Bork voted for business in 8 out of 8 nonunanimous decisions and against environmental groups, workers, consumers or individuals in 26 out of 28 cases. See Public Citizen Litigation Group study, pp. 3-4.

(47) HATCH: "96%", "5 out of 5", "10 out of 10." Selective statistics, see 39 above. Choose right cases and you can get 100% for any result. For instance, several cases chosen, e.g., *Norfolk & Western*, feature one business suing another. No wonder that a business wins.

Facts: *Norfolk & Western* was a unanimous decision. See facts #45 and 46.

(48) HATCH: "96%", "5 out of 5", "10 out of 10." Falsehood statistics, see 40 above. For example, *Dronenburg*, one of Judge Bork's most controversial decisions, is not included because it was unanimous.

Facts: See facts #45 and 46.

(49) HATCH: "96%", "5 out of 5", "10 out of 10": Skewed analysis, see 41 above. For instance, Judge Bork rules for a small business in a suit against the federal government and it is still called a "big" business victory. (*Citizens Coordinating Committee*)

Facts: Wrong again. In *Citizen Coordinating Committee*, 765 F.2d 1169 (1985), Judge Bork ruled against the small business on a standing issue.

(50) HATCH: "96%", "5 out of 5", "10 out of 10": Miscategorizing cases, see 42 above.

Facts: Previous responses apply.

(51) HATCH: "96%", "5 out of 5", "10 out of 10": False impression, see 43 above.

Facts: Previous responses apply.

(52) HATCH: "Book on antitrust laws:" Misleading characterization of book. In fact, six of the nine Justices of the Supreme Court have cited this book and all nine have joined opinions citing it. This is the leading treatise of antitrust law in America.

Facts: If anything, we should have called it a "controversial book on antitrust laws." After all, in the book Bork called the entire body of Supreme Court precedent in the antitrust field "mindless law." (p.411). According to Dean Robert Pitofsky of Georgetown University Law Center, if Bork's writings are a fair guide, he would vote to overrule a substantial proportion of precedent in antitrust law.

(53) HATCH: "Conglomerate mergers:" Selective quoting out of context. A full exami-

nation of the book indicates that Judge Bork's entire theme is consumer welfare. He indicates that sometimes antitrust laws frustrate consumer welfare.

Facts: Bork uses "consumer welfare" as a synonym for "efficiency." Bork's view that antitrust laws should not be applied to conglomerate mergers would allow very large concentrations of economic power with serious consequences for the consumer.

As the Attorney General of West Virginia, Charles Brown testified:

We would see the institutional non-enforcement of the Federal level and the gradual erosion of this enforcement by the States. Real victims of a Bork antitrust era on the Supreme Court will be consumers, small business entrepreneurs, and mid-sized corporations. For the individual buyer and the bold business person, there will be nothing free about the market created by Judge Bork. Price fixing and exclusive dealing will rule the marketplace. Innovative industrialists will be absorbed in the great corporate giants." (Comm. Print Draft, Part 3, p.1981)

(54) HATCH: "Look past his resume:" An [sic] thinly veiled attempt to short-change the individual with the most impressive legal resume in the country.

Facts: No one has questioned Judge Bork's education and legal credentials. It is Bork's view of the Constitution that is at issue.

(55) HATCH: "Consistently ruled against the interests of the people." Outright lie. See 22 and 36 above.

Facts: See FACTS #22 and 36 above.

(56) HATCH: "Against our constitutional rights:" Outright lie. See 22 and 36 above, just for starters.

Facts: See FACTS #22 and 36 above.

(57) HATCH: "His extremist philosophy:" Hallow [sic] name calling. The real question is who is "extreme." A fair reading points more to Judge Bork's critics than to him.

Facts: See FACTS #3 above.

(58) HATCH: "Views so extreme:" Repeat a lie often enough. . .

Facts: see FACTS #3 above.

(59) HATCH: "White House image-makers:" Judge Bork's days of testimony before the Judiciary Committee had nothing to do with image-making.

Facts: Even Richard Viguerie acknowledged the White House efforts to make Judge Bork over as a moderate, "The White House has decided to package him as a moderate. . . . since when do conservatives want to fight and bleed and die to get moderates on the Supreme Court? (*Boston Globe*, September 20, 1987)

(60) HATCH: "Repackage:" Before he was too rigid, now the insinuation is that he is changing. Both cannot be correct.

Facts: The repackaging does not mesh with reality. Bork is far from the mainstream of traditional Supreme Court jurisprudence.

(61) HATCH: "Bork himself is changing his image:" This is simply false. Many of the views Judge Bork is reputed to have changed, including his views on equal protection and respect for original intention, were first articulated in 1971.

Facts: As Bruce Fein, Heritage Foundation consultant, noted: "Bork is bending his views to improve his confirmation chances and it's a shame. . . . He is trying to fold his views into the mainstream." (*Boston Globe*, September 20, 1987). Bork, in meeting with Senators and in his testimony has adopted positions that conflict with his previously stated views. Perhaps the most noteworthy aspect of Judge Bork's shift is his abrupt about-face in discussing equal protection for the rights of women under the Fourteenth Amendment. As recently as three weeks prior to his nomination in a USIA Worldnet interview, he said: "I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity." However, in his confirmation hearings he shifted his view and said that the Equal Protection clause protects women.

(62) HATCH: "Bork . . . lobbying the Senate and the media:" Ironic charge. The most expensive lobbying campaign ever launched against a judicial candidate accuses the judge of lobbying. In fact, he has done nothing but appear, at the request of Senators, to answer their questions.

Facts: Judge Bork gave an unprecedented number of interviews to the press after he was nominated, he met with Senators, many at *his* own initiation, and even met with constituent groups, including meeting with representatives of Jewish organizations.

(63) HATCH: "People For The American Way:" Hypocritical. In a speech before the Federalist Society months before the nomination, Tony Podesta, Director of PFTAW, answered that he would support Antonin Scalia, Robert Bork, or Frank Easterbrook, if nominated for the Supreme Court.

Facts: The pivotal seat filled by Justice Lewis Powell was not vacant when Tony Podesta, former President of People For The American Way, spoke to the Federalist Society. At the meeting Podesta did say that Bork was more qualified to sit on the bench than Dan Manion who was under consideration at that time, which is true. He did not *endorse* Robert Bork for the Supreme Court.

(64) HATCH: "Committed to protecting American values:" How is it "protection of American values" to undermine the integrity and independence of the Judiciary with a political campaign?

Facts: The debate over the Bork nomination was an example of how our democratic system works best when the people participate. It was a debate over democratic values: from the proper role of the Court to whether free speech extends beyond political expression; and whether Supreme Court Justices should respect precedent.

(65) HATCH: "Values never faced a tougher challenge:" Judge Bork embodies American values. He is not their enemy.

Facts: *The New York Times* editorial "Against Robert Bork" said it best in describing how "His Bill of Rights is Different:"

Robert Bork's Constitution is smaller and more closed than the living document America celebrates in this its bicentennial year. His is so different from the charter produced by two centuries of Supreme Court interpretation that every moderate senator should feel justified in voting against his elevation. . . .

Even in his latest appearance he declined to revise his pinched view of civil rights. He has criticized some of the Supreme Court's landmark civil rights decisions for reasons that vary from case to case. The bottom line, however, is almost always the same—unfavorable to minorities.

. . . Repeatedly over the years, Judge Bork has taken a narrow view of the rights of expression. He declared that only the "core" value of political speech was immune from government restraint. Not until 1984 did he allow as how art and literature might be protected, and then only because they sometimes relate to politics. His conversion, late, is also limited.

Even this limited liberty, in his view, remains utterly at the mercy of the majority when speech becomes advocacy of illegal action. . . .

. . . As recently as June 10, just before his nomination, he told an interviewer that he thought the 14th Amendment, which covers all persons, "should have been kept to things like race and ethnicity" and not extended to women. . . .

. . . The Constitution does not state a right of privacy beyond freedom from unreasonable searches and the like; thus Judge Bork does not recognize its existence. Yet great judges and justices have found room for personal privacy in the concept of liberty enshrined in the Fifth and Fourteenth Amendments. (*The New York Times*, October 5, 1987)

(66) HATCH: "Support our Action Fund:" Finally the motives are clear. Fundraising. It can be profitable to create a "monster" and then cast yourself as the only knight—albeit an impecunious knight—able to rid the land of scourge.

Facts: People For would have been more than happy to forego a campaign against a mainstream conservative nominee. However, President Reagan chose instead a nominee who has a grudging, mechanistic view of the rights protected by the Constitution and the role of the courts and who for 25 years has attacked the Supreme Court's landmark decisions protecting individual rights and liberties and has repeatedly expressed a willingness to overturn those decisions. People For worked with many groups in a broad-based coalition to oppose a Supreme Court nominee whose confirmation we believe would be disastrous for the Constitution and for the country. All of the contributions receive were spent to further this effort.

As a conservative activist gloated about the Bork nomination: "We have the opportunity now to roll back 30 years of social and political activism by the Supreme Court." (*The Washington Post*, July 2, 1987). We did not believe that such a prospect was in our nation's best interest.

(67) HATCH: "Bork vs. the People:" See 1 above.

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PEOPLE FOR THE AMERICAN WAY ACTION FUND'S PUBLIC EDUCATION CAMPAIGN IN OPPOSITION TO THE CONFIRMATION OF ROBERT H. BORK: EXPLANATORY NOTES

When Robert Bork's nomination to the Supreme Court began to appear doomed, his supporters started attacking advertisements in opposition to the nomination produced by the People For the American Way Action Fund. We stand by the accuracy and fairness of our efforts to reiterate that their themes form the underpinnings of our broad concerns with the nomination.

The Action Fund ads distilled the case against Bork's nomination from his 25 year record of writings, speeches and judicial opinions into the available space of a newspaper page and 60 seconds of television time. While reaching only a small fraction of the audience who watched Bork's own testimony or read news coverage of the hearings, these ads enabled us to reach a wider audience than the lengthy reports we also prepared.

In light of the controversy the ads have engendered, we have prepared the following factual and contextual background. Part I discusses in depth three issues in the Gregory Peck ad that Bork's supporters have criticized. Part II documents assertions made in both the TV and print ads.

I. CONTEXT OF BORK AND PFAW STATEMENTS ON CIVIL RIGHTS ISSUES: DOCUMENTATION FOR THE TV AD NARRATED BY GREGORY PECK

*A. Poll taxes*

Poll taxes were one of several devices adopted by Southern states after the end of Reconstruction as a means of disenfranchising Negro citizens. Between 1890 and 1902, Tennessee, Mississippi, Alabama, North Carolina, Virginia and Texas were among the Southern states that adopted the poll tax. There was no mystery about the purpose of the poll taxes. As the Supreme Court recognized in the *Harper* case, the tax in Virginia and elsewhere was born of a specific desire to keep blacks from voting. And it was immediately effective in achieving its purpose. In Tennessee, for example, the tax was adopted in 1890, and later that year, the *Memphis Daily Avalanche* reported that the "Negro was practically disenfranchised by the law compelling every voter to show his poll tax receipt."

As the years progressed, poll taxes, while remaining a tool for excluding blacks from voting, became less important than other devices such as literacy tests. One reason was that, in order to protect poll taxes from law suits alleging that they were racially discriminatory, they had to be applied to whites as well as blacks. In contrast, literacy tests could be administered so that whites passed while blacks failed.

Nevertheless, many states were quite content to keep white, as well as black, political participation low and thus continued to apply the poll tax. In Virginia at the time the *Harper* case was brought in 1964, only 45% of voting age black citizens were registered and only 56% of voting age whites. Clearly, the tax had a disparate impact on blacks, many more of whom were poor than whites. But it was the fact that the tax hurt whites as well as blacks that led the Supreme Court to consider the issue as one of *economic* discrimination while recognizing the *racial* origin of the tax.

And it was in that context that the Court decided by a 6–3 vote that "wealth or fee paying has . . . no relation to voting qualifications" and that the poll tax violated the equal protection clause of the Fourteenth Amendment.

Bork attacked the validity of the *Harper* decision in 1971 and then argued at his 1973 confirmation hearings that "it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the nation one way or another."

There is no question that Bork "defended poll taxes," as People For's ad stated. In addition, Bork was both wrong and callous in his remarks. As Senator Heflin pointed out, a $1.50 poll tax that had to be paid 6 months in advance, at the courthouse with all back taxes for three years, was certainly a burden on blacks and poor people. Secondly, Bork was playing with words when he said it was not discriminatory. He knew it was discriminatory in *economic* terms, but had previously expressed the opinion that the 14th Amendment does not cover economic discrimination. And he surely knew of the racial origins of the tax and that it continued to have a disproportionate effect on blacks. Finally, the "impact of the tax" had been demonstrated by a surge in black voting participation in *federal* elections after the 24th Amendment abolished use of the poll tax in *federal* elections, a surge that was not matched in state elections. In addition, after the *Harper* decision and the Voting Rights Act of 1965, black registration went from 45% to 61% in 1976 and white registration from 55% to 67%. The larger impact can be measured in the progress that race relations have made in the South since the enfranchisement of black people, progress that has benefited blacks and whites alike.

*B. Literacy tests*

The issue here is Judge Bork's description of Supreme Court decisions in two voting cases (*Katzenbach* v. *Morgan* and *Oregon* v. *Mitchell*) as "very bad, indeed pernicious constitutional law."

*Katzenbach* dealt with one provision of the historic Voting Rights Act of 1965—a provision that said that citizens who completed the 6th grade in accredited schools in Puerto Rico in which instruction was given in Spanish should not be disqualified because of inability to read or write English.

*Mitchell* dealt with a provision of a 1970 law which extended the ban on literacy tests contained in the 1965 Voting Rights Act (which applies mainly to Southern states) to *all* states and *all* types of elections.

In both cases and, (in *Mitchell* unanimously), the Supreme Court upheld the law as a proper exercise of Congressional authority under the 5th section of the Fourteenth Amendment. That provision says that "the Congress shall have power to enforce by appropriate legislation, the provisions of the article." In the Supreme Court's view, that provision was an affirmative grant of authority to prevent or forbid practices that would contravene the broad purpose of the Fourteenth Amendment. In Bork's view, all that Congress could do was to ban practices that the Supreme Court had said (or would say) violated the Fourteenth Amendment. So, if the lower court had said that literacy tests were unconstitutional, Congress could prescribe penalties for state officials who continued to impose them. But, because the Supreme Court had said some years earlier that literacy tests were not *per se* unconsitutional, in Bork's view, Congress could not prohibit them.

The difference between Bork's view and the Court's view of Congressional authority to protect civil rights is of great practical importance. Literacy tests were the prime device used until 1965 to keep blacks from voting. In Mississippi in 1964, largely due to the literacy test and intimidation, only 28,500 blacks were registerd to vote—6.7% of the voting age population. Yet Congress had given the Justice Department authority to attack racially discriminatory practices in the courts in 1957. The fact is that some years later, in the 46 counties of Mississippi and elsewhere in the South where suits were brought, only 37,146 Negroes of voting age were registered to vote.

It was only when Congress adopted the Voting Rights Act of 1965—striking down such tests in places where black registration was low—that things began to change significantly. Bork did not attack this particular provision of the Voting Rights Act. But his argument against Congressional authority—that Congress could not go beyond the Courts in declaring rights—would have applied. The courts had not said that literacy tests would be barred simply because black registration was low.

If his views had prevailed, literacy tests would still be valid, except where there was explicit and intentional racial discrimination, and voting participation by blacks, Puerto Ricans and other Hispanic citizens, would be much lower than it is today.

What Bork said is that, except in limited circumstances, neither Congress nor the Supreme Court could extend voting opportunities by curbing the use of literacy tests. That would have left only the difficult route of a constitutional amendment—something Bork did not advocate.

That most certainly was a defense of literacy tests as People For's ad said.

*C. Public accommodations*

Robert Bork wrote in the *New Republic* on August 31, 1963:

There seems to be a strong disposition on the part of proponents of the legislation [Interstate Public Accommodations Act] simply to ignore the fact that it means a loss of a vital area of personal liberty . . . The legislature would inform a substantial body of the citizenry that in order to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate . . . The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

He added, "They [those who sit-in] are actually part of a mob coercing and disturbing other private individuals on the exercise of their freedom."

These words appeared three days after the historic march on Washington where 200,000 people participated in a demonstration for "jobs and freedom" and where Martin Luther King, Jr. made his "I have a dream" speech. Shortly after the August 31 piece, Bork reiterated his view in the *New Republic* in a reply to his critics.

Bork's words came in the context of widespread exclusion of black people from hotels, restaurants, parks, theaters and other places of public accommodation throughout the South and Border States. Black families travelling by automobile to visit friends or relatives in other towns had to plan as if going on the most perilous foreign journey. They had to know where they could find the one restaurant (probably owned by a black person) where they could eat, where they might find a gasoline station where their children would be allowed to go to the restroom, where they could find lodgings with a black family.

It was in this context that Robert Bork defended the "freedom" of whites to discriminate and described the public accommodations law as embodying "a principle of unsurpassed ugliness."

In justification of these views, Bork supporters note that he publicly changed his mind on the law 10 years later. But he did so only when asked at his confirmation hearings for Solicitor General and on grounds (that the law had worked and been accepted) that fell far short of his original criticisms. His supporters also note that some Senators like Senator Thurmond also opposed the public accommodations law. But, as William Coleman and others pointed out, those Senators were responding to the demands of a constituency that Robert Bork did not have.

There can do no question that Bork "opposed the civil rights laws that ended 'whites only' signs at lunch counters," as People For's ad stated. Bork's position that the bill had "serious constitutional problems" was rejected by a unanimous Supreme Court in 1964.

In 1963, Nicholas deB. Katzenbach was Deputy Attorney General. At Bork's recent

confirmation hearings, Katzenbach testified:

His 1963 article in *The New Republic* . . . is one that I remember very well. It was then, and is now, absolutely inconceivable to me that a man of intelligence and perception and feeling could have opposed that legislation on the grounds that it deprived people of freedom of association.

It meant, and it could only have meant, that he valued the right of people in public situations to discriminate against blacks if that is what they chose to do. What kind of judgment does that demonstrate? (Comm. Print Draft, Part 1, p. 870.)

II. DOCUMENTATION FOR TV AND PRINT ADS

Statements made in the Gregory Peck TV Ad and the "Robert Bork v. The People" print ad are based on Judge Bork's own statements and his judicial record. Each statement is repeated below, followed by the factual documentation on which we relied.

*A. "The Last Word" Gregory Peck TV Ad*

"He defended poll taxes . . ."

Hearings before the Committee on the Judiciary, U.S. Senate, 93rd Congress, 1st Sess., on the Nomination of Robert H. Bork to be Solicitor General, Jan. 17, 1973, p. 17:

*Senator Tunney:* Have you a position with respect to the correctness of the Supreme Court's decision in *Harper v. Virginia Board of Elections*, which held that the imposition of the poll tax was unconstitutional?

*Robert Bork:* . . . I think I have previously indicated that that case, as an equal protection case, seemed to me wrongly decided . . . As I recall, it was a very small tax, it was not discriminatory and I doubt that it had much impact on the welfare of the nation one way or the other.

Bork, "Forward," *The Constitution and Contemporary Constitutional Theory*, Center for Judicial Studies, 1985:

[T]he Court frequently reached highly controversial results which it made no attempt to justify in terms of the historic Constitution . . . I offer a single example. In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court struck down a poll tax used in state elections. It was clear that poll taxes had always been constitutional, if not exacted in racially discriminatory ways, and it had taken a constitutional amendment to prohibit state imposition of poll taxes in federal elections. That amendment was carefully limited so as not to cover state elections. Nonetheless, the Supreme Court held that Virginia's law violated the equal protection clause, saying little more than, "[W]e have never been confined to historic notions of equality . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."

Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Hearings before the Committee on the Judiciary of the United States Senate, 100th Cong., 1st Sess., September 15, 16, 17, 18, 19, and 21, 1987, Comm. Print Draft, Part 1, p. 129: [1]

*Senator Kennedy:* [H]ave [you] changed *the view that the Supreme Court was wrong in the Harper case to hold that poll taxes are unconstitutional?*

*Judge Bork: I think it was [wrong], and I will tell you why . . . [I]f that had been a poll tax applied in a discriminatory fashion,* it would have clearly been unconstitutional. It was not. I mean, there was no showing in the case. It was just a $1.50 poll tax.

[NOTE: In its 1966 decision in *Harper*, the Supreme Court expressly noted that the "Virginia poll tax was born of a desire to disenfranchise the Negro." 383 US. at 666 n. 6]

"[He defended] literacy tests which kept many Americans from voting."

Judge Bork has criticized Supreme Court decisions that upheld the power of Congress to limit or prohibit literacy tests used by states which had the effect of inhibiting minority electoral participation:

Hearings before the Committee on the Judiciary, U.S. Senate, 93rd Congress, 1st sess., on the Nomination of Robert H. Bork to be Solicitor General, Jan. 17, 1973, p. 16:

Well, insofar as Katzenbach against Morgan says, as I read it to say, that Congress controls the content of constitutional protection, I think that is incorrect because I think that it is ultimately under the tradition of judicial review we have had in this country."

Bork, Speech, 7th Circuit, undated, p.5:

*Katzenbach v. Morgan* is terrible constitutional law. It stands for a revolution in the constitutional roles of the judiciary and the legislature.

Hearings before the Subcommittee on the Separation of Powers of the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st Sess., on S.158 (The Human Life Bill), 1982, p. 310:

[Regarding *Katzenbach v. Morgan* and *Oregon v. Mitchell*], each of these decisions represents a very bad and, indeed, pernicious constitutional law.

"He opposed the civil rights law that ended 'whites only' signs at lunch counters."

Bork, "Civil Rights—A challenge," *The New Republic*, August 31, 1963:

There seems to be a strong disposition on the part of proponents of the legislation [Interstate Public Accommodations Act] simply to ignore the fact that it means a loss in a vital area of personal liberty . . . The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate . . . The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

"He doesn't believe the Constitution protects your right to privacy."

"An Interview with Judge Robert H. Bork," *Judicial Notice*, Vol. III, No. 4, June 1986:

Well, the so-called right to privacy was born in the case of *Griswold v. Connecticut* . . . I don't think there is a supportable method of constitutional reasoning underlying the *Griswold* decision.

*Time* magazine, July 13, 1987, p. 11:

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

*Supreme Court Confirmation Hearings, Comm. Print Draft, Part 1, p. 266:*

*I do not* have available a *constitutional* theory which would support a general defined right of privacy.

"And he thinks that freedom of speech does not apply to literature and art and music."

Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 1971:

Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.

Bork, Speech, University of Michigan, February 5, 1979:

There is no occasion, on this rationale, 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.

Interview, Worldnet, USIA, June 10, 1987:

Clearly as you get into art and literature, particularly as you get into forms of art—and if you want to call it literature forms of art—which are pornography and things approaching it—you are dealing with something now that is [not] in any way and form the way we govern ourselves, and in fact may be quite deleterious. I would doubt that courts ought to throw protection around that . . .

A judge given that amendment knows that he or she is supposed to protect speech but does not know how far or how much.

*B. "Robert Bork v. The People" print ad*

"Sterilizing workers. . ." 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. *O.C.A.W. v. American Cyanamid*, 741 F.2d 444 (1984). In the opinion Bork wrote:

We may not, on the one hand, decide that the company is innocent because it chose to let the 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.

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."

Supreme Court Confirmation Hearings, Comm. Print Draft, Part 1, p. 450:

[T]*he five women who chose to stay on that job with higher pay and chose sterilization—I suppose that they were glad to have* the choice—they apparently were—that the company gave them.

"Robert Bork supported an electric utility that wanted consumers to pay for a nuclear power plant that was never built. Thanks to

[1] Although both ads were prepared prior to the hearings, statements made by Judge Bork during the hearings that substantiate the assertions in the ads have been included.

Judge Bork, consumers got a bill for $400 million." [2]

Public Citizen Litigation Group, *The Judicial Record of Robert H. Bork*, 1987, p. 18:

In 1982, Jersey Central, an electric utility, filed requests for rate increases with the Federal Energy Regulatory Commission which were designed to recover $397 million that the utility lost when it suspended construction of a nuclear plant at Forked River, and to obtain a return on lost investment in the plant. . . . FERC allowed an increase in rates to recover the expense of building the cancelled project, but denied the company any return on its investment. . . .

When Jersey Central's challenge to FERC's decision first came before the Court, Judge Bork, writing for a unanimous court, rejected all the utility's arguments [for a rehearing on the issue of return on investment]. After Jersey Central asked the Court to reconsider its decision, however, Judge Bork switched his position and wrote two opinions siding with the utility, one on behalf of a regular panel of the D.C. Circuit, 768 F.2d 1500 (1985), and a second one on behalf of the full Court, 810 F.2d 1168 (1987).

. . . [I]n the second panel opinion, Judge Bork . . . focused on whether FERC's order allowed Jersey Central's shareholders a "reasonable" return on their investment in the aborted nuclear power plant. 768 F.2d at 1503. In suggesting that FERC's order did not provide for sufficient profits, Judge Bork took the unprecedented step of comparing Jersey Central's rates to those charged by "neighboring utilties." Under Judge Bork's analysis, if Jersey Central's higher rates did not exceed those of other utilities, as the company had contended, it would be unfair for FERC to reject them, regardless of the impact that they might have on Jersey Central's own customers. *Id.* at 1502. Judge Bork ordered FERC to hold a hearing and to "promptly grant a rate increase" if Jersey Central's factual contentions are borne out by the record created during the hearing. *Id.* at 1505. Judge Mikva disagreed with Judge Bork's reasoning and result. He charged that Judge Bork had "profoundly misconstrue[d]" the Supreme Court's decision in *Federal Power Commission* v. *Hope Natural Gas*, 320 U.S. 591 (1944) and had departed from Judge Bork's own cardinal rules of judicial restraint. *Id.* at 1506.

"Asked by Time magazine in July if he found a right to privacy in the Constitution, he declared, "I do not."

*Time* magazine, July 13, 1987, p. 11:

Asked recently by Time if he found a right to privacy anywhere in the Constitution, Bork's reply was unequivocal: "I do not."

"To this day he says the Supreme Court was wrong when it stopped one state from making the use of contraceptives by married couples a punishable crime."

"An Interview with Judge Robert H. Bork," *Judicial Notice*, Vol. III, No. 4, June 1986:

Well, the so-called right to privacy was born in the case of *Griswold v. Connecticut* . . . don't think there is a supportable method of constitutional reasoning underlying the *Griswold* decision.

"Unsurpassed ugliness." That's how Professor Bork described a law that said hotels and restaurants had to serve black Americans."

Bork, "Civil Rights—A Challenge," *The New Republic*, August 31, 1963:

There seems to be a strong disposition on the part of proponents of the legislation [Interstate Public Accommodations Act] simply to ignore the fact that it means a loss in a vital area of personal liberty . . . The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate . . . The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

"He also criticized decisions that stopped states from using poll taxes. . . ."

Hearings before the Committee on the Judiciary, U.S. Senate, 93rd Congress, 1st Sess., on the Nomination of Robert H. Bork to be Solicitor General, Jan. 17, 1973, p. 17:

*Senator Tunney:* Have you a position with respect to the correctness of the Supreme Court's decision in *Harper v. Virginia Board of Elections*, which held that the imposition of the poll tax was unconstitutional?

*Robert Bork:* . . . I think I have previously indicated that that case, as an equal protection case, seemed to me wrongly decided . . . as I recall, it was a very small tax, it was not discriminatory and I doubt that it had much impact on the welfare of the nation one way or the other.

Bork "Forward," *The Constitution and Contemporary Constitutional Theory*, Center for Judicial Studies, 1985:

[T]he Court frequently reached highly controversial results which it made no attempt to justify in terms of the historic Constitution . . . I offer a single example. In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court struck down a poll tax used in state elections. It was clear that poll taxes had always been constitutional, if not exacted in racially discriminatory ways, and it had taken a constitutional amendment to prohibit state imposition of poll taxes in federal elections. That amendment was carefully limited so as not to cover state elections. Nonetheless, the Supreme Court held that Virginia's law violated the equal protection clause, saying little more than, "[W]e have never been confined to historic notions of equality . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."

Supreme Court Confirmation Hearings, Comm. Print Draft, Part 1, p. 129:

*Senator Kennedy:* [H]ave [you] changed the view that the Supreme Court was wrong in the *Harper* case to hold that poll taxes are unconstitutional?

*Judge Bork:* I think it was [wrong], and I will tell you why . . . [I]f that had been a poll tax applied in a discriminatory fashion, it would have clearly been unconstitutional. It was not. I mean, there was no showing in the case. It was just a $1.50 poll tax.

"He also criticized decisions that stopped states from using . . . literacy tests to keep minorities from voting."

Judge Bork has criticized Supreme Court decisions that upheld the power of Congress to limit or prohibit literacy tests used by states which had the effect of inhibiting minority electoral participation:

Hearings before the Committee on the Judiciary, U.S. Senate, 93rd Congress, 1st sess., on the Nomination of Robert H. Bork to be Solicitor General, Jan. 17, 1973, p. 16:

Well, insofar as Katzenhach against Morgan says, as I read it to say, that Congress controls the content of constitutional protection, I think that is incorrect because I think that it is ultimately under the tradition of judicial review we have had in this country.

Bork, Speech, 7th Circuit, undated, p. 5:

*Katzenbach v. Morgan* is terrible constitutional law. It stands for a revolution in the constitutional roles of the judiciary and the legislature.

Hearings before the Subcommittee on the Separation of Powers of the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st Sess., on S. 158 (The Human Life Bill), 1982, p. 310:

[Regarding *Katzenback v. Morgan* and *Oregon v. Mitchell*], each of these decisions represents a very bad and, indeed, pernicious constitutional law.

—"And he opposed the decision that made all Americans equal at the ballot box—'one man, one vote.'"

Hearings on Solicitor General nomination, p. 13:

*Senator Tunney:* Do you continue to believe that the Supreme Court erred in establishing the "one man, one vote" principle?

*Mr. Bork:* I do, Senator . . . [O]ne man, one vote was too much of a straitjacket. I do not think there is a theoretical basis for it.

Interview, Worldnet, USIA, June 10, 1987, transcript p. 22:

I think this Court stepped beyond its allowable boundaries when it imposed one man, one vote under the Equal Protection Clause.

Supreme Court Confirmation Hearings, Comm. Draft Print, Part 1, p. 131:

[I]f the people of this country accept one man, one vote, that is fine. They can enact it any time they want to. I have no desire to go running around trying to overturn that decision. But as an original matter, it does not come out of anything in the Constitution and if the people of the country want it, they can adopt that apportionment any time they want to.

—"Robert Bork has long believed that courts should not hear certain kinds of cases. In 14 out of 14 controversial cases involving people on social security, military veterans, minorities, the handicapped and the homeless, Judge Bork refused to give them their day in court."

Public Citizen Litigation Group, *The Public Record of Judge Robert H. Bork*, 1987, p. 4:

[I]n the 14 split cases involving questions of access to the courts or to administrative agencies, Judge Bork voted against granting access on every occasion. He voted to dismiss cases brought by prison inmates, social security claimants, Haitian refugees, handicapped citizens, an Iranian hostage, and the homeless.

He has voted to dismiss cases brought by the United States Senate, the State of Massachusetts, veterans . . . (p. 49)

"Recent studies reveal that Judge Bork has already made up his mind that large corporations are nearly always right. One study found he favored corporations over consumers 96 percent of the time."

Public Citizens Litigation Group, *The Judicial Record of Judge Robert H. Bork*, 1987, p. 5:

Taken together, Judge Bork's decisions in the fields of administrative, constitutional, and criminal law and his rulings on access present a clear theme: where anybody but a

[2] The case cite was mistakenly dated 1984. It should have read 1985 and 1987.

business interest challenged executive action, Judge Bork exercised judicial restraint either by refusing to decide the case or by deferring to the executive on the merits. However, where business interests challenged executive action on statutory or constitutional grounds, Judge Bork was a judicial activist, favoring the business interest in every split decision in which he participated. In summary, when split cases in which Judge Bork participated during his five years on the D.C. Circuit are combined, on 48 out of 50 occasions (or 96 percent of the time) Judge Bork voted to deny access, voted against the claims of individuals who sued the government, or voted in favor of the claims of business which sued the government.

"Another showed he ruled in favor of utility companies in 5 out of 5 utility rate cases."

"Liberal Lawyers' Group Says Bork Favored Business in Court Rulings," *New York Times*, August 7, 1987:

In eight nonunanimous cases brought by business interests against Government agencies, including five challenges by regulated utilities to limitations on the rates they can charge consumers, "Judge Bork voted for business every time."

"In 10 out of 10 regulatory cases, he decided in favor of business."

Statement by the AFL-CIO Executive Council on Opposition to the Nomination of Robert H. Bork . . . August 17, 1987:

Ten cases in which Bork voted against consumers and/or in favor of regulated business: *Mississippi Industries v. FERC, Jersey Central Power and Light Co. v. FERC, Telecommunications Research v. FCC, California Assoc. of Physically Handicapped v. FCC, Norfolk & Western v. ICC, Paralyzed Veterans of America v. CAB, Middle-South Energy, Inc. v. FERC, National Soft Drink Assoc. v. Block, Black Citizens for Fair Media v. FCC, McIlwain v. Hayes.*

"And in his book on antitrust laws, he said the federal government should 'never interfere with conglomerate mergers.'"

Colman McCarthy, *The Washington Post*, July 19, 1987:

The major intellectual work of Bork is *The Anti-Trust Paradox: A Policy at War with Itself* . . . it claims that antitrust laws were ill-conceived in the past and are not much needed in the future . . . "Antitrust should never interfere with any conglomerate merger," he writes.

ROBERT BORK VS. THE PEOPLE

The nomination of Robert Bork for a vacant seat on the Supreme Court has caused a lot of controversy. And has a lot of people worried.

With good reason.

Robert Bork is a federal judge and former law school professor with extremist legal views. His views are so extreme that over the last 25 years he has consistently taken positions against the Constitutional rights of average Americans.

But don't take our word for it. You be the judge:

STERILIZING WORKERS

A major chemical company was pumping so much lead into the workplace that female employees who became pregnant were risking having babies with birth defects. Instead of cleaning up the air, the company ordered all women workers to be sterilized or lose their jobs. When the union took the company to court. Judge Bork ruled in favor of the company. Five women underwent surgical sterilization. Within months, the company closed the dangerous part of the plant. And the sterilized women lost their jobs. [OCAW v. American Cyanamid, 1984]

BILLING CONSUMERS FOR POWER THEY NEVER GOT

Judge Bork supported an electric utility that wanted consumers to pay for a nuclear power plant that was never built. Thanks to Judge Bork, consumers got a bill for $400 million. [Jersey Central Power & Light v. FERC, 1984]

NO PRIVACY

Asked by Time magazine in July if he found a right to privacy in the Constitution, he declared, "I do not." To this day he says the Supreme Court was wrong when it stopped one state from making the use of contraceptives by married couples a punishable crime. [1986 Judicial Notice, regarding Griswold v. Connecticut]

TURN BACK THE CLOCK ON CIVIL RIGHTS?

"Unsurpassed ugliness." That's how Professor Bork described a law that said hotels and restaurants had to serve black Americans. He also criticized decisions that stopped states from using poll taxes and literacy tests to keep minorities from voting. And he opposed the decision that made all Americans equal at the ballot box—"one man-one vote." Ask yourself: Should America go back and re-fight settled civil rights battles? If Robert Bork is on the Court, we may have to.

NO DAY IN COURT

Robert Bork has long believed that courts should not hear certain kinds of cases. In 14 out of 14 controversial cases involving people on social security, military veterans, minorities, the handicapped and the homeless, Judge Bork refused to give them their day in court.

BIG BUSINESS IS ALWAYS RIGHT

Recent studies reveal that Judge Bork has already made up his mind that large corporations are nearly always right. One study found he favored corporations over consumers 96% of the time. Another showed he ruled in favor of utility companies in 5 out of 5 utility rate cases. In 10 out of 10 regulatory cases, he decided in favor of business. And in his book on antitrust laws, he said the federal government should "never interfere with conglomerate mergers."

If you look past his resume, you see that Judge Bork has consistently ruled against the interests of people. Against our Constitutional rights. And in favor of his extremist philosophy.

His views are so extreme the White House image-makers have launched a national campaign to re-package him as a "moderate." Even Judge Bork himself is out changing his image, lobbying the Senate and the media.

We're fighting back. We're People For The American Way. 270,000 Americans—Democrats, Independents, and Republicans—committed to protecting American values.

Those values have never faced a tougher challenge than Robert Bork. Please help. Write your Senators. And support our Action Fund.

Robert Bork vs. The People. Don't let it reach the Supreme Court.

"THE LAST WORD"

This is Gregory Peck.

There's a special feeling of awe people get when they visit the Supreme Court of the United States.

They know our nation's highest court is the ultimate guardian of our rights as Americans.

That's why we set the highest standards for our Supreme Court Justices. And that's why we're so concerned.

Robert Bork wants to be a Supreme Court Justice. But the record shows he has a strange idea of what justice is.

He defended poll taxes and literacy tests which kept many Americans from voting. He opposed the civil rights law that ended "white only" signs at lunch counters.

He doesn't believe the Constitution protects your right to privacy. And he thinks that freedom of speech does not apply to literature and art and music.

Robert Bork could have the last word on your rights as a citizen. But, the Senate has the last word on him. Please urge your Senators to vote against the Bork nomination.

Because, if Robert Bork wins a seat on the Supreme Court, it will be for life. His life . . . and yours.

Mr. BIDEN. Mr. President, I thank the Chair for his indulgence, and I look forward to continuing this debate hopefully not as late tomorrow night as it went tonight.

I yield the floor.

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.

## 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.

## DEADLINE EXTENSION FOR IRAN/CONTRA COMMITTEE REPORT

Mr. BYRD. Mr. President, I ask unanimous consent that, notwithstanding the provisions of section 9(a) of Senate Resolution 23, the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition shall make its final report to the Senate on or before November 13, 1987.

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

## BILL PLACED ON CALENDAR

Mr. BYRD. Mr. President, I ask unanimous consent to place on the calendar H.R. 3283 dealing with the transfer of an obsolete submarine to Dade County, FL, just received from the House.

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

Mr. BYRD. Mr. President, not the submarine, but the legislation.

UNITED STATES OF AMERICA

# Congressional Record

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Dow Jones spiraling downward; it was the Federal deficit. It was a President who refuses to leave the White House Rose Garden to tend to the business of America. It was an administration pointing the finger of blame at Congress for running up the Federal deficit; the same administration that proposed higher deficits in 7 out of 8 years than those approved by Congress. For more than 6 years, American business leaders suspended disbelief—forgetting all the basic rules of economics—and they bought the administration's rhetoric which claimed we could grow out of our fiscal troubles. Last Monday, those same business people took a cold shower.

And, the ever increasing budget deficit was not the only cause of the stock market's unprecedented decline. On October 14, the administration announced that the trade deficit did not narrow as expected in September. In fact, the trade deficit in the month of September alone was more than $15 billion, nearly twice the trade deficit for the entire year of 1976. At that rate, the trade imbalance this year will be more than $200 billion and maybe $300 billion.

Do not blame the computers for our unprecedented trade deficit. For more than 6 years, the administration has preached free trade, while American manufacturing jobs have gone overseas. The machine tool industry, which is so vital to my home State of Vermont, has seen orders cut in half since 1981, while the administration resisted efforts to tear down illegal trade barriers which keep American machine tools out of foreign markets. Our lack of a national trade policy led to our record trade imbalance and led us to become the greatest debtor nation in the world. No one wants protectionism. We just want a smart, competitive trade policy. The financial markets are looking for the same thing.

We also must not forget the increasingly perilous situation in the Persian Gulf in our search for explanations for the stock market's tumble. In an effort to protect the flow of oil from that strategic region, American warships recently fired on and destroyed an oil production platform. Over the past month hostilities in the gulf continued to escalate. The Iranians tried to shoot down our helicopters and directed missiles against United States-flagged oil tankers. The strategically vital supply of oil from the Middle East can no longer be guaranteed. All of this had a destabilizing effect on financial markets around the world.

Alone, each of these factors, bad news about the budget and trade deficits and the escalating war in the Persian Gulf, could be expected to have a negative effect on the stock market. But, combined, they sent the market into a free fall.

Each of these problems can be solved, but only by decisive leadership and only with bipartisan cooperation. I am glad to see that the President is finally willing to permit his aides to work with Congress to reduce this year's budget deficit. I hope he will do the same thing on trade policy, and throw down his veto pen and his free trade rhetoric and roll up his sleeves and work with Congress to increase American competitiveness. Finally, the President must acknowledge the role Congress must play if the United States is going to have an effective policy in the Persian Gulf—a policy which the American people can support.

We all hope that this Wall Street roller coaster will end soon, but the only way to ensure that this will happen is to address these underlying problems.

None of this is to say that this week's events do not highlight the serious questions about how our securities and futures markets interrelate and are best coordinated and regulated.

I would point out that the impact of program trading has received a good deal of study. Reports by the SEC and CFTC concerning two previous record drops—one on September 11 and 12, 1986, and the other on January 23, 1987—concluded that these losses were not caused by program trading strategies, although such strategies were utilized as the market declined. Rather, these losses were serious market corrections which could have occurred with or without program trading. The Senate Committee on Agriculture, Nutrition and Forestry held hearings on these findings this July and we will continue to monitor these matters closely.

We ought to take the time to let Federal regulators seriously analyze what happened this week.

What role did index-arbitrage trading strategies play in this week's market volatility?

Were margins on index futures sufficient and did the futures exchanges respond quickly enough in raising margins?

Was the stock exchange specialist system adequate to handle the tremendous volumes being traded this week?

Would limits on daily price moves on index futures decrease market volatitity and would unacceptable market distortions result from such limits?

Are there better methods for coordination amongst the world's financial regulators to keep panic from spreading?

These are serious, complex questions. They deserve thoughtful answers not finger pointing and crash hearings.

Blaming the computers for Wall Street's near collapse is like the home-run hitter who blames his bat for striking out. When he hits a grand slam, all the glory is his. But, when times get tough, he looks for excuses.

## CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, the hour of 9 a.m. having arrived, morning business is closed.

## EXECUTIVE SESSION

The PRESIDING OFFICER. The Senate will now go into executive session to resume consideration of the nomination of Robert H. Bork. The clerk will report.

## 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. SYMMS. Mr. President, I seek the floor this morning to speak in favor of Robert Bork as President Reagan's most recent nominee to the Supreme Court.

I would say at the outset that although I have had many, many areas of agreement with this administration and some areas of disagreement, the one area that I think the Attorney General and the President deserve good commendation from the American people, who elected the President in 1980 and again in 1984, is the process and the choice of selection of nominees to the high courts in this country, both to the Federal district courts of appeal, to Federal judgships across the country in the different districts, and to the Supreme Court.

I think that Judge Bork, it may be that in my time in the Senate, probably may be the highest qualified and the most distinguished judge to be nominated to the Supreme Court. I would hope that somehow, in spite of the pessimism as to the outcome of this nomination, some of our colleagues would reconsider their positions and reanalyze the qualifications of this very fine and distinguished judge and cast their vote for him for the Supreme Court so that the quality of the Court will not only be enhanced, but also, I would say, Mr. President, so that the process, which has been so highly politicized, could get back to a point of a better appreciation of the Constitution and how the process was intended to work than this process has been, where it has been so highly politicized concerning a very, very fine Judge. The American people, in my judgment, voted for President Reagan on two occasions

with the intention that he would appoint nonactivist judicial people with a record of nonactivism to the Court and that they could be confirmed, so that we could have a Court that would interpret laws and not a Court that would try to make laws, so to speak.

I just would say at the outset that that is why I seek recognition this morning. I am not naive as to what may happen when the final rollcall is taken, but I guess we can always have hope that maybe there would be three or four Senators who could reconsider their position and if they did that there would be enough to pass the confirmation nomination process, the confirmation of Judge Bork, and he could move onto the Supreme Court.

Earlier this week, speaking of politicalization of this, and I want to go into what I think have been some of the reasons why this nomination has been so highly politicized, my good friend, the distinguished Senator from New Hampshire, stood on the floor for nearly 20 minutes responding to charges that a pro-Bork telephone campaign in which he was involved as honorary chairman has politicized the confirmation of Judge Bork.

Although the script of the telephonic recording was printed in the RECORD earlier this week, I want to read it again because I think that to say this is what politicized or has politicized the nomination is really quite not actually the case. I just want to read this statement and tell my colleagues so that they will understand what has happened.

Senator HUMPHREY. Hello, this is Gordon Humphrey in my role as honorary chairman of the National Conservative Political Action Committee. I decided to speak to you by telecomputer because of the urgent need for citizens to rally behind the President. President Reagan needs your support in his effort to have Judge Robert Bork confirmed to the United States Supreme Court. Please hold for an important message from President Reagan.

Then President Reagan's voice.

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 politicalization of our court system. Tell them you support the appointment of Judge Robert Bork to the Supreme Court.

ANNOUNCER. As President Reagan and Senator Humphrey said, it is absolutely vital that you call your Senator (name, phone number) in Washington, DC., 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.

That is it, Mr. President. That is the phone message to which several Members have referred earlier this week when they complained the confirmation of Bork was being politicized by Bork supporters. As Senator HUMPHREY stated, there is no criticism, either directly or indirectly, by name or implication, of any Senator. No Senator's motives are being impugned. It is a straightforward, factual statement urging citizens to support the President's nomination and to call the Senators at whatever number is indicated. The Senator from New Hampshire is exactly correct in his characterization of that telephonic message.

I referred to that unfortunate exchange, Mr. President, as an introduction to my thoughts about the politicization of the Bork nomination.

In my judgment, it is not the supporters of Judge Bork who have politicized the confirmation process. Indeed, I believe the pro-Bork forces, including Members of Congress and organizations around the country, have been far too reluctant to engage in the highly partisan trench warfare which the anti-Bork forces have conducted from the day the President announced his nomination of Judge Bork, and Members of this body have been directly involved in that trench warfare right from the start.

Mr. President, on that point, I would like to call to your attention some excerpts from newspaper editorials, articles on the Bork nomination, which the Republican Policy Committee has compiled from newspapers around the country, and some quotes from some of our distinguished colleagues made here on the Senate floor, and other statements.

On the day that President Reagan announced his nomination of Robert Bork, before the nomination had been officially received by the Senate, before the Judiciary Committee had held 1 day of hearings, one Senator rushed to the floor with this statement:

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 citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim or government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.

That was stated on this floor on July 1, 1987.

The opening salvo pretty much set the tone for what has been an abusive and unfair, distorted campaign against Judge Bork.

Referring to the comments noted above, Washington Post Columnist Edwin Yoder wrote this in the Washington Post, July 1, 1987:

This twaddle is what Adlai Stevenson used to call white collar McCarthyism.

Bork opponents now claim that they are not using McCarthy tactics. They claim they are not attacking Bork's integrity. They simply claim that they disagree with his legal views.

This may be true, but this is not what they were saying at the outset and in the past.

A few days after President Reagan submitted Judge Bork's nomination to the Senate, here is what one Member of Congress said:

"The next Justice must be a person of independence, impartiality and integrity. Judge Bork does not possess these qualities." CONGRESSIONAL RECORD, July 14, 1987, page 19613.

Another Member of Congress called Judge Bork, "a political extremist and a danger to the independence of the Supreme Court." September 10, 1987, CONGRESSIONAL RECORD.

Another Member of Congress said, "Robert Bork is a Trojan horse whose presence on the Supreme Court will result in the controversial process of undermining and sabotaging the mission of the Supreme Court." CONGRESSIONAL RECORD, September 15, 1987.

And still another Member of Congress, who also is a Presidential candidate called Judge Bork "one of the villains of Watergate." AP dateline New York, July 6, 1987.

"One of the villains of Watergate." I think Senator HATCH yesterday pointed out very clearly that one of the heroes of Watergate was Robert Bork. Hardly a villain of Watergate.

According to UPI another Presidential candidate speaking in New York likened Robert Bork to "A 19th century Supreme Court Justice Roger Taney, the author of the Dred Scott decision, affirming States rights to keep the blacks in slavery." UPI, July 8, 1987.

Now, Mr. President, I make the point that the politicization of the Bork nomination started and has been carried through by the opponents of Judge Bork. Does all of that sound like disagreements over fine points of constitutional law or does it sound like character assassination? I would leave it to my colleagues to be the judge of that. I hope that the American people will examine this very carefully as time goes on and remembers what happened to a very fine judge in the Senate of the United States and in the political process of this country.

Outside of the Congress the campaign against Judge Bork has been carefully orchestrated. An Associated Press report of July 11, 1987 noted:

The National Abortion Rights League on Saturday vowed an all-out attack, "the likes of which has never been seen," on President Reagan's nomination of Federal Judge Robert H. Bork to be Supreme Court Justice.

People for the American Way, a liberal lobbying group founded by television producer Norman Lear, was another organization active in the Bork

smear campaign. Early in July, People for the American Way had five or six people working full time on the Bork nomination and the use of $350,000 in "seed money." PAW's executive director, Mr. Art Kropp said:

We're talking at least a million this campaign. We're talking about a heavy newspaper print-ad strategy and radio strategy, hoping to reach saturation in some markets.

PAW's advertising campaign was started primarily for the opinionmaking markets of Washington, Chicago, New York, Los Angeles, and Atlanta. Washington Post July 7, 1987.

The fact is that they actually did launch a media blitz against Judge Bork. Analyzing one of the full-page newspaper ads sponsored by PAW, Senator HATCH of Utah, a member of the Senate Judiciary Committee, found 67 falsehoods, slants and distortions.

Mr. President, it is very interesting then after they have launched the attack and start affecting the opinion in the country, then some of the liberal groups start taking polls after they have had an impact on the opinions of some people with these distortions.

The special interest groups left no room for disagreement with their position. One special interest group leader said, "We must let our Senators know that a vote against Mr. Bork is a prerequisite for our vote in the next election." Washington Post, July 7, 1987.

Now, that is what I call politics and special interest group pressurers on Senators to vote on a matter as important as the confirmation of a judge to the highest court in the land.

Another special interest group leader warned a particular Senator that he better go along with the anti-Bork gang, adding, "I have the votes to defeat him. I'll get what I want. It's strictly politics." Washington Post, July 11, 1987, page 23.

But, some Bork opponents argue, all these heavyhanded McCarthy style tactics notwithstanding, there was a real grassroots movement in opposition to Judge Bork.

Maybe so, maybe not. But read carefully this excerpt from a New York Times article on the quick start made by the groups opposing the Bork nomination:

Arlene Schwartz, director of the [National Abortion Rights Action] League's affiliate in New York State, said Judge Bork's opponents had already started a coordinated telephone campaign and were sending thousands of postcards and telegrams to Members of Congress. The New York organization was able to begin the effort on short notice, Ms. Schwartz said, by using a computerized system under which the league members authorized the organizations to send out telegrams in their name without prior consultation. (New York Times, July 13, page 12.)

Considering all this, is it any wonder that in response to the question did Judge Bork receive fair treatment, a Los Angeles radio received 3,453 calls in a 3-hour period with 84.6 percent saying no.

It is not a surprise to this Senator that that would happen after a well-orchestrated, special interest offense against this man was mounted, highly funded, well-financed, that then they could get responses like that and say, "See, the public is opposed to Robert Bork."

There is no way that the public would have known Robert Bork without a concerted effort to go after Judge Bork.

I use some more of the information that was made available to me by the staff of the U.S. Senate Republican Policy Committee, Mr. President, because I think it is important that our record reflect what some of the newspaper articles across the country have said.

"The Lies About Robert Bork," the New York Post, October 6, 1987:

Over the last several weeks, Robert Bork has been the victim of one of the most extraordinary character assassination campaigns in recent history.

"The Bork Nomination," Washington Post, October 5, 1987.

I might point out, Mr. President, the Washington Post did not support the Bork nomination, but it was uncomfortable with the campaign against him saying, "Many aspects of the effort against him did not resemble an argument so much as a lynching."

In this same editorial the Post wrote:

There has been an intellectual vulgarization and personal savagery to the elements of the attack profoundly distorting the record and nature of this man.

That is the Washington Post, October 5.

"The Bork Disinformers," the Wall Street Journal, October 5, 1987.

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.

Already we have had one of our distinguished colleagues make statements in outrage, in moral, righteous indignation that if Judge Bork is not confirmed because of these outrageous attacks on him, he will never vote for a liberal judge again no matter who the President is or what the future is for it. I think it is unfortunate when we have those kinds of questions that have to come before this Senate and cause politics to drive what is happening with respect to something as important as this.

"The Vilification of Judge Bork That Simply Won't Stick," the Providence Journal, August 18, 1987:

Unable to lay a finger on Mr. Bork on the basis of professional competence, his opponents have organized a multimillion-dollar, nationwide campaign designed to label him an extremist who stands outside the American mainstream. * * * It is unconscionable that a distinguished legal scholar and jurist should be subjected to such a disreputable campaign of vilification.

"Vicious Smear of Judge Bork," Chattanooga News-Free Press, September 14, 1987—"A man who is surely one of our country's most able judges, a man of clearly proved qualifications, is under smear attack. * * * Judge Bork deserves to win. If he does, justice will triumph. If he does not, justice will have suffered a serious blow that should be of concern to every thoughtful American."

"The Disfigured Debate Over Bork," the Chicago Tribune, September 6, 1987.—"In fact, the rhetoric of opposition is getting so extreme and misshapen that it is threatening to disfigure not only the nominee but everyone involved."

That is my concern, Mr. President. That is my deepest concern, that we have gotten off the track of what advice and consent, confirmation, and agreement is supposed to be. The President sent over a nominee of fine integrity. It has been said by all people; fine respectability, highly thought of in the legal community, has had a fine record as a Federal judge on one of the most important courts in the United States. He was confirmed by this Senate in 1982 by a unanimous vote. Now he has been subjected to special interest group attacks that are just unimaginable.

"Bork's Sin: Faith in Democracy," the New York Post, September 2, 1987.—"The anti-Bork campaign has been disgraceful. It is one thing to take issue with a presidential appointee on ideological grounds; it is quite another to read him out of civilized society."

"A Judge Gets Borked," the Atlanta Journal, August 20, 1987.—"Bork's opponents are in a frenzy. Frenzied mortals amplify some facts and gloss over others. Let's just hope something enduring results for the justice-to-be, like a new verb: "Borked." Dictionaries will say it's synonymous with "maligned."

"Bork: Pressure-group Hostage," San Diego Union, September 24, 1987.—Columnist Raymond Price wrote that the interest group campaign waged against Judge Bork is: "pressure group politics of the crassest sort, using one of the most vicious, calculated campaigns of slander since the days of Joe McCarthy."

"Steamroller of Fear and Hate Crushed President's Choice," New York Post, October 7, 1987.—Columnist Ray Kerrison, writing in the New York Post noted that Judge Bork's nomination, "unleashed a flood tide of character assassination" and Kerrison concluded that this attack was "stunningly effective." Kerrison wrote further: "So the 'get-Bork' crusade, with all its slander, was pushed at the grassroots level with one aim: to strike fear into the hearts of people that Bork's confirmation would somehow destroy the republic. The judicial record did not beat Bork yesterday. Fear and doubt did the job."

"Bork Inquisition Poisons Process," the Chicago Sun Times, October 5, 1987.—"By the savagery of their rhetoric, many Bork opponents have generated an uneasiness among Americans as reflected in public

opinion polls. They have lent respectability to the pernicious notion that polls could determine the makeup of the branch of government that is supposed to be the most insulated form mass pressure."

"Bork Dilemma," the Dallas Morning News, October 3, 1987.—"But the Senate should not be stampeded by public opinion polls that have largely been fueled by special interest public relations campaigns."

"Bork, Hearings and Verdict," Chattanooga News-Free Press, October 1, 1987.—"Why the controversy? It is because, in the hearings and out, he has been subjected to the worst inquisition, smear and distortion campaign aimed at any judge in American history."

Mr. President, I was one Member of the Senate that was glad that Judge Bork stated his intention not to withdraw as the President's nominee despite the difficult task we have of getting Judge Bork confirmed, when we have had a majority of Senators already announcing their intentions to vote against his confirmation.

"A crucial principle is at stake," Judge Bork said. "That principle is the way we select the men and women who guard the liberties of all the American people. That should not be done through public campaigns of distortion. If I withdraw now, that campaign would be seen as a success and it would be mounted against future nominees."

This is very difficult, I am sure, for the judge's family and for the judge himself to go on with this fight. But I think it is important that we have this discussion, and this debate. And I suppose one would almost have to believe in miracles to think that maybe there would be three or four U.S. Senators that might change their position and decide they could find in their conscience the rationale to change their stated position and vote for Judge Bork.

The distinguished occupant of the chair, I believe, from my neighboring State of Nevada, has already made public that he has decided to vote against Judge Bork. I do not impugn his motives in any way. But I would hope even he, coming from a Western State, might reconsider that position because it would only take three or four Senators to change their position and we would have the votes to confirm this very fine judge.

I think Judge Bork is exactly right about the consequences for future nominees had he decided to withdraw, and I commend him for his courage and willingness to put his name and honor on the line to the end for the sake of that principle. The liberal propagandists apparently have won the battle against Judge Bork, but we have yet to see who will win the war over the most fundamental questions of judicial philosophy and the role of the Federal judiciary.

It is a war, Mr. President. A war over the scope of Federal judicial authority and, more fundamentally, a war over who will govern in this country—whether it will be the people, through their elected representatives, or the unelected members of the Federal courts. In sum, it is a war over whether or not we will have a majority of Supreme Court members who are committed to the concept of judicial restraint and believe laws should be made by legislatures and interpreted, not made, by courts. That is really fundamentally what is at stake in this question.

President Reagan nominated Judge Bork to fill the vacancy on the Supreme Court because both men believe in judicial restraint. Sadly, Judge Bork apparently will be rejected when the Senate votes on confirmation. His defeat—if it happens—will be the result of a successful campaign to distort Judge Bork's record on important legal and consitutional questions and to deceive the American people about the real issue of concern to those who have led the attack on Judge Bork.

This campaign of distortion and disinformation has not been focused on the issue of judicial restraint versus judicial activism, for obvious reasons. As succinctly defined in a White House briefing book on Judge Bork, judicial restraint means "judges must give full effect to values that may be fairly discovered in the text, language, and history of the Constitution and apply them to modern conditions as a check against government action. But unelected and unaccountable judges should not overturn legitimate policy choices of elected legislators by imposing their own personal preferences." Properly understood, the concept of judicial restraint is supported by the American people. They do not want Federal judges making laws; they elect representatives to do that job. That is what the Constitution commands us to do.

To camouflage the real issue, with which they could not win the sympathy of the American people or the vote of many undecided Senators, the leaders of the anti-Bork lobby created a considerable record of distortion and misrepresentation of fact relating to Judge Bork's judicial philosophy and position on important constitutional questions. Anti-Bork advertisements on television and radio and in the print media suggest directly or by innuendo that the President's Supreme Court nominee is a bigot, whose dogmatic legal views and social prejudices would turn back the clock on civil rights enforcement a hundred years or more. Those advertisements and some of the comments made by witnesses at the Judiciary Committee hearings strongly imply that Judge Bork supports such practices as forced sterilization of female laborers, poll taxes to discriminate against minority voters, sexual harassment and other forms of discrimination against women on the job, and government regulation of the sexual activities of married couples.

I was told by one of my colleagues that in a personal visit he had with Judge Bork this past week, the judge intimated to him, in his office, that the saddest thing about this was that some of the people, some of the groups, the minority groups, such as the blacks, in many cases, believe that the things that were said about him are true, and they are not true. It is heartbreaking to know a man of his fine credentials and fine record of restraint on the courts, of upholding the Constitution and upholding laws passed by Congress, with his record as Solicitor General of the U.S. Government, with his very sound civil rights record, and to have his record distorted to say that somehow he is a bigot.

It breaks my heart to think that this could have happened and that groups of people might have been misled by liberal propagandists and special-interest groups to distort the character and fineness of this man's qualifications.

That is the image of Judge Bork which the liberal propagandists have worked feverishly to plant in the mind of the American public. Unfortunately, I believe the number of Senators already committed in opposition to him indicates that this media blitz has met with sufficient success.

Others will outline in detail the facts relating to the court cases from which the innuendos against Judge Bork are drawn. Suffice it for me to say the facts in those court cases, combined with the testimony of jurists, lawyers, and scholars, liberal and conservative alike, who have known and worked with Judge Bork for years, lead one to exactly the opposite conclusion. This is a man of exceptional personal and professional character. As described by Leonard Garment, himself known for his longstanding commitment to civil rights and affirmative action programs, Judge Bork * * *

> Was and is open to ideas. He is devoid of cant, pomposity, and prejudice. I could never have come to this opinion of him, nor indeed would I write to you about it, if he were a crank, a zealot, or a manipulator, or if I had not found in him a natural respect for other human beings, their interests, and their needs.

I only wish, Mr. President, that the truth about Judge Bork's record and character were as easily, or as invitingly, portrayed in 30-second television bits or full-page ads as are the distortions produced by his opponents.

With respect to the suggestion that Judge Bork is too far outside the mainstream of judicial thought to serve on the High Court, it cannot be stated often enough that this conclusion is not borne out by a review of his 5-year record as a judge on the U.S. Circuit Court for the District of Columbia. During that 5-year period, Judge Bork has written more than 100

majority opinions and has been in the majority on more than 400 cases, none of which has been overturned by the Supreme Court. None. In addition, of the judge's 20 dissenting opinions, the Supreme Court has reviewed 6 and has adopted Judge Bork's position in each case. That is the Supreme Court we have today. He has agreed with liberal Circuit Court Judge Abe Mikva in 82 percent of the cases in which they both participated, and in the aggregate, he has agreed with his liberal colleagues on the circuit court in more than 75 percent of the cases. Put simply, that is not the record of an ideologue or of a jurist outside the mainstream of judicial thought. The record simply is not there to make the case that he is outside the mainstream.

As a final note on the question of qualifications, I would remind my colleagues that in 1982 we unanimously confirmed Judge Bork for his position on the D.C. Circuit Court, the second most important and influential court in the land. Now, I understand there may be a higher level of scrutiny required for nominees to the Supreme Court, but I repeat that just 5 years ago we confirmed the same man without a single "no" vote or a single reservation voiced. To quote the pointed and eloquent remarks of Senator HATFIELD on the question:

> There is no escape from the charge: This Senate was either asleep at the wheel and therefore derelict in its duty or there is something very wrong with what is occurring right now. Something very wrong. The case against this man is flawed.

I commend to my colleagues' attention Senator HATFIELD's thoughtful speech on the Bork nomination which appears in the October 7 CONGRESSIONAL RECORD on page S13744.

Mr. President, the debate on Judge Bork has included a considerable amount of discussion about the proper role of the Senate in the confirmation process. Some have suggested this is the proper place to emphasize the Senate's role as a coequal partner with the President in appointing officers of the United States. There should have been little doubt on this subject given the numerous Presidential nominees who have been rejected by the Senate in times past and the words of Alexander Hamilton in the Federalist Papers who said:

> The [President] would have a concurrent power with a branch of the legislature in the formation of treaties * * * and a like concurrent authority in appointing to offices.

With a powerful hand, this Senate has reemphasized its coequal status with the President in making appointments to the Supreme Court. Unfortunately for Judge Bork, the Federal judiciary, and the Nation, our action on this nomination fails to demonstrate the wisdom which must have coequal status with power in the Senate if our institutions of Republican government are to survive.

I am also concerned that our action on this nomination may reflect, in part, the growing hold of a psychology which some have labeled "the Imperial Senate" syndrome. I do not impugn the motives of any of my colleagues, but I would ask my colleagues to reflect for a moment on the complaints we have all heard on the floor and in the hallways that one or another Senator was not consulted on the nomination, or if consulted, not listened to. I would turn again to the Federalist Papers, No. 70, where Hamilton makes the following observations about human nature and our governmental institutions:

> Men often oppose a thing merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted, and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments.

Again, I do not impugn the motives of any of my colleagues. I only ask that each of us examine our consciences to be sure that any ill feelings about the consultation process have not affected our votes on this most important nomination and will not affect our votes on any future nominations to the Supreme Court.

Finally, I want to address a few remarks to President Reagan. Mr. President, thank you for nominating Judge Bork to fill the Supreme Court vacancy. He is an honorable man and a highly qualified jurist who deserves to be confirmed. Sadly, it appears that will not be the result of our upcoming vote.

And I say that with all sincerity, sadly. I think it is a sad, sad day that this fine man has had his motives, thoughts, and record so badly distorted and politicized to the point that the special interest groups have been able to sway the decisions that are being made by our colleagues here in this body.

Since, then, you must quickly name another nominee, I take this opportunity to call your attention to the following insightful remarks of Dr. Thomas Sowell, a Fellow at the Hoover Institution and a witness at the Judiciary Committee hearings:

> This may be the most important Supreme Court nomination of our time, not simply because the present Court is so closely divided, or even because Judge Bork is the most highly qualified nominee of this generation, but because this is an historic crossroads as regards the expanding power of judges, which is to say the erosion of people's rights to govern themselves democratically.

So I would say, President Reagan, send us another highly qualified nominee, if we are not successful here. I pray that some of my colleagues will change their stated position and vote for Judge Bork. But to paraphrase Dr. Sowell's words, send us another nominee who would constrain the power of the Court within the bounds set by the Constitution, thereby protecting the people's rights to govern themselves democratically.

President Reagan, it is because of his commitment to judicial restraint that Judge Bork may be defeated when the Senate votes on the nomination. But he will not be defeated by that commitment to judicial restraint. His loss—our loss, really—will be the result of a well-organized, well-financed, nationwide advertising campaign of fear, distortion, and outright lies about the Judge's judicial philosophy and record. I repeat my conviction that the American people believe in judicial restraint—they believe judges should not make laws, but should only interpret them, and judges should not create constitutional rights out of whole cloth. The next advertising campaign of fear, distortion, and lies will lack public credibility, and this body will eventually confirm a qualified advocate of judicial restraint notwithstanding the virulent opposition of those who have led the attack on Judge Bork.

I personally truly regret the injustice Judge Bork and his family have suffered through this ordeal. I think it is a sad day. But I am sorrier still that the Nation will not benefit from his prudent judgment and intellect as an Associate Justice of the Supreme Court.

Mr. President, I ask unanimous consent that the following statement, editorials, and letters be printed in the RECORD at the end of my remarks: First, Judge Bork's October 9 statement as reprinted in the Washington Post; second, two fine editorials on the Bork nomination from the Wall Street Journal; third, a column by Dr. Walter Berns, which appeared in the August 24 Washington Post; fourth, a copy of a letter dated September 25, 1987, from Leonard Garment to Senator SPECTER; and fifth, a letter in support of Judge Bork from the Ad Hoc Committee for Principled Discussions of Constitutional Issues, signed by 129 of the Nation's leading professors and academics.

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

[From the Washington Post, Oct. 10, 1987]

"ASK THAT VOICES BE LOWERED"

Here is the statement Supreme Court nominee Robert H. Bork made at the White House yesterday.

More than three months ago, I was deeply honored to be nominated by the president

for the position of associate justice of the Supreme Court of the United States.

In the 100 days since then, the country has witnessed an unprecedented event. The process of confirming justices for our nation's highest court has been transformed in a way that should not and indeed must not be permitted to occur again.

The tactics and techniques of national political campaigns have been unleashed on the process of confirming judges. That is not simply disturbing, it is dangerous.

Federal judges are not appointed to decide cases according to the latest opinion polls. They are appointed to decide cases impartially, according to law.

But when judicial nominees are assessed and 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 politics, the opposing candidates exchange contentions in their efforts to sway voters. In the give and take of political debate, the choice will, in the end, be clear.

A judge, however, cannot engage. Political campaigning and the judge's functions are flatly incompatible.

In 200 years, no nominee for justice has ever campaigned for that high office. None ever should, and I will not.

This is not to say that my public life, the decisions I have rendered, the articles I have written, should be immune from consideration. They should not.

Honorable persons can disagree about those matters, but the manner in which the campaign is conducted makes all the difference.

Far too often the ethics that should prevail have been violated, and the facts of my professional life have been misrepresented.

It is, to say no more, unsatisfying to be the target of a campaign that must, of necessity, be one-sided, a campaign in which the "candidate," a sitting federal judge, is prevented by the plain standards of his profession from becoming an energetic participant.

Were the fate of Robert Bork the only matter at stake, I would ask the president to withdraw my nomination.

The most serious and lasting injury in all of this, however, is not me. Nor is it to all of those who have steadfastly supported my nomination and to whom I am deeply grateful. Rather, it is to the dignity and the integrity of law and of public service in this country.

I therefore wish to end the speculation. There should be a full debate and a final Senate decision. In deciding on this course, I harbor no illusions.

But a crucial principle is at stake. That principle is the way we select the men and women who guard the liberties of all the American people. That should not be done through public campaigns of distortion. If I withdraw now, that campaign would be seen as a success and it would be mounted against future nominees.

For the sake of the federal judiciary and the American people, that must not happen. The deliberative process must be restored. In the days remaining, I ask only that voices be lowered, the facts respected and the deliberations conducted in a manner that will be fair to me and to the infinitely larger and more important cause of justice in America.

[From the Wall Street Journal, Oct. 1, 1987]

WHY NOT THE BEST?

The Bork hearings are over and despite the posturing and special-interest pressures the decision comes down to a handful of senators who seem honestly undecided. For senators interested in a decision on the merits, it's worth pondering for a moment the sweep of constitutional history as it applies to civil rights, judicial activism and Robert Bork.

Taking a broad view is not easy, of course, given the kind of campaign waged against the nominee—a campaign that started, we see in a Washington post profile of anti-Bork leader Ralph Neas, the moment Justice Powell resigned and before even the identity of the noiminee was known. One thing the senators have to weigh is how business is done in the World's Greatest Diliberative Body. If presssure campaigns of this type are proved to work they will be repeated, and life as a senator will not be enviable.

Still, it's clear that the honest doubts of honest men center on two issues: civil rights, in particular the Supreme Court's historic efforts against racial discrimination; and judicial activism, the propriety of the courts' assuming decisions that properly belong to the elected branches of government. The tension between these issues is no accident but is a product of history.

For of course, the recent era of judicial activism started with *Brown* v. *Board of Education*, which ordered school integration "with all deliberate speed." In trying to enforce this law, the courts encountered extraordinary resistance, often in clear bad faith. Faced with a doctrine of "massive resistance," the courts were in effect forced to assert extraordinary powers and find extraordinary remedies.

The American people are quite rightly proud of this sort of activist court. The historical justification for *Brown* is unchallengeable and unchallenged. The decision reversed the judicial activism of an earlier era, *Plessy* v. *Ferguson*'s unsustainable doctrine of separate but equal. And when the court moved, the legislative branch was hopelessly stalled by the undemocratic institution of the filibuster. In time the court's leadership helped open the legislative branch, allowing such landmark laws as the 1964 Civil Rights Act and, equally important in securing the rights of blacks, the 1965 Voting Rights Act.

All of this is now part of the warp and woof of American society. Practically no one, least of all anyone of Judge Bork's erudition, wants to reverse this kind of progress. But if a stiff dose of activism was crucial in the extraordinary circumstances of *Brown*, it nonetheless carries its dangers. Supreme Court justices are not elected and cannot be turned out by the people. The courts are not legislative bodies where compromise can be struck and consensus formed, nor executive bodies with experience at administration. The judiciary is supposed to exercise narrow powers and to be limited by a body of pre-existing law and constitutional doctrine, to be "the least dangerous branch."

Quite predictably, as traditional inhibitions to activism were worn down, the well-known dangers appeared. In the effort to protect the downtrodden, judges discovered plenty of new rights to protect accused criminals, but none for victims. Judges freed convicted criminals from state and federal prisons because of "unconstitutional" overcrowding. Judges deinstitutionalized mental institutions; many of the supposed beneficiaries are today's pitiful homeless. The other day in Missouri, a federal judge asserted the power to levy taxes.

Worst of all, the activist temperament invited anyone with a gripe to come into court, with the hope that judges would make laws that the voters and their elected representatives would never approve. The litigation explosion was upon us.

And inevitably, these results have produced a political reaction. Religious fundamentalists who were previously nonpolitical were turned into the New Right almost overnight by the school-prayer decision. Ronald Reagan could make reining in the power of federal judges a leading platform item in two landslides. Where judges actually have to face elections, Rose bird and her hyperactivist colleagues were cashiered from the California Supreme Court. The Bork foes have gained an upper hand in public opinion with a one-sided barrage the White House has not exerted itself to offset, but that is no guarantee they will like the final outcome of the game they are playing.

How, then, does Judge Bork fit into this historical maelstrom? As a legal scholar, he stopped supporting judicial activism when he saw that the courts had gone too far; he started to point early to its potential dangers. Yet, as was clear in his five days of testimony, he has no urge merely to turn activism in another direction. For example, he said that some doubtful court rulings, such as the broad view of the Commerce Clause, must stand because so many expectations have built up around them that they are now part of the social fabric. For another, he would give women the same protections blacks get from the 14th Amendment. And of course, his intelligence, integrity and scholarship are unchallenged.

The next phase of constitutional history has already begun; clearly it will consist of reimposing some limits on the excesses of judicial activism. Conceivably this could mean a wholesale rejection of both the bad and the good of the Warren Court, though we would think that likely only if Supreme Court seats become the spoils of demagogic political battles in which intelligence, scholarship and erudition count for nothing.

Honestly undecided senators, we would hope, would be looking for men with the temperament to make the next phase of constitutional history a constructive one, for men with the sophistication to conduct a principled and evolutionary change. In searching for such men, the first one you find is Robert Bork.

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[From the Wall Street Journal, Oct. 15, 1987]

BOGEYMAN FUND-RAISING

"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 citizens' doors in midnight raids . . . and the doors of the federal courts would be shut on millions of citizens." These were Senator Teddy Kennedy's first words after the Bork nomination.

While at the time it seemed mere hyperventilation, this portrayal was in fact central to the apparently successful campaign to discredit Judge Bork. It's not that hyperbole directly persuaded Senators, but that the hyperbole was needed to raise the money to persuade Senators. The bogeyman image was absolutely crucial to the needs of

the real special interests, the Spitz Channels of the left.

"Dear Friend," said Joanne Woodward's mass mailing on behalf of the National Abortion Rights Action League, "$500,000 is needed *immediately*. . . ." Norman Lear's People for the American Way mailed out 3.8 million anti-Bork solicitations; its Arthur Kropp boasts, "We wanted to raise $1 million but now it looks like closer to $2 million." Direct-mail consultant Roger Craver, who has five different anti-Bork clients, told the New York Times, "This is the equivalent of Jim Watt wanting to flood the Grand Canyon."

This is bogeyman fund-raising. The livelihood of fund-raisers is raising funds, either through direct contacts or mass mailings. Success lies in getting a batch of first contributions in some heated battle, then returning to a proven list to pay ongoing salaries. Not for nothing did more than 30 special-interest groups submit requests to testify—meaning, appear on national television. At the lowest and most cynical level of American politics, the level at which it has settled the past two months, one might argue that special-interest groups are prevailing and being well paid for their efforts. Judge Bork's discomfort is just tough luck; he happened to be handy when the fund-raisers needed a nightmarish caricature.

Of course, both conservatives and liberals have for some time exploited bogeyman fund-raising. Conservative direct mailers wept at Tip O'Neill's retirement. With the creation of the Bork bogeyman, however, something seems to have snapped in Washington politics. Tip O'Neill and Jesse Helms are political figures who have the platform and resources to fight back. A judicial nominee, especially a federal appeals court judge, is severely constrained from defending himself at the level of discourse preferred by, say, the creator of Archie Bunker.

It isn't only Judge Bork's supporters who are concerned that the rest of the country now sees Washington as a stinking swamp of intellectual dishonesty and political reprisal. Lloyd Cutler's support for the nomination is based not on the merits alone but on concern that the tenor of the Bork opposition is poisoning the well for his own party. In the current issue of The New Republic, Andrew Sullivan frets that with the fund-raising hysteria, "The only nominee who in the future will be able to survive the demagoguery will be someone who can respond in kind." Perhaps the president should nominate Don Rickles ("Get off my back, you hockey puck!")

Mr. Sullivan's article should be read by anyone who still doubts this process profoundly distorted the Bork record. While he says a serious case can be made against the nomination, he catalogs "the disingenuousness of the Bork-hate campaign." The lies, such as a claim that Judge Bork testified in favor of a law he in fact opposed. The name calling of Ralph Nader: "a plague on the next generation." The mailings of one of liberalism's sainted groups, Planned Parenthood, said, "Bork's position on reproductive rights? You don't have any." Mr. Sullivan concluded: "And Senators wonder why the polls show a drift away from the Bork nomination."

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 ferverish and false.

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[From The Washington Post, Aug. 24, 1987]

A JUDGE WHO RESPECTS LIMITS

(By Walter Berns)

Almost everybody who has addressed the subject has recognized at some point that it is improper to assess the qualifications of a Supreme Court nominee solely in terms of his politics or ideology. Most commentators acknowledge that federal judges are not politicians and ought not be judged like politicians.

Although it is not his main purpose, this point is well made by Prof. Charles L. Black Jr. in an article originally published in the Yale Law Journal and reprinted in The Post [Outlook, July 12]. A former colleague of Bork at the Yale Law School, Black points out that presidents surely take account of a person's political opinions when making a nomination—such considerations play a "large, often a crucial role in the president's choice of his nominee"—and, therefore, that the Senate cannot afford to ignore them when called upon to give its advice and consent.

To support his conclusion, however, he goes on to contrast the Senate's proper role in considering judical nominations with its role in considering a president's nominees for Cabinet positions. With the Cabinet, he writes, "there is a clear structural reason for a senator's letting the president have pretty much anybody he wants." Here—but by inference not in the case of judges—a nominee's politics will properly govern the outcome. Cabinet officers are the president's people; they work for him, as Black puts it. Not so the judges. "The judges are not the president's people," he says emphatically. "God forbid!" But, as he is quick to add, they are also not the Senate's people.

All of which is to say they are not politicians, and, because they are not, the Senate should not allow political considerations to govern or control its decision in a confirmation vote.

Of course, the same rule must constrain a president when he makes a judicial nomination, especially one for the Supreme Court. As the Framers of the Constitution reiterated time and again, judges occupy a separate branch of government—detached from the people by the manner of their selection and from the political branches by their life tenure—precisely because their work is not political in the ordinary sense. A good judge is not the same as a good politician; he is neither a conservative nor a liberal.

Bork, for example, is called a conservative by friends and enemies alike, but on the Court of Appeals he voted with his nominally liberal colleague, Judge Ruth Bader Ginsburg, in 90 percent of the cases on which they both sat, including an important press libel case where he differed with his so-called conservative colleague (as he then was), Judge Antonin Scalia.

How, then, to judge a judge? At a minimum, by his refusal to be political. A fair measure of that self-discipline is his capacity to recognize and his willingness to respect the difference between what is politically desirable (or at least desired) and what is constitutionally permissible. Bork's record is filled with examples of this.

When still a professor, Bork joined a host of legal luminaries (including Archibald Cox) by complaining that the Supreme Court had no constitutional warrant for its decision in *Roe v. Wade*, the abortion case; but as a judge he concurred in a decision holding that the Department of Health and Human Services had no authority to require that parents be notified of the contraceptives prescribed for their minor children. And in 1981 he testified against a proposed "human life bill," which sought to reverse *Roe v. Wade* by statutory means. Even if the original decision had been incorrect, he said, the proposed bill amounted to an unconsitutional attempt to prescribe a rule of decision for the courts.

Bork could not have liked the poster—"Tired of the JELLYBEAN REPUBLIC?"—condemning President Reagan for his alleged lack of compassion, and privately he may have agreed with the transit authorities who in 1983 refused to lease space to allow its display in the Washington-area subway stations. Nevertheless, Bork wrote the court's opinion declaring the officials' action to be a violation of the First Amendment.

Had he been a Republican member of the House of Representatives, Bork, too, might have protested the unfairness of the committee assignments made by the Democratic leadership. But as a judge, and going well beyond his colleagues sitting in the case, in 1983 he rejected the lawsuit filed by 14 Republican House members. As he put it, they lacked standing to bring this suit, a conclusion he reached out of respect for the constitutional principle of separation of powers.

Decisions such as these may explain why, although he has written 106 majority opinions during his five years on the Court of Appeals, he has never been reversed by the Supreme Court. What is perhaps even more remarkable, of the 401 cases in which he joined the majority, not one has been reversed by the Supreme Court. This surely can serve as a response to those critics who complain that his appointment would threaten the liberal-conservative balance on the court.

What is at stake here is more than the career of Robet Bork. Against the political activist of the left or right who would look outside the Constitution—which in practice means inside himself—for moral principles that he would then impose on the rest of us, Bork represents the cause of constitutional government. This means government limited by the rules and moral principles embodied in the text of the Constitution, rules that are to be honored by judges as well as by presidents and legislators. Honoring that text requires a judge to both abide by the rules and respect the principles.

As Bork said recently, in a constitutional democracy the moral content of the law must be given by the morality of the Framers or, in the case of a statute, that of the legislators, never by the morality of the judge. "The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the Framer's or the legislator's morality into a rule to govern unforeseen circumstances."

That, I submit, can serve as the standard by which we judge a judge, especially a judge on a court with the power to overule the judgments of a democratic people.

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WASHINGTON, DC, *September 25, 1987.*
Hon. ARLEN SPECTER,
*U.S. Senate, Senate Office Building, Washington, DC.*

DEAR ARLEN: During the Judiciary Committee hearings on Judge Robert Bork's nomination to the Supreme Court, witnesses have made many claims about his real attitude towards civil rights and suggested that he has changed his public positions on the issues in order to be confirmed by the Senate. I have some first-hand evidence that bears on these questions and hope the Committee will weigh it in the balance. I am presenting it to the Committee through you because I know you and because your much-noted colloquy with Judge Bork the other day on the subject of civil rights and Constitutional philosophy made quite clear that you know what the real issues are and take them with utter seriousness.

The Bork debate has gotten so full of accusations about bad motives and bad faith that I must ask you to bear with me while I give some personal history and establish my bona fides in the civil rights field.

I worked in the White House from 1969 to 1974, and my responsibilities lay largely in the area of civil rights. I played a central role in the Nixon administration's support of affirmative action programs for minorities and women (including the Philadelphia Plan, the 4-Agency Agreement, and the initiation of remedial race and gender litigation by the Department of Justice); the 1970 program for school desegregation in the South, including both the Emergency School Aid Act to help desegregating school districts and the critical work of the President's Committee on School Desegregation; the administration's role in the creation of the Legal Service Corporation, the development of the Indian Reform Act and the reorganization of the Bureau of Indian Affairs bureaucracy, and numerous other specific civil rights actions such as President Nixon's Executive Order directing the IRS to deny tax exemptions to segregated private schools. I was the administration's liaison to the U.S. Civil Rights Commission and the leadership of the civil rights community and formed close and continuing friendships there.

In 1975, having left government, I served under President Gerald Ford as U.S. Representative to the United Nations Human Rights Commission.

Since 1976 I have been chairman of the Judicial Selection Committee of Sen. Daniel P. Moynihan of New York; we have interviewed hundreds of men and women for the positions of federal district court judge and United States Attorney.

In 1977, President Carter named me to his judicial selection panel for the Second Circuit Court of Appeals, where I served as vice chairman. On our recommendation, President Carter appointed Amalya Kearse of New York and Jon Newman of Connecticut to the appeals bench, where I am proud to say both have served with distinction.

In 1970, as the result of a letter of recommendation dated May 15, 1970 from the late Prof. Alexander Bickel of the Yale Law School, I introduced Judge Bork to the administration. In 1973 he became Solicitor General. I dealt with him mainly on the important civil rights cases in which the government was involved during those years. I was usually on the sparsely-populated liberal side of the internal debates surrounding these cases, and during the brief period when our government service overlapped usually found that Judge Bork was my ally. I particularly remember our discussions in his office and his personal decision *not* to intervene on the side of the plaintiff in the controversial *De Funis* v. *Odegaard* reverse discrimination case, in the face of strong arguments from antiquota lobbying organizations, The White House and his own staff.

I became his friend, and found that he was a thoughtful, conscientious, sensitive, and witty human being. He was and is open to ideas. He is devoid of cant, pomposity, and prejudice. I could never have come to this opinion of him, nor indeed would I write to you about it, if he were a crank, a zealot, or a manipulator, or if I had not found in him a natural respect for other human beings, their interests, and their needs. This friendship has deepened considerably since my return to Washington in 1980.

I have been listening to critics of Judge Bork analyze his opinions and articles and say that they reveal a man without the social and philosophical sensitivities that are required in a judge. They say they see in Judge Bork's words a man who may sound moderate now, but who will reveal his callousness once you give him his judicial freedom.

I know, in the most definite and concrete way an individual can know these things, that those critics are saying untrue things about Judge Bork's character and temperament. The opinions and qualities I found admirable in him were there more than a decade ago, well in advance of these hearings. The Committee's deliberations should not be based on a falsified picture of him.

Judge Bork has taken some positions that do not agree with my social philosophy. When he has done so, though, it is clearly not because he is socially uncaring but because the central enthusiasm of his life is and has been the law—learning it, teaching it, speculating, writing, and debating about it, and applying it as judge. He has given his energies to a search for a coherent structure of Constitutional principle, thought through carefully and evolving slowly over the full span of his career.

The law—it is embarrassing to repeat such an obvious truth—is the centerpiece of all civilized human activity, and particularly of the life of a democratic society. For an individual to devote himself to the law as Judge Bork has done should need no defense. When we in this country reach the point in our political debate at which social philosophy leaves no room for judges who have such a love, and who do not always deliver the correct answers, we have started down the road to tragedy.

Sincerely,

LEONARD GARMENT.

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AD HOC COMMITTEE FOR PRINCIPLED DISCUSSIONS OF CONSTITUTIONAL ISSUES,
*New York, NY, October 13, 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.

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, unparallelled 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 towards 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 Arahamsen, 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, Univ. 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, Queen College; James S. Coleman, Univ. of Chicago; Werner Dannhauser, Cornell University; Harold Demsetz, Univ. of CA, 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 Institution; Jules B. Gerard, Washington University; Hilall Gildin, CUNY, Queen 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, Univ. of California at Berkeley; Howard Kaminsky, Florida International U.; Thomas Kando, CA State Univ., Sacramento; Benjamin Klebaner, CUNY, City College; Benjamin Klein, Univ. of CA, 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, Sanford University; Paul McGouldrink, SUNY, Binghamton; Bernard D. Meltzer, University of Chicago; Marvin Meyers, Brandeis University; Stuart Miller, San Francisco State University; Katharina Mommsen, Sanford University; Aurelius Morgner, Univ. 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, Univ. of Puerto Rico at Mayaguez; Wolfe W. Schmokel, University of Vermont; George Schwab, CUNY, City College; Paul Seabury, Univ. of California at Berkeley; John R. Searle, Univ. 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; Peter Ahrensdorf, Kenyon College; Armen A. Alchian, UCLA; Maurice Auerbach, St Francis College; R.K. Boutwell, University of Wisconsin; Harry Clor, Kenyon College; Robert Greer Cohn, Stanford University; John Murray Cuddihy, CUNY, Hunter College; Kirk Emmert, Kenyon College; Arnold Harberger, UCLA; Lawrence W. Hyman, Emeritus, CUNY, Brooklyn College; Rael Isaac, Irvington, NY; Pamela Jensen, Kenyon College; Whittle Johnston, University of Virginia; Alphonse Juilland, Stanford University; George L. Kline, Bryn Mawr College; David Leibowitz, Michigan State University; Sullivan S. Marsden, Jr., Stanford University; Clark R. McCauley, Jr., Bryn Mawr College; Arthur Melzer, Michigan State University; A. Mizrahi, Indiana University Northwest; Dean Morse, Columbia University; JoAnn Morse, Barnard College; Allan Nelson, University of Waterloo; Norma L. Newmark, 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 Univ.; Harold P. Rusch, University of Wisconsin; Edward Shils, Chicago, IL; Morris Silver, CUNY, City College; Martin Trow, University of CA at Berkeley; George J. Viksnins; Georgetown University; Albert L. Weeks, New York University; Jerry Weinberger, Michigan State University; Arthur J. Weitzman, Northwestern University; Bradford Wilson, Ashland College; Richard M. Zinman, Michigan State University; Rev. Joseph Zrinyi, SJ, Georgetown University.

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

The PRESIDING OFFICER. The Senator from Hawaii.

Mr. INOUYE. Mr. President, I have followed the debates very carefully and I have been a bit confused. The word "politicized" has been used by every speaker as though to politicize was to commit a very evil deed. In fact, one would conclude after listening to these debates that to be a politician is to be akin to a thief. But, Mr. President, all of us are politicians. The President is a politician. Members of the Senate are politicians.

We are men and women who are involved in the art and science of politics. Politics is an essential element in a democracy. No one has ever described the Russian Prime Minister as being a politician or members of the politburo as being politicians. You do not find politicians in a Communist country. You find politicians in a democracy where men and women are able to stand up, debate, discuss, and disagree. There is nothing evil in being a politician.

But since that word "politicized" has been used so often, I believe a few statistics and quotations are justified.

Mr. President, one gets the idea that because of this politicizing the President has not been able to receive a fair hearing on his nominations. Since President Reagan first took his oath of office 6 years ago, he has submitted to the U.S. Senate a total of 379 judicial nominations, 379. It is almost one-half of all the judges in the United States.

Of the 379 nominations 3 were withdrawn and not resubmitted. This is where the Senate advised the President of the United States that these three men were not acceptable, that something was wrong with them. Names were withdrawn and not resubmitted. Three nominations were returned to the President and they were not resubmitted. In other words, the U.S. Senate rejected 6 out of 379 nominations.

Unless someone is suggesting to us that we should have approved every one of them, may I just remind ourselves and the people of the United States that this is the 200th anniversary of the Constitution and among the many words in our Constitution there are those important words that create the executive office and the legislative office. We are in the legislative branch of the Government. Nowhere in the Constitution did our Founding Fathers suggest that we Members of the U.S. Senate should be rubber stamps of the President. In fact, we have been overly generous. No other President has ever received this treatment.

Out of 379, 3 were drawn, 3 rejected.

Mr. President, in listening to those who support the nomination of Judge Bork one would get the impression that the committee hearings constitut-

ed a kangaroo court, that the witness was treated unfairly.

For the record, may I submit a few quotations? The first quotation is by the former President pro tempore of the U.S. Senate, a most distinguished Member of this body, the senior Senator from the State of South Carolina. He is the ranking Republican on the Judiciary Committee and this is what he had to say, and I quote:

Now, Mr. Chairman, in closing I want to say that I think the hearings have been worthwhile and good, and I want to associate myself with the statement made by Senator Heflin [That "I think that everybody on the Republican side and * * * the undecided side will say that you have been completely fair, and I appreciate your fairness in this."] And I want to take this opportunity to express to you my sincere appreciation for the fair and reasonable manner in which you have handled these hearings. I don't know of anyone who would have conducted it in a fairer manner than you did * * * in conducting these hearings, you have stood by your reputation for being fair and just and reasonable.

Thus said the senior Senator from South Carolina, the ranking Republican on the committee.

And these are the words of the distinguished Senator from Iowa, my dear friend, Senator GRASSLEY:

I want to thank you for the way you have conducted these hearings. You have handled them very well. It has been a very difficult job. You have been under a lot of pressure, but you have handled yourself and the committee extremely well and I want to thank you for that.

Thus said Mr. GRASSLEY.

And the assistant leader of the Republicans, a friend of all of ours, the senior Senator from Wyoming [Mr. SIMPSON], had this to say:

I want to say, right now that our chairman has been ultimately fair, not only in these hearings, but in everything I have done with him in my 9 years in the Senate. He is very able, very candid, very accommodating, and very courteous to me, as a member of the majority, or the minority. * * *

Mr. Chairman, I thank you. Indeed, you have tried to be fair in a very difficult situation.

Thus said Mr. SIMPSON.

And, now, Mr. President, these are the words of the nominee, Judge Bork:

Members of the committee, this has been a long, detailed, and often a profoundly interesting 4½ days of hearings. And I want to thank you personally, Mr. Chairman, for the courtesies you have personally extended to me and to my family during this week. I also want to thank all the members of the committee for their patience, their attention, and their general good humor throughout these proceedings. For that I am most deeply grateful.

The chairman spoke:

My function, as I have viewed it, is not to persuade, but to be part of assuring that all the issues were laid out; that you have a full and fair and thorough opportunity to respond, and to initiate any point that you wished to make. I hope you feel that has been done.

And Judge Bork responded: "I do."

Mr. President, the hearings were fair, just, open, candid, and very democratic. If this is what politicizing means, I hope that we continue to politicize all of our hearings.

I thank the Chair.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I rise to speak again to my reasons why I think Judge Bork should be approved by this body, but as well to take time to set the record straight.

Before I start with my prepared remarks, Mr. President, I think it is important for those of us who support Judge Bork to speak about whether or not things are done fairly or not. There is absolutely no disagreement between the statements that we made in the Russell caucus room, the hearing there, the complimentary remarks we made to the chairman of the committee for the very fair job he did—and I repeat that—the very fair job he did in conducting that hearing.

But the point, Mr. President, is that it was not the hearing in the Russell caucus room that we refer to when we refer to the unfairness and the kangaroo-type environment in which people in this country are making a judgment upon and about Judge Bork, because there were really two hearings going on during the month of September and one since the committee adjourned.

There was the hearing in the Russell caucus room that was conducted, as most Senate hearings are, with an opportunity for all sides to be heard.

But there was another hearing going on simultaneously and still going on and that is what the public sees about Judge Bork. And that is how the public reacts to the interest groups that have decided to take their case to the grassroots, which in the normal environment of politics, where both proponents and opponents can respond, would be a very rational way to do things in a participatory democracy. But we are not talking about electing judges and Justices to the Supreme Court. We are talking about the appointment of people to the Supreme Court, and not the Senate's appointment to the Supreme Court, but the President's appointment to the Supreme Court with the additional power of advice and consent by the Senate.

And that hearing that went on outside of the Russell caucus room is the one that I want to refer to in my remarks today, and particularly those interest groups that were involved in the official testimony. And, again, I would have to say the chairman was very fair to those of us on the other side. But also as to the statements made by these same groups outside of the Russell caucus room, there was no chance for Judge Bork or any of us on the Senate Judiciary Committee to respond to.

So I rise this morning, Mr. President, to address a tactic that used to be referred to as "the big lie." I am sure my colleagues are familiar with how it has been employed in the past. All you have to do is just repeat the same outrageous charges and repeat them so often that people are persuaded that those charges are true.

Mr. President, this kind of strategy worked in the 1950's. And of course I think we all look back at that period of time as a very dark era in history. I hope that this is not evidence that that era is with us again.

I ask my colleagues to look at not only the debate on Judge Bork that is going on on this floor of the Senate, but give us an opportunity to look inwardly toward this body as well as suggesting what was done on the outside of this body of whether or not the process is the right process and whether, when the Judge Bork issue is behind us, that process ought to be repeated in the future.

Now the strategy of "the big lie" was candidly revealed in a Washington Post column by Mary McGrory on October 6.

It was reported there that when the hearings opened, the liberal lobby groups held daily strategy meetings at 8:30 a.m. At those meetings, they discussed their one goal in orchestrating the test and that goal was, "for everybody to say the same thing;" for everybody that day to say the same thing.

For the past 100 days, the "get Bork" forces have taken the form of a national political campaign machine, complete with pollsters, mobilization plans, "war rooms," and press kits. They have spent millions to willfully smear an American citizen.

Remember the strategy: "Everybody say the same thing." And, particularly, say the same thing on the same day. But in a court of law, and hopefully here in the U.S. Senate, the factfinders who have to decide the issue will have the opportunity to assess the credibility of the witnesses, in this case, the accusers.

So let us examine the past statements of some of these same groups. When we do, we find that they have a history of saying the same thing about Supreme Court nominees.

They also have a shabby record on the facts; so shabby that they have no credibility.

For instance, one noted civil rights lawyer once castigated a Supreme Court nominee's, and these are his words, "record of hostility to the law." And that same nominee's "continued war on the Constitution."

Who was this nominee referred to a few short years ago in our history?

That nominee was Lewis Powell, condemned by this civil rights lawyer. The year was 1971. The occasion was his nomination to the Supreme Court. The witness was a man named Henry Marsh.

This is the same Lewis Powell who some civil rights groups now find to be a paragon of fairness toward civil rights. The same Lewis Powell who the civil rights groups say cannot be replaced by Robert Bork.

Another witness said that the nominee, and I quote, "had already taken sides with the executive. He would be but their echo."

Who was this nominee to the Supreme Court? That nomineee was Lewis Powell again. The year, again, was 1971. The occasion was his nomination to the Supreme Court. The witness was liberal lawyer Paul O'Dwyer.

This is the same Lewis Powell who some in the liberal lobby now apparently think maintains the proper balance between the three branches of government. These same liberals now say that we will negatively alter the balance of the Court if we replace Lewis Powell with Robert Bork.

Another witness, this one from the National Organization of Women. They testified that of this nominee, and I quote: "Justice for women will be ignored or further delayed; which means justice denied." Who was this nominee? Well, again, it was Lewis Powell. Again, Mr. President, this is the same Lewis Powell who some of the so-called women's groups feel cannot be replaced by Robert Bork.

Another witness, this one from liberal National Lawyers Guild, stated that the nominee, and I quote: "does not bend or twist the Constitution. Instead, he totally ignores it."

Who was that nominee? Well, you guessed it again. It was Lewis Powell. This is the same Lewis Powell who apparently now has just the right kind of moderate views of the role of the Supreme Court and what a Justice on that Court ought to do; the same Lewis Powell who, some say, cannot be replaced by Robert Bork; the same Lewis Powell, by the way, who was confirmed by this body, Mr. President, on an 89-1 vote.

Mr. President, the big lie—let me emphasize, the big lie is standard operating procedures for some of these groups. Remember the strategy: Have everyone say the same thing. One of these groups appeared before the Judiciary Committee and had this to say about a nominee before the Supreme Court:

> We oppose his confirmation, not solely because of his consistent opposition to women's rights, but more importantly, because he has demonstrated that his legal opinions on women's issues are based on an apparent personal philosophy and not on the facts and the laws of the cases before him. . . His record as a circuit judge clearly reveals that he cannot fairly, judiciously, and impartially review women's rights cases.

Who was this monster? We might ask who was this monster of a sexist, because I am sure it has got to come out that way in that test. Well, this monster was Justice John Paul Stevens. The year was not 1971, when Powell was put on the Supreme Court. The year was 1975. The occasion was John Paul Stevens' nomination by President Ford to the Supreme Court. The witness who said all those bad things about John Paul Stevens was the president of the National Organization of Women.

Mr. President, and Members of this body, this is the very same John Paul Stevens who was so outside the mainstream on women's issues that this body, this very U.S. Senate voted to confirm him 98 to 0; 98 to 0.

As these examples show, some of these outside groups have a history of always saying the same thing about any nominee not pledged to their liberal agenda for America. However, their biggest problem is that they are always wrong. They are always wrong. The fact is that these attacks by some women and civil rights groups of Lewis Powell and John Paul Stevens were dead wrong. The careers of Powell and Stevens on the Supreme Court have been marked by openmindedness, by high principle and by integrity. It has not been marked in any way by bigotry, by insensitivity, and results-oriented jurisprudence, which has been alleged by all these groups that spoke so distastefully of these outstanding citizens and lawyers at that time, and now outstanding Supreme Court Justices.

I have not always agreed with every opinion authored by Justices Powell and Stevens, but they are without question, without question fairminded Justices. But it just so happens in this environment we are in today, being fairminded is not enough for some in the liberal lobby. You either play their tune without one single off-key note, or you cannot be in their band. That is where we are today, Mr. President and Members of this body, on this nomination. I believe that we are at a crossroads in terms of the Senate's role and I have asked my fellow colleagues to consider the Senate's role in the process as much as Judge Bork himself. Today, or when we vote on this, we can ratify the vicious campaigns of lies and innuendos or we can repudiate it and swear that it is never going to happen again; that we are never going to view a Supreme Court Justice as if it is an elected position, subject to campaigning as we do in our role, running as Senators.

I think, Mr. President, that this is a very critical choice because as I have just shown from recent history, the tactics used and the groups employing them are not in any way an aberration. Indeed, those most responsible have already so much as promised that they are going to do it again. They are going to exercise the big lie again. They are going to say the same thing at the same time again. And they are going to be just as wrong again.

Why are they about this? For them the stakes are no less than control of the Supreme Court itself or of intimidating the President of the United States; intimidating the Senate; intimidating the nominee, and even witnesses who offer to appear on behalf of the nominee, into total capitulation to special-interest politics.

Their "litmus test" finds acceptable only those who will commit to rule a certain way—their way—on every issue, not just a few key issues.

So much for the independent third branch of Government, which the judiciary is meant by our constitutional writers to be, and which it will not be if this process is followed any longer.

To some of these groups, our courts are just another political branch, responsible as a political branch for doling out "desirable" political results to the special interests that lobby them, like some kind of permanent, nonreversible, Appropriations Committee.

What is their message now, these groups that conducted this grass-roots, unfair campaign? That Judge Bork would "reopen old wounds;" that he would "return us to the days of segregated lunch counters;" that he would "turn back the clock" on civil rights.

In Judge Bork's own words, "That is preposterous." His dilemma, however, is one always faced by the target of a smear campaign—it takes longer to disprove the smear than to simply make the smear.

Robert Bork's personal commitment and record on civil rights are exemplary.

Read any of the briefs filed by Solicitor General Bork. As William Rogers, a former Attorney General and Secretary of State testified, Robert Bork often advanced positions on behalf of minorities that went beyond those ultimately adopted by the Supreme Court. Solicitors General have great discretion to file briefs weighing the claims of private parties in cases where they are not required to act on behalf of the Government. Robert Bork used his position to argue more pro-civil rights cases than any Supreme Court nominee since Thurgood Marshall.

Study his record on the court of appeals, where he never rendered a decision less sympathetic to minority or female plaintiffs than the position taken by the Supreme Court or Justice Powell. His opinions are among the most notable civil-rights rulings, especially for women.

Listen to witnesses like Griffin Bell, Attorney General under President Carter, and one of seven former attorneys general to testify on Judge Bork's behalf. He said:

If I thought he was going to turn back the clock on civil rights, I would not support him * * * I have spent a lot of years of my life in that field of endeavor, and we do have things in pretty good shape now * * * but I have never seen him say anything that would indicate to me or seen anything he has written that he would do anything against civil rights.

Listen to witnesses like Ms. Jewel Lafontant, a former Deputy Solicitor General who served under Robert Bork, or Mr. Roy Innis, a leading national civil rights figure. Both spoke without hesitation before the Judiciary Committee in support of Judge Bork.

I think it is interesting—given the revelations of the past few days—that both Ms. Lafontant and Mr. Innis stated that some in the professional civil rights lobby "turned up the heat" to discourage them from appearing before our committee. It saddens me to think that a movement—long associated with freedom of speech, association, and the championing the rights of individuals against the onslaught of the majority—would be so insecure as to attempt to exercise this kind of censure of those who disagree.

I think Roy Innis captured the essence of the "big lie" when he said,

My colleagues have chosen to ignore Judge Bork's remarkable record of concrete civil rights achievement and have latched onto, in some cases distorted some of the man's ancient academic views in order to whip people into an irrational hysteria. To defeat him on this basis would be more than unfortunate.

What is upsetting my colleagues, I believe, is the notion that Judge Bork's exercise of judicial restraint will not guarantee the results that many of them want irrespective of what the Constitution and the law requires. The tragedy of this misguided view is that this desire for an activist judiciary clearly shows how out of touch much of the civil rights movement is with the problems facing black Americans in the 1980's.

Rampant crime, inadequate education, single-parent families, teenage unemployment, AIDS, and drug-abuse—unlike desegregation and equal employment opportunities—are not problems that can be solved by even the most activist judiciary.

When some in the interest groups cannot rebut Judge Bork's pro-civil rights record, or the voices of reason like Judge Bell or Roy Innis, they resort to a loud chorus of slogans and falsehoods.

Let us face it: the reason for this noisy campaign of lies and fear has nothing to do with "reopening old wounds," "segregated lunch counters," or even poll taxes, literacy tests and restrictive covenants.

Those bygone issues and overworked slogans are but a smokescreen for today's special-interest agenda—a society racially polarized due to strict adherence to numerical quotas. If some of the special interest pleaders have their way, school admissions, government contracts, employment and other opportunities will all be distributed by courts on the basis of race, not merit.

Judge Bork has amply demonstrated his strong commitment to racial fairness as both Solicitor General and as a judge. The fact is, the interest groups fear he will be too fair—that he will apply the Constitution in a colorblind manner as the framers of the 14th amendment intended when they wrote the words "no State shall * * * deny to any person * * * the equal protection of the laws."

Minorities above all others ought to demand a justice who practices judicial restraint and a fair reading of the Constitution. After all, until fairly recently, Supreme Court history demonstrated how minorities are oppressed by activist judges. See Plessy versus Ferguson and Dred Scott as the two infamous examples. Do you think it cannot happen? This can happen again—to all our freedoms—unless we install judges who live by the credo of judicial restraint.

A second charge of those opposing Judge Bork concerns claims that he would not apply the equal protection clause of the 14th amendment in a manner consistent with liberal orthodoxy. This charge is a distortion of Judge Bork's views on equal protection, the status of existing law under the clause, and its significance as a source of legal progress for women.

Recall, however, the strategy of "the big lie" that I told you about—keep repeating the charge that women "fear" Judge Bork, and eventually people will start to believe it.

But let us break down this big lie.

First, the extreme preoccupation with the equal protection clause as the focus of the battle for women's rights is fundamentally off-base. The fact is that the vast majority of legal gains for women have been enacted by legislators by way of the numerous statutes prohibiting sex discrimination.

The fact is that gains for women have little to do with the equal protection clause. For example, title VII of the 1964 Civil Rights Act prohibits discrimination in all forms of employment. This has been the catalyst for female advances in the workplace all across America. Other major sources of women's rights are the Equal Pay Act, title IX of the Civil Rights Act, which prohibits gender discrimination in education programs, and a host of other Federal and State laws prohibiting discrimination.

Unlike the equal protection clause, these statutes apply even without State action. You would never know it by listening to some so-called women's groups, but the equal protection clause has played a minor role in the legal progress of women. Instead, the dominant source of rights are the statutes enacted by democratically elected representatives.

Judge Bork's record in vigorously enforcing those statutes in the Court of Appeals has been impeccable, as you would expect of a judge who has never been reversed.

Proponents of "the big lie" are not just wrong on the significance of the equal protection clause for women's rights. They then go on to deliberately and repeatedly misstate Judge Bork's position.

The equal protection clause of the 14th amendment states that no State shall deprive "any person" of the equal protection of the law. In applying this provision, the courts have adopted various levels of "scrutiny" to differing classifications. For example, measures discriminating on the basis of race are subjected to "strict scrutiny" and can be justified only by a compelling State interest. This means such distinctions will almost always be struck down.

Measures discriminating on other, noninvidious grounds are subjected to a much lesser degree of scrutiny, known as the rational basis test. Under this standard, the distinctions will be upheld if there is a rational regulatory basis for them.

Until about 15 years ago, gender-based classifications were subjected to this "rational basis" test for equal protection purposes. In subsequent cases, some Supreme Court cases have applied what is called intermediate or heightened scrutiny to gender-based classifications challenged under the equal protection clause. However, the Supreme Court justices have been sharply divided on this issue, and the appropriate level of scrutiny to be applied in gender cases has remained a matter of continuing debate within the Court.

During this proceeding, Judge Bork has been attacked on two different levels in this area. First, he is falsely charged with taking the position that women are not covered by the equal protection clause. This is simply not true—it is a falsehood because that is not the case.

Judge Bork testified clearly and repeatedly that the equal protection clause applies to women, as it applies to all persons. He would apply its protections to women as to all other persons.

Knowing full well that Judge Bork applies the equal protection clause to women, his "big lie" opponents move on to create an entirely misleading "straw man." This one on the level of "scrutiny" he would use in gender-based cases.

Because Judge Bork testified that he, like Justice John Paul Stevens, disagrees with the artificial and newly

created "multi-tier" approach, his opponents charge that he will deny women the full benefit of the equal protection clause.

The "reasonableness" standard employed by Justice Stevens—and endorsed by Judge Bork—provides a responsible and effective alternative to the "multi-tier" approach, which has created only confusion. Judge Bork's test—like that of Justice Stevens—would invariably strike-down race-based classifications, since there is almost never a legitimate basis for a distinction based on race. It would also reject gender-based classifications, except in those occasional cases—such as women in combat—where a clearly justified distinction exists.

But this reasonable explanation is not enough to suit Judge Bork's "big lie" opposition: For them, his failure to commit himself to a particular, liberal orthodox position on this makes him ineligible to serve the Court.

So the "big lie" crowd in the end is both irresponsible and uninformed.

The fact is that in the most significant gender-based equal protection case of recent years—Mississippi University for Women versus Hogan—Justice Powell contended that a "rational basis" test, not "heightened scrutiny," was appropriate. Chief Justice Burger and Justice Rehnquist agreed.

In the 1976 case of Craig versus Boren, the Justices were in widespread disagreement over the proper standard. Quite simply, this is an unsettled area of the law. Yet many of my colleagues opposing Judge Bork condemn him as unfit to serve merely because he would opt for the perfectly responsible "reasonableness" test already used by Justice Stevens. Now, Mr. President, would they vote against Justice Stevens, whom this body confirmed on a 98 to 0 vote?

What is worse than falsely portraying Judge Bork's view, the "get Bork" crowd wants to force any nominee to "kowtow" to a Senator's individual politics on this particular issue as a condition for confirmation. In this way, the Senate becomes a kind of "enforcer"—a "bully" of the liberal, ideological orthodoxy. In my judgment, the Senate violates its traditional role, and the separation of powers, with such a litmus test.

If the Senate will confirm only those nominees with an ideology that conforms to what prevails in the Senate at a given time, it signals that the Senate wants the Court to decide constitutional issues not on an independent, judicial basis—but on a political, ideological basis.

In closing, Mr. President, I would like to quote Prof. Paul Bator of the University of Chicago Law School. When he was asked to speculate on the consequences of Judge Bork's rejection for the Court, he said:

> I think the consequences would be very sad, because I think that the precedent that would be set is that a nomination of the greatest possible distinction, in terms of intellectual and professional capacities, and in terms of moral integrity, can be done in, can be hounded to death on the basis of what are very short-range and partisan considerations * * * and what we are seeing today is really * * * a very sad and aggressive effort to excommunicate all who do not agree with a single * * * narrow and partisan version of what the Constitution must mean.

A very important quote for us to think about in these final days as we consider this nomination—a very distinguished university president.

Mr. President, I think that sums up where the "big lie" leads us. I ask my colleagues to reflect on this statement * * * on what the Senate has here wrought. I yield the floor.

Mr. ROTH. Mr. President, Senate confirmation of a Supreme Court Justice is a very serious responsibility under our Constitution. Consequently, I have been concerned by the attempts of some outside groups to politicize the confirmation process and to misrepresent the record of the nominee, Judge Robert Bork.

Under the Constitution the President has broad discretion in selecting a Supreme Court nominee. The function of the Senate cannot be equal to that of the President for obvious practical reasons. But neither was the Senate given its role as a matter of ceremony. As Hamilton explained in the Federalist Papers, the role of the Senate is to check whether the nominee is qualified. How the Senate has exercised its responsibility is a rich and colorful history, with nominations often hinging on Senate attitudes toward the President more than toward the nominees.

As the Senate's role has evolved over time, the Senate has limited its analysis to the nominee's objective qualifications regarding his or her experience, intelligence, temperament, competence, and integrity. However, as any witness to the Bork confirmation process knows, the Senate departed from its customary role. While some supporters of the Bork nomination might decry the double standard being applied, I am persuaded that our general practice in this century may have been too narrow. Yet, the present remedy is excessive.

I am very troubled that the questioning of the nominee was too specific and too detailed. In effect, committee members were extracting campaign promises from the nominee who gave them under oath. In doing this the Senate is seeking to control the result of Supreme Court deliberations. In my opinion, this compromises the independence of the judiciary and infringes on the separation of powers.

We have no business trying to get a nominee to decide cases our way. As a corollary, we must not deny confirmation because a nominee would decide this case or that case contrary to our preferences. It is not the proper role of the Senate to dictate how specific cases must be decided as a condition of confirmation. Never before has the Senate done so—until now.

Not only is such an approach offensive to the Constitution, it is unfair to the nominee. Constitutional law is a diverse and complex subject. If it becomes the practice to grill the nominee on every aspect of constitutional law in order to determine whether there is an area of disagreement, for which confirmation is denied, then no nominee will ever pass muster. For no two people will ever agree on all aspects of constitutional law.

While the distortions and misrepresentations surrounding the Bork nomination are deplorable, I am even more concerned by the new process I have described. Something is amiss when one Senator after another says, in effect, "while Judge Bork possesses all the objective qualifications for the Supreme Court, I will vote no because I disagree with him on this first amendment issue or that fourth amendment issue," or whatever specific issue the Senator chooses. We should not overlook the fact that the next Supreme Court Justice will face thousands of issues, not just one or two of interest today. Nor should we overlook our own shortcomings in being able to predict what those issues will be.

While I, like everyone else, disagree with Judge Bork on some issues, that is no reason, in my opinion, on which to base a no vote or a yes vote. Nor do I believe, as I said earlier, that the Senate should restrict itself simply to reviewing the objective qualifications of the nominee. I believe the Senate should take a middle ground between looking only at objective factors and grilling the nominee about specific issues: the Senate should review, in addition to the objective factors, the general judicial philosophy of the nominee to determine whether he or she fully appreciates the role of the Supreme Court in our democracy.

For most of the 200 years of our history under the Constitution, the proper role of the Supreme Court was not in doubt. Hamilton and Jefferson, who disagreed on many issues, concurred in the fundamental belief that the judiciary's role is to exercise judgment, not will, and to interpret law, not make law. They both understood that the special contribution of America to the history of the world—a written constitution—would be lost if judges substituted their views for those of the framers.

The Supreme Court has shared this faith in constitutional governance until modern times. That does not mean the Supreme Court never made a mistake. Hardly. Judicial restraint is

not a magic formula that yields the single perfect answer to every issue. Rather, it is a way of approaching legal issues that excludes some very wrong answers.

Nor should one assume that a Supreme Court that expresses faith in constitutional governance never sins against it. In earlier days, judicial activists struck down laws abolishing slavery, improving working conditions, and establishing the New Deal. That this was judicial activism by the right makes it neither more nor less desirable. Judicial activism is equally wrong whether it favors the right or the left. In more recent days, liberal activists have created new constitutional rights to overprotect criminals and have gone overboard in requiring forced busing of schoolchildren.

Just this year, in an ironic celebration of the bicentennial, a judge has taken charge of a locality's taxing powers to impose taxes on citizens that they have already rejected by referendum. Two hundred years ago we believed that taxation without representation is tyranny. Today, it is not tyranny, just judicial activism.

By confusing the judicial and the legislative roles, judicial activism encroaches on the prerogatives of the legislature. When judges act like politicians in robes, we all lose. The ability of citizens to control their Government and their lives is diminished since judges are not accountable to the people. And respect for the judiciary declines as people begin to understand what is happening. That could bode ill for the future.

Judge Bork has devoted his considerable talents to demonstrating the errors of judicial activism. But in what is the most troubling and most shocking aspect of this confirmation process, Robert Bork is the first nominee in the history of the Republic to be denied confirmation for expressing opposition to judicial activism.

Imagine that Judge Bork agrees with our Founding Fathers and with Supreme Court opinions spanning nearly two centuries that the proper role of the judge lies in judicial restraint. And for that he is denied confirmation.

The judicial activism of today is different from that of yesteryear. No one owned up to it in the past, but today it is admitted and defended as a greater good. While today's activism may appear more honest, it is, my opinion, more dangerous.

Judicial activism is not only antithetical to our democratic institutions, it undermines respect for law itself. Today's judicial activists justify themselves not on the basis of the law but on the basis of results. Thus activists make a joke out of the amendment process in article V of the Constitution by circumventing its democratic requirements and taking a short cut requiring only 5 votes on the Supreme Court. Activists likewise make a joke out of article VI which requires that judges take an oath to support the Constitution. Activists take an oath only to their own creativity. If activism is acceptable, why take an oath at all?

Inherent in the concept of law itself is the sense of obligation. But what constrains an activist seeking to create new law? It can't be anything in the Constitution.

Members of Congress ought to be particularly hostile to judicial activism. Not only does it diminish our role as representatives accountable to the people, it makes us less than equal with the Supreme Court. For we are bound by the Constitution, whereas an activist Supreme Court is above the Constitution.

Judicial activism not only disparages the Congress but also deprecates Federalism and the States themselves. The committee's majority report asserts that judicial restraint is repugnant to our forefather's belief in God-given "inalienable rights," that assertion overlooks the simple fact of history that our forefathers were already citizens of the various States and were already enjoying their inalienable rights when the established a Federal Government with limited authority to be exercised by three limited branches.

In looking for vindication of their rights, our forefathers looked primarily to their State constitutions, their State legislatures, and their State courts. The Federal Constitution was never thought to establish a complete Government or a complete list of rights. The Federal Government is not our only government. But since today's activists don't like the results that come from the States and, moreover, don't like the results that come from the political branches of the Federal Government, it has become necessary in their eyes to legitimize an activist Supreme Court, a court that can look beyond the law and create new inalienable rights.

I am somewhat perplexed that such an antilegal doctrine could gain such acceptance in legal circles. Perhaps it is merely short-sighted enjoyment of current results. Perhaps it is the notion that if having some rights is good, having more rights is better. But if that were true, we would be tripping over ourselves in offering bills and amendments. Why don't we simply pass every proposal introduced in this Chamber and go home?

I am continually impressed by the wisdom of the framers and by our own shortcomings. Governance is something more than the creation of more and more rights. Under the law, a right is the validation of an interest. The framers recognized that we as a people have competing interests. The purpose of the Congress is to achieve an accommodation of those conflicting interests. It is not possible to govern by creating conflicting rights.

In my opinion, the notion underlying judicial activism that we are all better off to the extent more rights are created is naive. Are victims of crime better off when criminals go free on the basis of some new technicality?

Sometimes it is in the best interests of the Nation to create new rights and sometimes it is not. That's why we established the Congress—to make those choices. That is not why we established the Supreme Court.

It is ironic that it is Robert Bork who subscribes to this textbook explanation of constitutional governance, for which he is criticized as an extremist. If Robert Bork is an extremist, what word is left in the English language to describe his critics?

In summary, Robert Bork has demonstrated that he has a proper understanding of the role of the Supreme Court and that his critics do not. He has, as we all know, an excellent record as a lawyer and a judge.

He served with distinction as Solicitor General and has an exemplary record as an appellate judge. None of his majority opinions has ever been reversed by the Supreme Court and six of his dissents have become the majority view of the Supreme Court. His confirmation is supported by seven Attorneys General of both political parties, by President Ford, and by President Carter's White House Counsel, Lloyd Cutler. Chief Justice Burger testified that Robert Bork is as qualified a nominee as he has seen in his 50 years of professional life.

Mr. President, for these reasons I support the nomination.

Thank you.

Mr. PROXMIRE addressed the Chair.

The PRESIDING OFFICER (Mr. KERRY). The Senator from Wisconsin.

Mr. PROXMIRE. Mr. President, I have not made up my mind on the confirmation of the nomination of Robert Bork. There is no question in my mind that he has an excellent mind and he has a great deal of experience, and nobody, to the best of my knowledge, has questioned his integrity. But there are elements of Mr. Bork's background that trouble me.

Yesterday, I was visited by one of his strongest supporters and was told that the committee report is not accurate, that there are inaccuracies in it, and, as it was put by the person who visited me, they were lies.

The initial part of the committee report is very brief. It is only seven pages, and I would like to ask the distinguished manager of the bill on the majority side, Senator BIDEN, if he can

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respond to some questions in connection with this.

One of the most troubling parts of this report is this. It says:

For the first time since the American Bar Association's Standing Committee on Federal Judiciary began evaluating Supreme Court nominees, a substantial minority of the standing committee found a Supreme Court nominee to be "not qualified" to serve on the Nation's highest court.

It points out that 10 members said "well qualified," 1 said "not opposed," and 4 said "not qualified."

The report states:

No Supreme Court nominee who has received even a single "not qualified" vote from the standing committee has ever been confirmed by the Senate.

I ask the distinguished chairman of the Judiciary Committee: Has that statement ever been successfully challenged? Is there any documentation to refute that assertion?

Mr. BIDEN. My response is that the committee report accurately states that three members of the ABA committee said in 1971 that they were not opposed to confirmation. "Not opposed" is the language used in the report.

The Senator may know that for a Supreme Court nominee, the ABA allows their members to vote one of three ways: well qualified, not opposed, or not qualified.

"Not opposed" is a little bit like—and this is the characterization of the Senator from Delaware—passing the vote or voting "Present." "Not opposed" means just what it says—not for, not opposed.

In 1971, there were three members who voted "not opposed."

The report did not use the words "not qualified." It says "not opposed."

If I get a copy of the report, I believe that is accurate.

In response to the Senator's question, the report is accurate. There was one time in 1971 when the ABA had three members of the selection committee vote "not opposed," but they did not vote, as in the case of George Bork, "not qualified."

Mr. PROXMIRE. So in this case four voted "not qualified."

Mr. BIDEN. "Not qualified," and 1 voted "not opposed," and 10 voted "qualified," or the exact terminology is "well qualified."

Mr. PROXMIRE. What puzzles this Senator as a nonlawyer is how four distinguished members of the American Bar Association can say that a man with the experience of Judge Bork, a man who has served as a distinguished faculty member of one of the greatest law schools in the country, the Yale Law School, a man who has written widely, a man who has served in several administrations, and a man who has served on the appeals court for years, a man of unquestioned intellectual capacity, how can they say he is not qualified?

I know among the elements considered are the prospective nominee's compassion, decisiveness, openmindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equal justice.

Were these the factors that made them say that in spite of his experience, in spite of his intellect, in spite of his extensive writing, which is highly respected, that he was not qualified?

Mr. BIDEN. If I can answer the question by giving a very brief background, the ABA has jealously guarded their internal minutes and they have been less than forthcoming over the years with the exact rationale as to why they reached various conclusions for lower court judges as well as Supreme Court Judges. They have been on the end of criticism, the criticism directed at them from the Senator from Utah as well as the Senator from Delaware on occasion because it is not like you would expect a court hearing where there is a transcript, where there is a detailed analysis of why they vote the way they did.

But having said that, let me suggest to the Senator that Judge Harold Tyler who was the chair of the standing committee, a former Federal judge and a former high-ranking member of the Justice Department, came to deliver the report of the ABA for the minority as well as the majority, minority meaning those 4 who were against Judge Bork saying not qualified, the 1 saying not opposed, and the 10 saying well qualified; he spoke for all of them. We had entertained the idea of asking the dissenters to come in. We do not know who the dissenters were officially. There were a lot of rumors who they were, but we do not know who they were. Judge Tyler, and I think he is probably correct, refused to name specifically who voted for and against the judge and strongly pleaded with me not to subpoena them to come for fear that if we do it would chill future deliberations which are held in confidence and confidentiality and in private.

Mr. PROXMIRE. The Senator says he was wrong in doing that?

Mr. BIDEN. I think he was probably right in doing that, quite frankly. That is why I did not insist on the minority, whoever they were, coming to testify.

Now, having said that, Judge Tyler explained that the judicial dissenters, the four who said not qualified, were evaluating, in his words, "judicial temperament," which, according to the ABA, includes all the things that the Senator said.

Now, the spokesperson, the chair, did not come in, though, and say to us in the hearings and in response to some tough questioning from all members, and specifically suggest whether it was compassion, decisiveness, openmindedness, whatever. The chair did deny that it was politically or ideologically motivated.

So all we can do is go by the record under oath what Judge Tyler said, and what he said was to deny that it was political or ideological but did not specify in any detail as to how they arrived at the conclusion other than they did it according to ABA rules, according to Judge Tyler, the chair of the standing committee.

Mr. PROXMIRE. Would the chairman characterize the investigation conducted by the American Bar Association when they came to this very unusual conclusion of having four saying not qualified, that it was extraordinarily thorough. I got the impression from reading the report that it felt that way. Let me read why.

It said:

The 15 members of the ABA Standing Committee conducted an extensive investigation of Judge Bork, including interviews with five members of the Supreme Court, with many of his colleagues on the D.C. Circuit Court of Appeals, and with approximately 170 other federal and state court judges, including female and minority members of the bench, throughout the United States. The ABA Committee also interviewed approximately 150 practicing attorneys, 79 law school deans and professors, 11 of Judge Bork's former law clerks and a number of present or former lawyers who served under Judge Bork in the office of the Solicitor General when he headed that office.

Then it says a little further down:

Finally, Judge Bork was personally interviewed on two separate occasions, for a total of about six hours, by three members of the ABA Standing Committee. A second interview was unprecedented for a Supreme Court nominee, but was considered necessary because of "some additional questions" that arose from discussion among members of the ABA Committee and submissions of various groups.

In the many years the Senator from Delaware served on the Judiciary Committee, would he say this is an extraordinarily thorough investigation of a Supreme Court nominee?

Mr. BIDEN. I would, but in fairness let me say that I am reluctant to characterize it beyond saying that it was the most extensive that I am aware of. It was one where Judge Bork himself was before either individuals in the committee or more than one member of the committee, meaning the ABA standing committee, for a total of 6 hours.

Keep in mind, I say to my colleague from Wisconsin, Judge Bork's views and Judge Bork's judicial attitude and Judge Bork's judicial competence have generated a great deal of division within the legal community as a whole. Two thousand—two thousand—present teaching faculty members at the American law schools, 2,000 said

Judge Bork should not be a Supreme Court Justice.

Mr. PROXMIRE. That is my next question. As I understand it, the Senator is exactly right, 2,000, as I read the report, a little later on, to be a little more precise 1,925 law professors opposing Judge Bork's confirmation and then they said this:

> This figure represents nearly 40 percent of the full-time law faculty at American Bar Association-accredited law schools in 47 States—

And so forth.

Mr. BIDEN. That is correct, and the reason I get 2,000 there are 32 deans also. So, when you count the deans from Harvard Law School and Georgetown, now there were deans, for example, I believe from BYU and other schools, there were six deans that came and testified for him, the point being, the only point I am trying to make is I cannot get inside the mind of the ABA panel which is sometimes very cryptic and I am not the biggest fan of the process, I must acknowledge to the Senator.

Having said that, I think the reason why this was so extraordinary is because Judge Bork is such an extraordinary man, he generates very strong feelings for and against him because he has been so outspoken, so intellectually probing, so different in many cases on constitutional principles that all of those things were read into the RECORD.

For example, if I can make one slight digression, before the debate began, before the committee hearings began, I was here on the floor of the U.S. Senate with one of my distinguished colleagues from Kentucky, Senator MCCONNELL, and Senator MCCONNELL was pointing out that we should not make a single-issue test and we should just look at judicial temperament.

I said to the distinguished Senator at the time. I said, "How would you feel about a judge or a prospective nominee if they had ruled a certain way on a case?" And I mentioned Brown versus the Board of Education, explicitly, one that Judge Bork did not, did not I emphasize, take issue with. All right.

Well, obviously, if someone disagreed with Brown versus Board of Education, he said, I am paraphrasing him, I could not be for him because that would reflect on their judicial temperament, because obviously they could not be that far out of the mainstream and have a sound judicial temperament.

Whether or not that is correct, I cite that as a single Senator who uses judicial temperament as a way to reach a conclusion, depending on how a judge reaches a conclusion in a case.

I cannot get inside the minds of ABA members and conclude when they say "judicial temperament" and they say which according to the ABA definition includes compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equality of justice, I cannot vouch that none of the members of that committee who dissented did not sit and say, well, because of Judge Bork's view on privacy, I can conclude that means he is not sensitive or not compassionate or not open-minded, and therefore lacks judicial temperament. I do not know how they arrived at the decision except Judge Tyler argued strenuously that it was not politically motivated in a partisan sense and was not ideologically motivated and was in accordance with ABA rules.

Mr. PROXMIRE. Now, I am very impressed by the fact that 40 percent—almost 40 percent—of the entire faculty of the accredited law schools in this country have gone on record against Judge Bork. Now, some people will say, "Well, 60 percent are for him."

Mr. BIDEN. Well, that is not correct.

Mr. PROXMIRE. But I take it the 40 percent that have gone on record impressed me because I would think most law school professors would not go on record at all. Many of them would not have an opinion, many of them might have an opinion against the Justice but might not want to make it public.

Is that not an enormously telling judgment when you consider the fact that these are law school professors whose life is devoted to teaching the law, understanding the law, teaching it to lawyers who were moving on?

Mr. BIDEN. In fairness to Judge Bork, I believe that, although there were only 99 professors who went on record for him and close to 2,000 against him, I think the reason why so many were against him was not because they did not think him intellectually competent, a good professor, or a legal scholar, but because, as he pointed out in the hearings and other witnesses pointed out on his behalf, his views are so different from the mainstream of present American judicial philosophy and teaching in the schools that he would generate that kind of change.

For example, throughout the history of American jurisprudence, there have been every 30 to 60 years swings in the judicial philosophy pendulum in this country from Cardozo to Frankfurter and on. Judge Bork, I believe, I say to my friend from Wisconsin, is on the cutting edge of a school of thought referred to as the school of law and economics. Mr. Posner is part of that, out of the University of Chicago.

I think one of the reasons why he generated such strong opposition from his colleagues—and almost every one of those letters that came in that were against him attested to his intellectual ability, honesty, and integrity—but I believe the reason they are against him is because he was an extraordinary man and he—I hate to use the expression to say different—but he departs in so many critical places from what has been the last 20 or 30 years of American jurisprudence.

So, again, I want to emphasize that they are not against him, as I have read the letters that came in—and I admit I did not read them all—because he was viewed as a lightweight, because he was viewed as dishonest, because of any of those things, but because he was so different than they in their thinking and in what most of them wrote.

One other point I would make on that. I could personally attest to having spoken to several of the Nation's most prestigious law deans, presidents of major universities, who called me to tell me that they really hoped Judge Bork would not go on the Court, but they did not want to come out publicly against him.

And the reason I bother to tell you that is I think it is totally inaccurate to suggest that because 40 percent took the time to write and say "We are against him," that the remaining 60 percent believe he should be on the Court.

Mr. PROXMIRE. As far as the record is concerned, it apparently shows that 40 percent of all professors in this country from accredited law schools went on record against him and less than 100 went on record for him; is that right?

Mr. BIDEN. Correct.

Now, again, there may be more than 100 that would be on record but who are not on record and who are for him. But only 100 went on record for him. Six law deans came and testified for him. Thirty-two law deans wrote against him.

Again, Judge Bork has been in the caldron of the debate on judicial philosophy in this country for the past 20 years. He has been the lightning rod, the center of the intellectual gravamen of one of the ends of that debate. And that is the very reason, by the way, why the Senator from Delaware has concluded that he is against him, because he does such, in my view, such an antiseptic and narrow reading of the Constitution.

It is an oversimplification to suggest this, but I think it is fair to say that those 40 percent of the teachers in law schools today, accredited ABA schools, share a similar view of the Senator from Delaware: that his view is antiseptic, it is narrow, it is not particularly appropriate for the 1990's.

Mr. PROXMIRE. Let me ask you a question about an area of substance that is important to this Senator, because I have been concerned, as the

Senator may know, with the economics of our country.

Dean Pitofsky, of Georgetown, a highly respected and fine law school, said about Judge Bork on antitrust, and I quote from page 77 of the report:

As a result, it is likely that this would be a very difficult country.

If Judge Bork's view of antitrust prevails.

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. Firms might continue to display vigorous competitive characteristics, but that would only be as a result of market forces. The antitrust laws would be available as a check should market forces fail to work properly.

Now, that is a very, very severe criticism in the antitrust area.

In my view, one of the great strengths of our country is the Sherman Act and the various other antitrust enactments that the Congress has imposed over the last 100 years on a bipartisan basis, Republicans and Democrats agreeing that, above all, we have to have a competitive economy.

So I want to ask the chairman if there was any view on antitrust that contradicted Pitofsky and indicated that this kind of antitrust view that Bork had, had been distorted in any way by Dean Pitofsky.

(Mr. FOWLER assumed the chair.)

Mr. BIDEN. Let me answer that in two ways. First, there was no disagreement about whether or not the statement made by the dean—and he was, I assume, very careful in the choice of his words, as the Senator from Delaware attempted to be.

Quoting from the same page, same paragraph, he says: "As a result, it is likely that this would be a very different country." And he goes on to point out if Judge Bork's views had been adopted. He is not saying if Judge Bork got on the Court it would be very different. He is saying if he got on the Court and his views prevailed.

Let me just read, if you have a moment, from the testimony of Judge Bork. Judge Bork wrote his famous book and one that was quoted, as pointed out—the second way to answer it—as the Senator from Utah and others very forthrightly and skillfully pointed out during the hearing that many in the economic field and many on the court and some on the Supreme Court have been moving toward Judge Bork's view. So there is no disagreement on what his view is. But it would not be appropriate to say that it is viewed as so outlandish that respectable people, including members of the Court, have also moved toward it. The Court has not fully, but some have.

Now, having said that, let me amplify for a moment on what Judge Bork said at the hearing. Judge Bork expressed his long-held views on antitrust laws. Unlike other areas of the law, he has not tried to distance himself in any way from his views. He said that he could give assurance that the antitrust laws would be enforced "but it will have to be according to my understanding of what the law means and what the economics means." That is volume 1, page 342 of the hearing testimony.

Judge Bork then reaffirmed his position on vertical price fixing should be legal per se, which is one of the points that the Senator spoke to and has been in the forefront of defending the Sherman Act and the other antitrust provisions in Congresses past.

He claimed that price-fixing between a manufacturer and a dealer could be justified by increasing competition in dealer services which might result. The argument he made, and some proponents agree with it, he said, and I remember the case, he said, "If you go downtown to a discount store, sure you can buy the TV more cheaply. But," he said, "they won't carry as much of the line. Now," he said, "if you allow the price-fixing, if you allow the manufacturer to tell Woodies" or I forget which store he named—Marshall Field—he said, "If you allow the manufacturer to tell Marshall Field that you must hire such and such a price for the television, then Marshall Field will carry the entire line of those televisions, thereby giving the consumer a greater choice, though it is at a higher price, a greater choice."

So he goes on to argue, therefore, this is not anticonsumer, it is proconsumer. The price will be higher, but selection will be greater, the point being that vertical integration, vertical price-fixing, I should say, is all right per se. Right now, it is the flip.

Let me go on just a moment longer. He said: "I may be wrong about resale price maintenance, because there may be new economic information on transition costs." He said, "All they have to do is say no resale price maintenance and it will be all right."

Judge Bork affirmed his views on mergers between competing companies. He said: "I do not think two or three companies can control the market unless they conspire, but if they could it" would be all right. Those were my words, the last four words.

He repudiates past statements that two companies in a market would be enough for competition. The view in the Congress in passing the Clayton Act would not allow him to do that, allow only two companies—that is at page 345. And he indicated for the first time that he would go along with the will of Congress in the antitrust field even if he thought the judgment of Congress was mistaken. He has said some very harsh things about the Congress, which is probably shared by some Members of this body, that the Congress is incapable of making difficult economic decisions. Therefore, when it makes decisions about antitrust, it really cannot direct the Court because none of us are smart enough in here to know—which prompted, by the way, one of the Members to suggest that maybe the Congress might be smart enough for individual Members, but it was the business of the Congress.

It seemed strange, by the way—editorial comment by the Senator from Delaware. It seems strange to the Senator from Delaware that here is a man who calls himself a strict constructionist; who calls himself—what is the exact phrase he uses? I cannot remember the exact phrase he uses. But original intent is his notion. He has looked at the Constitution for precisely what it means. That is what you must look at.

So he finds, for example, since there is no right of privacy listed, a generalized right of privacy, it does not exist. He goes down the line. But when it comes to antitrust he says: Hey, look, if the judge thinks that what the Congress did did not make any sense, then he does not have a pay attention to it because the Congress does not know what it is talking about in this field. It is a complicated field.

So he gives great latitude to judges to disregard the Congress in the area of antitrust but he wants the Court to follow precisely what the Constitution says and what the Congress says in all other fields.

Again, it has been the area where he is known—I conclude by saying he is known in the field among those 2,000 or 1,900 professors who were against him, as well as those who did not speak, as well as those who are for him—no one denies that he is the leading expert in antitrust in America. He has written more about it than anyone else. But that his views are significantly different than the views that have been the prevailing view in antitrust for the past 40 years.

Mr. HATCH. Will the Senator yield?

Mr. PROXMIRE. May I yield, Mr. President, without losing the right to the floor?

The PRESIDING OFFICER. Without objection.

Mr. HATCH. Let me just say that I believe that his position in front of the committee has been somewhat mischaracterized. I do not believe that Judge Bork indicated in any way that he would supersede Congress' wishes to impose his views in antitrust upon the jurisprudence of this country. As a matter of fact, it was precisely the contrary.

He is the leading advocate for support of congressional views on the bench today. He is the leading advocate that judges should interpret the laws, not make laws. I do not think there is any interpretation of the antitrust views of Judge Bork that would lead one to believe that he would be an activist, interventionist with regard to antitrust laws.

Mr. PROXMIRE. Would the Senator yield on that point?

Mr. HATCH. Sure.

Mr. PROXMIRE. What troubles me is that, as I understand it, Mr. Bork has not always been quite consistent in that view. What the chairman of the committee pointed out as the Bork lack of respect for Congress and Congress' intelligence in the economic area—he may be right about that, but that seems to contradict——

Mr. HATCH. I think you have pointed that out almost every morning you have been here.

Mr. PROXMIRE. I would agree we have been far from perfect. But that would seem to undermine in some respect the view that he would respect whatever Congress did with respect to antitrust.

Mr. HATCH. With all due respect to the Senator from Wisconsin, the fact of the matter is that he does not express a detrimental view of Congress. He does acknowledge that Congress has not gotten its house in order. I think all of us acknowledge that. I do not know of any Member of Congress who does not decry the failure of us to get our house in order.

But I might add that the report of the majority, really, concerning Judge Bork's antitrust views as extremist or extreme, and as advocating judicial activism, I think that report is farfetched at best, really.

As to whether Judge Bork's views are extreme, the Senator declined to mention that 15 past chairmen of the American Bar Association's antitrust section wrote to report to the committee that Judge Bork's views are mainstream and that they accept those views.

Mr. BIDEN. If the Senator would yield—the Senator from Delaware did not use the world "extreme."

Mr. HATCH. I am not indicating the Senator did. I am talking about the report, not the Senator from Delaware. But I think the report may be even more important than the views of the Senator from Delaware, because that is what becomes the major record that Senators are relying on in this matter.

I might mention that these 15 past chairmen further noted that his book, which is harshly criticized by the report, has been cited with approval in six Supreme Court decisions joined by all nine current Justices.

Now, I think it is a misrepresentation to state here on the floor that Judge Bork would suddenly become an activist judge in antitrust law.

I might also add, as the distinguished Senator from Wisconsin undoubtedly knows, antitrust law, the laws that are written are very generalized laws and they are very much subject to interpretation and there are some areas where interpretations will disagree; and will be disagreed with.

I might add, there is a wide-ranging debate on which kind of economic principle should apply to various antitrust principles. I just submit to my dear friend from Wisconsin that there is no one alive in America today, or perhaps in the world, who understands antitrust law better than Judge Bork.

Mr. PROXMIRE. Would the Senator yield? This is exactly what bothers me, you know. If a man like Bork goes on the Court with his dominant understanding and all the work he has done in the antitrust area, he is likely to become the driving force.

Mr. HATCH. Yes.

Mr. PROXMIRE. If this results in vertical price fixing in which the manufacturer can determine the ultimate price, I think that it is a serious setback, from this Senator's value judgments, as far as our economy is concerned and I think it has a very adverse effect on the kind of competition, the kind of prices which consumers are going to pay.

Mr. HATCH. That is a legitimate complaint and legitimate concern. But let me just add this: Judge Bork did not say that he would change the present case law with regard to antitrust law. He did express some question as to whether or not certain aspects of present, current antitrust law really work or do not work. But I do not know anybody in the field who does not have some concerns in precisely those areas.

So I do not expect, and neither did he indicate, that he would suddenly change the laws with regard to price fixing and vertical integration.

But a man with his intellectual stature and understanding of our economy and antitrust laws and so forth, I would be deeply concerned that he could have a profound effect, fundamentally changing our laws and diminishing the kind of competition we have which I think is the very lifeblood of our economy.

If I could just finish this thought, let me say this. I think you have to judge Judge Bork upon his record as a public servant. And on his record as a public servant he has never been in my opinion a judicial activist nor has he been an advocate—activist in the sense of judicial activism as a Solicitor General.

I might add that Chief Justice Burger summed it up by stating that "Congress designed the Sherman Antitrust Act as a consumer welfare prescription."

For this proposition, the Chief Justice cited Judge Bork's book.

I might add that the report does say—and I think this is fair to state here at this time, in this context—that Judge Bork's Rothery decision is an example of judicial activism. The facts rebut that assertion.

Judge Bork reached the unremarkable conclusion that a firm supplying a mere 6 percent of the market has no market power and hence was not restraining trade beyond reason.

In fact Professor Areeda, Phil Areeda and Turner who have written the authoritative multivolume treatise suggest that a market share of less than 30 percent is presumptively evidence of lack of sufficient market power to produce a monopolistic result.

I believe you will find that not only are Judge Bork's views with regard to antitrust stringent, but they are widely subscribed to because they are extremely intelligent and well reasoned. You will also find that the leaders of unions basically subscribe to those views.

Mr. PROXMIRE. I am puzzled by the fact that a generation of Yale law students called him pro antitrust.

Mr. HATCH. I do not know that a generation has done that. There have been some, which is done all the time in antitrust. There are conservative viewpoints, there are liberal viewpoints, and there are viewpoints all the way in between. Judge Bork's would be more moderate to conservative, than, for instance, Professor Pitofsky.

Here is what I mean, when I cited the report. I am not attributing this directly to my good friend from Delaware, but he signed off on it. It says:

> Judge Bork has called antitrust "a particularly instructive microcosm" of his overall judicial, social and political philosophy. Despite his reputation as a practitioner of judicial restraint, he is, in the words of Robert Pitofsky, a respected antitrust scholar and Dean of the Georgetown University Law Center, "an activist of the right" in the antitrust field, "ready and willing to substitute his views for legislative history and precedent in order to achieve his ideological goals; and * * * even when examined by comparison to other conservative critics of antitrust enforcement, his views are extreme."

I might mention that Robert Pitofsky is not known for moderately conservative viewpoints in antitrust. I think you will find that with regard to activism he is far more an activist than Judge Bork ever thought of being.

I think the real answer that I am giving you is that Judge Bork is the leading proponent of judicial restraint in America today. He is the leading proponent that judges not substitute their own views as law and social policy, including antitrust policy, for

that of the elected representatives of the people, meaning us. When the elected representatives have not defined some of these areas as they should, then judges are faced with a viewpoint that they cannot make any rulings in this area and have to find them, which all judges have to, I believe, and there will be areas, I think, where there are errors in decisions on antitrust by Judge Bork. But I can say that his positions are mainstream. I do not think they are radical, and I do not think they are not in accord with the laws.

Mr. PROXMIRE. Mr. President, I yield to my good friend, the manager of the bill.

Mr. BIDEN. Mr. President, let me try to respond.

First of all, nowhere in the report does the Senator from Delaware use the word "extreme." Dean Pitofsky used "extreme." We quote him because, as you know, he is one of the leading antitrust scholars in America. He views Judge Bork's views as extreme. That is Pitofsky's word. It is not BIDEN's. That is number one.

Second, with regard to his view toward Congress, if the Senator will look at page 76, we quote from Judge Bork's prior statements:

> Courts that know better ought not to accept delegations to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary. * * * It would have been best, therefore, if the courts first confronted with the Clayton Act and later the Robinson-Patnam Act had said something along these lines: We can discern no way in which tying arrangements, exclusive dealing contracts, vertical mergers, price differences and like injure competition or lead to monopoly. * * * For these reasons, and since the statutes in question leave the ultimate economic judgment to us, we hold that, with the sole exception of horizontal mergers, the practices mentioned in the statutes never injure competition and hence are not illegal under the laws as written.

If they should not disregard the view of the Congress, at least they should give a very, very different interpretation to that of everyone else.

In the Rothery case, quoted by the Senator from Utah, Judge Bork did speak in an antitrust case. The result was a correct result by most people's standards, but the reasoning he used was very different and very much like he has written in the past. Judge Bork wrote only one significant antitrust opinion while serving on the court, but Rothery was a simple case involving competitive restraint placed upon a local agent by a national van line. Neither party held a significant share of the market. Judge Bork reached out and declared that two important Supreme Court cases on horizontal restraint had been effectively overruled even though the Court itself had not taken such action, implicitly or explicitly.

Throughout the hearing, he did not in any way modify his views on antitrust. I am not suggesting he should have. I am not suggesting that they are bad, immoral, unreasoned, but they are different.

Lastly, let me say to my friend from Wisconsin, Judge Bork considers his field antitrust. He has spoken on many other matters, but antitrust is the place where he has devoted most of his lifetime. He would be a powerful, intellectual force on that Court. His views are as follows, not only in his writings but in the hearing confirmed. I am not quoting, but I am giving you information.

All vertical price fixing and all non-price vertical restraints would be lawful, according to Judge Bork. All conglomerate mergers and vertical mergers would be lawful, according to Judge Bork. All horizontal mergers would be permitted up to a point where an industry was left with only three firms holding 60 to 70 percent of the market.

All time agreements and exclusive dealing contracts would be lawful, per se. Even price fixing among competitors would be lawful if they possessed less than 40 percent of the total market.

The practical effect of these policies would have serious consequences on the American consumer and the American economy. Some would argue, and I suspect Judge Bork does, that those practices he suggests would benefit the economy. But at a minimum I think no one can doubt that if Judge Bork's views on antitrust prevailed, we would have a very fundamentally different antitrust policy in America. Maybe we should. But to suggest that these are somehow traditional views, traditional interpretations, ones that have been accepted by the vast majority of the courts in the past, is just not right.

Lastly, the Senator from Utah, as he skillfully does, says that the Supreme Court has cited on 60 occasions, I believe, Judge Bork's views on antitrust. That is true, but they have not cited them for any of these reasons to, in fact, come up with vertical price fixing, conglomerate mergers, et cetera. They cited them only to make a point in dicta that, in fact, economic effects should be taken into consideration. That is what they cite. They do not cite it, when the impression is left, to say, "As Judge Bork says, there is no restraint on vertical price fixing nor should there be."

They do not say things like that. They say that economic effects should be a consideration.

Mr. PROXMIRE. There are other areas I would like to explore with the distinguished chairman.

Vincent Blasi is a professor of law at Columbia University, a very distinguished professor of law. He has written a very detailed letter and a very impressive letter which I presume other Members of the Senate have received, and which troubles this Senator very basically.

He says:

> The most striking (and frightening) feature of his scholarly writing on the First Amendment is his rejection of the philosophical rationale for free speech that was expressed so eloquently by Justices Holmes and Brandeis in their now legendary opinions on the subject.
>
> That rationale has evolved into one of the most notable commitments of our constitutional tradition. The central tenet of that rationale is that government can never be trusted with the power to determine for its citizens what beliefs shall be held to be true. Over the years, different justices have expressed this idea in different ways. Holmes said:
>
> "The best test of truth is the power of the thought to get itself accepted in the competition of the market." Brandeis said:
>
> "The fitting remedy for evil counsels is good ones." Jackson said:
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, or other matters of opinion." Harlan said:
>
> "One man's vulgarity is another man's lyric." Justice Powell said:
>
> "Under the First Amendment there is no such thing as a false idea." These observations by such a spectrum of our most esteemed justices are so familiar that today they strike us virtually as homilies.
>
> But it takes only a passing familiarity with the climate of opinion at the time Holmes and Brandeis wrote to realize that it was not always taken for granted that government could not prescribe what shall be the orthodox view on the subject of the moral propriety of violent revolution.
>
> It is not an exaggeration to say that the principal achievement of modern First Amendment jurisprudence is the rejection of the claim that government possesses the power to make certain ideas off limits for its citizens.

Then he goes on to say:

> It is important to realize this in assessing the significance of the fact that Judge Bork has explicitly and repeatedly disassociated himself from the Holmes-Brandeis view of the First Amendment.
>
> The concerns I have expressed are not allayed by the modifications and concessions that Judge Bork recently has expressed regarding his views on the First Amendment. He now says that he would apply the First Amendment well beyond the realm of explicitly political speech, and I believe him. He has also said that he accepts the precedent of *Brandenburg* v. *Ohio*, even though he might have decided the case differently had he been writing on a blank slate. Again, I believe him. The problem for me is that these concessions do not go to the heart of the matter. A judge could adhere to Brandenburg and still hold that government employees can be dismissed from a wide range of jobs because of their political beliefs. A judge could adhere to Brandenburg and still believe that foreign nationals can be denied non-resident visas on the basis of the undesirability of the ideas they proclaim. A judge could adhere to Brandenburg and still believe that Marxist writings can be excluded from high school libraries. A judge could believe as a general matter that the First Amendment extends beyond explicitly

political speech and still hold that an unsettling idea such as the moral propriety of adultery can be banned from public discourse. A judge could believe that First Amendment protection extends beyond political speech and still hold that a book that contains graphic descriptions of sexual conduct such as D.H. Lawrence's Lady Chatterly's Lover can be made inaccessible to teenagers. With the exception of ideological visa denial case, which he has decided as a circuit judge, I would not pretend to know for certain that Judge Bork would rule against the First Amendment claims in these cases. But I do think that one can be certain he would approach these cases with a far greater predisposition to uphold the regulatory claims of government than would a judge who derives his understanding of the First Amendment from the premise of limited government so forcefully articulated in the opinions of Holmes and Brandeis.

I ask my good friend from Delaware, who has had an opportunity to make a judgment in this area, about the position of Judge Bork on the first amendment. This it seems to me goes to the very heart of our constitutional democracy and the freedom of speech.

Mr. BIDEN. I think it is probably getting hard for people to believe that the Senator and I have not talked before. This sounds like almost a setup because of what I am about to say. This is the first time, on or off the floor, I have discussed this matter with the Senator from Wisconsin.

I concur completely with the analysis by the professor, whom I do not know.

Mr. PROXMIRE. Professor Blasi of Columbia.

Mr. BIDEN. The Columbia professor. And everything he says in this Senator's view is consistent with what Judge Bork's view of free speech is.

Now, Judge Bork, as the Senator probably knows, in 1971 had an extremely limited view of free speech, of the first amendment, which in fact he has in his testimony and subsequently said he no longer adheres to but he has only come so far. He has only come as far as the professor from Columbia suggested in this Senator's view. Let me read to you—I will not take but a moment—from a speech delivered in 1978, I believe, by Judge Bork that relates to this issue.

Cohen versus California was a case where a young man had an obscenity written on his back about the draft, a four-letter word that said, "Blank blank blank blank the draft." He was brought up on a charge. He was convicted and the Supreme Court overruled. It was not a raging liberal Justice. Justice Harlan wrote the opinion, saying that this in fact was appropriate speech, the Government could not say whether or not it was appropriate, and it could contain political thought. Even though it was an obscenity, it expressed a political thought. Therefore, it would be protected even under the political protection notion that Judge Bork speaks to.

Judge Bork wrote:

The Court has articulated no better grounds for these decisions * * *

Referring to Cohen as one of them:

* * * than the danger of a slippery slope and moral relativism as constitutional command. Justice Harlan, writing for the majority in Cohen, expressed both ideas. He said the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? One might as well say that the negligence standard is inherently boundless.

This is Judge Bork speaking.

For how is one to distinguish the utterly reckless driver from the safe one. The answer in both cases is the common sense of the community. Almost all judgments in the law are ones of degree.

He goes on to express why that is not the case. Then he says, in response to a question about the first amendment:

No. I stated, and I still state, that in order to protect the First Amendment guarantees of free speech, the Court has to define what obscenity is and it may not allow a community to override that. I object to Cohen v. California. I have here my Francis Boyer lecture on this matter, and what I said was—and I disagreed with Justice Harlan on two grounds.

And he goes on to cite them again. The point is that he did not back off his objection on the limitation of what historically, what has at least for the past 30 years been the Court's relatively broad interpretation of the first amendment by very conservative Justices.

Again, I am taking too much of the Senator's time. I see others on the floor wishing to speak, but there is a great deal to be said about Judge Bork's views on the first amendment.

But I think the letter, in this Senator's perspective, from the professor at Columbia accurately captures and characterizes Judge Bork's view.

Mr. PROXMIRE. I appreciate that very much. I would like to conclude, Mr. President, by reading from the concluding sentences of the letter. Professor Blasi concludes by saying:

But as I have tried to explain, I do think his confirmation would place on the Supreme Court a justice who does not share the premise upon which modern First Amendment doctrine rests. Over time, his contribution to First Amendment jurisprudence would surely be in the direction of establishing the premise of majoritarianism that he has asserted so frequently and defended so vigorously.

My conclusion is that Judge Bork's academic writings, his speeches, his testimony, and his judicial decisions on the subject of freedom of speech exhibit a consistent theme * * *

He concludes:

* * * constitutional tradition as it has evolved. I am sorry to say that in my opinion there is good reason to worry that the confirmation of Robert Bork would pose a threat of uncertain proportions to what I regard as one of our grandest constitutional commitments, the shared understanding of the freedom of speech articulated in the opinions of Justices Oliver Wendell Holmes, Louis Branders, 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.

Mr. President, I ask unanimous consent that Professor Blasi's October 6, 1987 letter and an Open Letter to the Senate Judiciary Committee from the University of Wisconsin Law School dated September 19, 1987, be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK SCHOOL OF LAW,
*New York, NY, October 6, 1987.*

Hon. WILLIAM PROXMIRE,
*U.S. Senate,*
*Washington, DC.*

DEAR SENATOR PROXMIRE: As a professor of constitutional law and the editor of a book on the Burger Court, I have taken a keen interest in the Bork confirmation hearings. As a specialist in the law of free speech, I have been particularly attentive to the testimony concerning Judge Bork's views regarding the proper interpretation of the First Amendment. I am opposed to his confirmation, in part because of my belief that his elevation to the Supreme Court would pose a threat to the maintenance of what I regard as one of our noblest constitutional traditions, that regarding the protection of fundamental and sometimes intemperate criticism of government. On the basis of a close study of his academic writings, several conversations with him, and a genuine effort to understand and accept any modifications he has made in his views, I continue to regard Judge Bork as a radical on the subject of the First Amendment. I would like to explain in some detail why I hold that view.

There is no need, I trust, to rehash the radical nature of his 1971 article in the Indiana Law Journal. I would remind you, however, of the testimony given by Dean Bollinger of the University of Michigan Law School that there can be no explanation for a scholar publishing such an article other than his desire to indicate his belief in the ideas expressed therein. As dean Bollinger observed, the thesis of the article was hardly novel in the sense that other First Amendment scholars had not realized the availability of such a view. Nor can the article be considered a contribution due to the rigor or subtlety of the justification given for the thesis that is advanced. To the contrary, the article is notable for its truncated, almost conclusory style of argumentation. The importance of the article to the scholarly community lay entirely in the fact that a professor with respectable credentials should subscribe to such a startling view regarding the proper interpretation of the First Amendment. It would violate the canons of academic discourse for a professor to publish such an article without having concluded that he held the views advanced, and held them seriously, not casually or playfully.

The depth of Judge Bork's adherence to the views he expressed in the Indiana Law Journal article can be gauged also by the fact that he repeated those views in his Cooley Lecture at the University of Michigan Law School in 1979. Had the Indiana Law Journal article attracted no notice at

all, it would be noteworthy if its author restated his acceptance of its thesis eight years later. In fact, however, from the moment of its publication the Indiana article was the subject of a great deal of debate in the law schools. Judge Bork was aware of that debate and surely must have given serious thought to his views about free speech before preparing his Cooley Lecture, which incidentally is one of the most prestigious lectureships in academia. It is noteworthy in this regard also that in a June 1986 interview with the publication "Judicial Notice," Judge Bork said this when asked what factors had influenced the development of his legal philosophy:

"What influenced it primarily was a seminar I taught with Alex Bickel in which we argued about these matters all the time. We taught it for seven years, and I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece which you have probably seen—"Neutral Principles and Some First Amendment Problems.".

This evidence does not establish that Judge Bork continues to hold the views about free speech that he expressed in that article. But it does prove, I believe, that his acceptance of those views in the past was the product of a serious and sustained effort to understand the First Amendment, not an offhand and fleeting attempt to be provocative.

There has been much speculation, of course, that Judge Bork has moderated his views about free speech in the course of his service on the Court of Appeals and in response to some probing questioning during his confirmation testimony. I have read his judicial opinions interpreting the First Amendment and I have listened carefully to his testimony. In my opinion, his performance as a judge and as a witness before the Senate Judiciary Committee provides little basis for concluding that the radical views he expressed as a scholar will not crucially influence the way he would interpret the First Amendment as a Supreme Court justice. The concessions he has made recently to traditional thinking about the First Amendment are not, I believe, as important as his proponents would have the public believe. Please permit me to specify.

The most striking (and frightening) feature of his scholarly writing on the First Amendment is his rejection of the philosophical rationale for free speech that was expressed so eloquently by Justices Holmes and Brandeis in their now legendary opinions on the subject. That rationale has evolved into one of the most notable commitments of our constitutional tradition. The central tenet of that rationale is that government can never be trusted with the power to determine for its citizens what beliefs shall be held to be true. Over the years, different justices have expressed this idea in different ways. Holmes said: "The best test of truth is the power of the thought to get itself accepted in the competition of the market." Brandeis said: "The fitting remedy for evil counsels is good ones." Jackson said: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, or other matters of opinion." Harlan said: "One man's vulgarity is another man's lyric." Justice Powell said: "Under the First Amendment there is no such thing as a false idea."

These observations by such a spectrum of our most esteemed justices are so familiar that today they strike us virtually as homilies. But it takes only a passing familiarity with the climate of opinion at the time Holmes and Brandeis wrote to realize that it was not always taken for granted that government could not prescribe what shall be the orthodox view on the subject of the moral propriety of violent revolution. It is not an exaggeration to say that the principal achievement of modern First Amendment jurisprudence is the rejection of the claim that government possesses the power to make certain ideas off limits for its citizens.

The public record indicates that Judge Bork has never made the Holmes-Brandeis tenet the starting point for his interpretation of the First Amendment. From his Indiana article in 1971 to his Boyer Lecture in 1985, he has decried the moral relativism he finds implicit in the limited-government view of the First Amendment. In contrast, Judge Bork derives the meaning of the First Amendment from the premise of majority rule: if a majority, acting through proper democratic processes, wishes to legislate a public morality in the realm of ideas, no constitutional check should frustrate that exercise of power. No matter how respectful of precedent he may be, a judge who views the First Amendment as an outgrowth of the principle of majority rule is bound to decide new cases in a manner radically different than a judge who views the First Amendment as an outgrowth of the philosophy of limited government. The philosophical difference I have sketched is fundamental. It is important to realize this in assessing the significance of the fact that Judge Bork has explicitly and repeatedly disassociated himself from the Holmes-Brandeis view of the First Amendment.

The concerns I have expressed are not allayed by the modifications and concessions that Judge Bork recently has expressed regarding his views on the First Amendment. He now says that he would apply the First Amendment well beyond the realm of explicitly political speech, and I believe him. He has also said that he accepts the precedent of *Brandenburg* v. *Ohio*, even though he might have decided the case differently had he been writing on a blank slate. Again, I believe him. The problem for me is that these concessions do not go to the heart of the matter. A judge could adhere to *Brandenburg* and still hold that government employees can be dismissed from a wide range of jobs because of their political beliefs. A judge could adhere to *Brandenburg* and still believe that foreign nationals can be denied non-resident visas on the basis of the undersirability of the ideas they proclaim. A judge could adhere to *Brandenburg* and still believe that Marxist writings can be excluded from high school libraries. A judge could believe as a general matter that the First Amendment extends beyond explicitly political speech and still hold that an unsettling idea such as the moral propriety of adultery can be banned from public discourse. A judge could believe that First Amendment protection extends beyond political speech and still hold that a book that contains graphic descriptions of sexual conduct such as D.H. Lawrence's *Lady Chatterly's Lover* can be made inaccessible to teenagers. With the exception of the ideological visa denial case, which he has decided as a circuit judge, I would not pretend to know for certain that Judge Bork would rule against the First Amendment claims in these cases. But I do think that one can be certain he would approach these cases with a far greater predisposition to uphold the regulatory claims of government than would a judge who derives his understanding of the First Amendment from the premise of limited government so forcefully articulated in the opinions of Holmes and Brandeis.

Defenders of Judge Bork might claim that he has modified his views on the First Amendment to the point that he now accepts the proposition that government has no business prescribing what shall be orthodox in matters of politics or morality. I find nothing in the public record to support that claim. His Boyer Lecture, delivered just two years ago at the University of Pennsylvania, contains a spirited defense of the proposition that government has a responsibility to promote a public morality. In his testimony before the Senate Judiciary Committee Judge Bork used the term "obscenity" to refer not simply to graphic depictions and descriptions of an erotic quality but also to the use of words and the expression of ideas that offend public taste and judgment. Any extension of the concept of obscenity beyond the traditional regulatory realm of graphic erotic depictions would greatly enhance the power of government to prescribe orthodoxy. One implication of the Holmes-Brandeis view of the First Amendment is that there can be no such thing as an obscene idea. So the Supreme Court held twenty-eight years ago. *Kingsley Int'l Pictures v. Regents*, 360 U.S. 684 (1959). Nothing in the public record—his academic writings, his decisions as a lower court judge, his testimony—indicates that Judge Bork would treat that proposition as a settled feature of the First Amendment tradition.

As these observations make plain, I believe that a judge's philosophy of the First Amendment necessarily exerts a powerful influence on the way he decides specific cases. That is true even for a judge who is unusually respectful of precedent. I do not know whether Robert Bork is such a judge—on this point his views expressed in speeches seem in clear conflict with his testimony. But even if you are convinced that as a justice of the Supreme Court he would follow established precedent faithfully, I do not think that prediction should be dominant consideration in the confirmation decision. At least in the area of First Amendment interpretation, the major determinant of a judge's performance inevitably must be his understanding of the underlying rationale for the principle of freedom of speech. For that reason, Judge Bork's emphatic, repeated, and never recanted rejection of the Holmes-Brandeis premise should cause anyone who cherishes our First Amendment tradition to view his confirmation with apprehension.

Judge Bork's defenders have argued that in assessing his probable performance as a Supreme Court justice one should give much more weight to his decisions as a sitting judge than to his academic writings and speeches. I think there is something to this point: although a lower court judge is more constrained by precedent than a Supreme Court justice, it is not true that lower court judges are so constrained by precedent that their underlying philosophies exert no in-

fluence on the way they decide cases. I am afraid, however, that as far as his views about the First Amendment are concerned, Judge Bork's performance on the bench does not provide the reassurance I seek that his thinking has evolved. In fact, I detect in the First Amendment decisions of Judge Bork a rather consistent adherence to the central theme of his academic writings and speeches: the renunciation of the Holmes-Brandeis premise that government has no authority to define for its citizens what ideas shall be considered acceptable.

For example, in *Abourezk v. Reagan*, 785 F.2d 1043 (1986), Judge Bork addressed the question whether the First Amendment restricts the power of the State Department to deny non-resident visas on ideological grounds (he was required to reach the First Amendment issue in the case only because he read the McCarran Act as modified by the McGovern Amendment to grant the State Department such authority). It is a fair characterization of his opinion, I believe, to say that he found the issue an easy one. In his view, the foreign affairs power of the Executive Branch clearly includes the power to wage ideological warfare by means of denying visas to foreigners who hold subversive beliefs. I do not mean to suggest that the issue is an easy one for those who would reach the contrary result. There are relevant Supreme Court precedents that take an expansive view of the power to deny visas, most notably *Kleindienst v. Mandel*, 408 U.S. 753 (1972). What is deeply troubling about Judge Bork's opinion, however, is that he hardly acknowledges the difficulty of the issue. He makes no reference whatever to the patent tension between the traditional strong presumption against content regulation of speech and the State Department's assertion of authority in the case. A judge who shared the Holmes-Brandeis premise could not help but be deeply troubled by the spectacle of our State Department denying visas on the ground of ideology. For Judge Bork, I am confident, the case was easy because his philosophy of the First Amendment, derived from the principle of majoritarianism, grants the government the power to protect its citizens from dangerous ideological imports.

Another decision that I find revealing is *Finzer v. Barry*, 798 F.2d 1450 (1986). In that case Judge Bork ruled that the United States government has the authority to prohibit American citizens from criticizing a foreign nation by means of displaying placards within five hundred feet of that nation's embassy. The regulation at issue did not prohibit the display in the identical place of a placard that carried a sympathetic or neutral message. Judge Bork's opinion echoes in some important respects his Boyer Lecture at the University of Pennsylvania. That is, he makes much of the point that a foreign nation can suffer a dignitary injury by means of being criticized near its embassy. In his Boyer Lecture he argued that First Amendment doctrine had gone astray by refusing to recognize what he characterized as "moral harms" as well as material harms. Again, I do not mean to suggest that the result in *Finzer v. Barry* is shocking, although I do believe the case was wrongly decided. There is a respectable argument that the diplomatic context of the dispute should weigh heavily in the determination of the First Amendment issue. But no judge who shared the Holmes-Brandeis view of the First Amendment could have been so casual about permitting speech to be regulated on the basis of amorphous dignitary interests, nor so willing to accept a regulation that makes legality turn on which point of view the speaker expresses.

Two decisions by Judge Bork in the First Amendment area have been invoked repeatedly during the hearings to support the claim that he does not invariably take a restrictive view of First Amendment rights. These decisions are *Lebron v. Washigton Metropolitan Area Transit Authority*, 749 F.2d 893 (1984), and *Ollman v. Evans*, 713 F.2d 838 (1983). In *Lebron* Judge Bork ruled that the Transit Authority could not refuse permission to an artist to buy space to display a poster critical of President Reagan simply on the ground that the artistic depiction was misleading. In *Ollman* Judge Bork ruled that two nationally-syndicated columnists could not be held liable for defamation for claiming that a college professor with left wing views had no standing in his profession. These cases have been cited by proponents of Judge Bork for the proposition that he does not always take a restrictive view of the First Amendment and does not always exhibit a visceral hostility to the constitutional claims of speakers and writers. I agree that the cases serve to refute some of the more extreme characterizations that have been made regarding Judge Bork's constitutional philosophy. Although *Lebron* impresses me as an easy case that no self-respecting judge could have decided otherwise, the same cannot be said for *Ollman*. And in both *Lebron* and *Ollman* Judge Bork offers dictum that belies the characterization of him as a judge who is invariably grudging in the vindication of First Amendment rights. Nevertheless, in neither case does the opinion of Judge Bork cast light on the aspect of his First Amendment philosophy that I believe should give any Senator pause in voting to confirm him. It simply was not necessary to accept the Holmes-Brandeis premise in order to grant the claims of the speakers in *Lebron* and *Ollman*. Those cases did not remotely raise the question whether government can use its regulatory power to foster an ideological orthodoxy. That Judge Bork ruled for the speakers in both of those cases, and did so in unstinting terms, does not put to rest my concern that his interpretation of the First Amendment as a Justice of the Supreme Court will be dominated by his philosophy of majoritarianism. Indeed, his views in the area of libel, to the extent they can be discerned from his opinion in *Ollman*, are consistent with the assessment of him as a judge who seldom favors the claims of individuals over the claims of some larger public good. An important twist of libel disputes is that the would-be regulators of speech are private individuals who claim to have suffered personal harms rather than the state claiming to speak in the name of the majority. That Judge Bork is unsympathetic to the claims of such individuals is not surprising.

I hope I have made plain that my objection to the confirmation of Judge Bork, insofar as it rests on his view of the First Amendment, is not based on the belief that he would be a justice who is disdainful of precedent or censorial in his sympathies. Nor would I accuse him of engaging in sophistical or disingenuous reasoning when discussing First Amendment issues. But as I have tried to explain, I do think his confirmation would place on the Supreme Court a justice who does not share the premise upon which modern First Amendment doctrine rests. Over time, his contribution to First Amendment jurisprudence would surely be in the direction of establishing the premise of majoritarianism that he has asserted so frequently and defended so vigorously.

My conclusion is that Judge Bork's academic writings, his speeches, his testimony, and his judicial decisions on the subject of freedom of speech exhibit a consistent theme that marks him as a radical thinker so far as the First Amendment is concerned. It is fair to ask, however, why the Supreme Court would not be enriched by the addition of such a radical thinker. Why should not the premise of majoritarianism have an articulate defender in the First Amendment deliberations of the Supreme Court? Is the Holmes-Brandeis premise of limited government so fragile that it ought not to be open to dispute within the chambers of the justices?

Were I confident that Robert Bork would stand alone as a justice in rejecting the Holmes-Brandeis view of the First Amendment, I would indeed be troubled by the line of argument I have just suggested. In fact, however, I am convinced that Chief Justice Rehnquist and Justice Scalia also bring to their interpretation of the First Amendment a philosophy of majoritarianism that is fundamentally at odds with the Holmes-Brandeis premise. As I see it, the confirmation of Judge Bork would leave the United States Supreme Court with a group of justices whose views on the freedom of speech and the judicial role are radically at odds with the premise that has spawned the modern First Amendment tradition. It is no answer, in my opinion, to say that those views cannot be so radical if they are held by so many justices. The unprecedented attention recently given to ideology in the appointment of Supreme Court justices explains how a political faction with radical views about individual rights can succeed in having those views championed by more than one justice on the Supreme Court.

When ideology plays so large a part in the initial appointment of justices to the Supreme Court, I think it is necessary that the Senate ask itself in ruling upon a nominee whether his or her confirmation would place in jeopardy any of the truly important features of our constitutional tradition as it has evolved. I am sorry to say that in my opinion there is good reason to worry that the confirmation of Robert Bork would pose a threat of uncertain proportions to what I regard as 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.

For that reason, among others, I believe the Senate would be wise to reject the nomination of Robert Bork.

Best regards,

*Vincent Blasi,*
*Professor of Law.*

UNIVERSITY OF WISCONSIN LAW SCHOOL,
*Madison, WI, Sept. 16, 1987.*

AN OPEN LETTER TO THE MEMBERS OF THE SENATE JUDICIARY COMMITTEE

We are members of the University of Wisconsin Law Faculty and, among us, hold views which cover the political spectrum. In addition, our backgrounds include those of us whose past work has been in academia, in government service and on behalf of business and corporate as well as individual clients. Despite this diversity in background and political views, we are united in urging that nomination of Robert Bork to the United States Supreme Court be defeated.

While a nominee's political or philosophical views are often overlooked by the Senate in the search for ability and integrity there is no constitutional mandate for such a limited Senate "advice and consent" function. President Washington's nomination of John Rutledge and President Johnson's nomination of Abe Fortas as Chief Justice and many in between were rejected on philosophical grounds. It is entirely consistent with the Senate's historical role to consider Robert Bork's views.

Among the major issues before the Supreme Court in the indefinite future will be several dealing with efforts by government, at all levels, to probe and regulate individual behavior utilizing and the amazing breakthroughs in technology that we are now seeing and will continue to see. Some examples are efforts utilizing advances in genetics and genetic engineering and electronic surveillance and monitoring. Questions about AIDS related legislation and practices will also find their way into the Court's calendar. We do not for a moment believe that all of these questions have to be resolved against government power. Nevertheless, the thought of a phalanx of five justices invariably and inevitably in favor of what the government does at the expense of the individual is frightening. Robert Bork would be the fifth.

As you know, Robert Bork subscribes to the theory of original intent and believes, essentially, that no individual protections should be read into the Constitution that were not intended by the framers when the Constitution was adopted. This is precisely the kind of cramped approach to the Constitution that will result in a massive enlargement of government power at the expense of the individual. For example, it takes no great historical insight to know that when the Bill of Rights was adopted, it was the excesses of the British Government over the prior centuries that were sought to be avoided—brutal interrogation techniques, persecution on account of religion, invasions of the home, suppressions of a free press, trial without jury, trials in places other than the venue of the accused, etc. The drafters of the Bill of Rights were good historians and knew about these abuses and did their best to keep them from recurring in the new Republic.

But brilliant as they were, there is no way they could have foreseen how the aged-old problem of reconciling a workable government and individual rights would manifest itself 200 years down the road. They could look back 200 years to Queen Elizabeth's Star Chamber but they could not look ahead 200 years to compulsory genetic testing or whatever the precise questions the Court will have to address in the near future.

The Constitution is a living document precisely because it represents a cautious and wary approach to the exercise of governmental power. A Justice who confines its protections to 18th century fears or to those prevalent when the 14th Amendment was adopted over a hundred years ago saps it of its vitality.

As you can see, we are not in blind opposition to a conservative nominee. Indeed, our position—grounded on a concern that government power be checked—could accurately be labelled conservative. We would certainly not urge defeat of a nominee such as retiring Justice Powell. Robert Bork, however, is not that kind of moderate conservative. He is an ideologue whose repeated and passionately expressed views commit him to the inevitable expansion of governmental power. We urge that you vote against his nomination.

Ann Althouse, Richard Bilder, Abner Brodie, Peter Carstenson, Arlen Christensen, Carin Clauss, Walter Dickey, Howard Erlanger, Martha Fineman, G.W. Foster, Marc Galanter, Herman Goldstein, Hendrik Hartog, Stephen Herzberg, J. Willard Hurst, James E. Jones, Jr., Leonard Kaplan.

John Kidwell, Neil Komesar, Lynn LoPucki, Stewart Macaulay, James MacDonald, Marygold Melli, Samuel Mermin, Joel Rogers, Frank Remington, Vicki Schultz, Gerald Thain, David Trubek, Frank Tuerkheimer, June Weisberger, William Whitford, Zigurds Zile.

Mr. PROXMIRE. Mr. President, I thank my good friend, the chairman of the Judiciary Committee, and my good friend, the distinguished Senator from Utah, for the exchanges that have taken place. They have been very helpful to this Senator in determining how I will vote on the nomination. I yield the floor.

Mr. GRAMM addressed the Chair.

The PRESIDING OFFICER. The Senator from Texas [Mr. GRAMM].

Mr. GRAMM. Mr. President, let me say that first I am awfully tempted to jump in and give all kinds of counterexamples that talk about the Cohen decision, a decision based on logic that one man's vulgarity is another man's lyric, and to talk about the Ollman versus Evans ruling where Judge Bork extended the first amendment right of free speech by finding that high settlements in liable suits threatened free speech in the media.

But the one thing I try never to do is become involved on somebody else's battlefield. While there are many distinguished students of the law here, I am not among them. I would argue that means on many occasions I am not confused. [Laughter.] But there are obviously those who would argue otherwise. I do not want to get into that debate.

I want to really address this whole issue of confirmation, and if I have anything to contribute on this subject, it is not trying to hammer out, from all of these rulings by names that most of us have never heard, that Judge Robert Bork is no extremist. What I want to talk about is the constitutional process, about confirmation, about what elections mean, and about what is at issue here for that process. And I want to try to do it in such a way as to focus on what I consider to be the big picture.

First of all, the Constitution outlines what we are about here in very simple terms. In article II, it gives the President the power to appoint people to the Supreme Court subject to the advice and consent of the Senate.

I would like to talk a little bit about what our Founding Fathers must have envisioned in the advise-and-consent role and what I believe they did not envision. Each of us must have a personal view of the Constitution. In fact, the other day I was speaking at an elementary school in Port Arthur, TX, and a third-grade student, a little girl, asked me, "Why does everybody love the Constitution?" I said, "Well, part of it is that we each sort of interpret it to suit ourselves." And I guess each of us come to this body with a general perception of our responsibilities under the Constitution.

I would like to outline my basic perception to set a context for what I am about to say.

I have always believed that elections set a political roadmap for the Nation, that when the American people go to the polls in a Presidential election and they elect a President in that election as in no other they set out their philosophical agenda. Obviously, each of us from time to time try to read our own meaning into what that is. I have served under one Democrat and one Republican President and I have always felt that when the people elect our Presidents, those Presidents ought generally to have the right to appoint the people they choose.

I guess I have come to understand the limits of Presidential power. And those limits are very severe indeed. We have about 3 million people who work for the Government. If you get elected President, you get to appoint about 3,000 of them. You have no guarantee that the other 3 million share your mission or your goal or your vision, or the vision of the people who elected you.

So I have always felt no matter who was in the White House, if he sent a nominee to the Congress for confirmation in the Senate, I ought consider two aspects. No. 1, the person's experience and qualifications; I think it is reasonable to vote against somebody if you think they are not qualified.

If I were appointed to the Supreme Court and someone said, "Well, old GRAMM is an economist and not even a lawyer," that would be, it seems to me, a reasonable justification for voting against me.

The second thing I think we have a right and an obligation to look at is integrity. Does this person have integrity? Does he represent in actions and in words—because in our business, words

are actions—the kind of person that we would want to fill a position of trust?

I have always believed that we should not be refighting the last election on Presidential appointments. One of the reasons I feel passionate about the subject of Judge Bork is not that I agree with Judge Bork on everything. In fact, a lot of things that Judge Bork has said and positions he has taken are positions and statements with which I do not agree. His position on the balanced budget amendment to the Constitution is totally unenlightened, which is code for "I don't agree with it."

In fact, I could say it is an extremist view. Eighty percent of the people of America in poll after poll after poll say they favor a balanced budget amendment to the Constitution, and here Judge Bork is taking an extremist view, going against the overwhelming will of the American people, saying he is against the balanced budget amendment to the Constitution.

There are few things that I agree with Thomas Jefferson more on than his belief that we made our major error in the Constitution by failing to limit the power of the Federal Government to borrow money.

So I do not agree with Judge Bork on the balanced budget amendment to the Constitution. Quite frankly, despite the discussion we had a minute ago on the floor about antitrust, as I read Judge Bork's rulings from the point of view of an economist and not a lawyer, I am not overwhelmed in terms of my support for where he has come down on the antitrust issue.

The point I am trying to make is the fact I do not agree with Judge Bork on issues that to me are pretty important, in the balanced budget amendment. I think it is important to the future of America and to the future of the free world, for that matter.

I am not opposing him because I disagree with him on that. In fact, I am in support of him, even though on this fundamental issue I could make an argument that this view is out of sync with the vast majority of the American people.

You see, my view is that when we elected Ronald Reagan there were judicial issues involved in that election that transcended these little specific instances where I might disagree with him.

I think most people who voted for Ronald Reagan in 1980 and in 1984 took the position that they wanted people on the Supreme Court, on the Federal bench in general, who were strict constructionists to the Constitution, who believed that the Founding Fathers wrote the Constitution to deal with the problems of their era and what they perceived to be the problems we would face in the future, but were not so arrogant as to believe they had a lock on truth for all times and, so, set out an amendment process, a process that we have now used many times.

I believe that a clear issue in those elections was a perception that Ronald Reagan would appoint people to the Federal bench who tended to be strict constructionists of the Constitution, and tended to believe that if it was not in the Constitution, and if Congress has not chosen in 200 years to amend the Constitution, that we ought not to have unelected officials writing the Constitution to suit themselves; that, in fact, if it is not in the Constitution as it was originally written and if it is not amended, the quickest way they can get it changed is to rule on the Constitution as written, and then have Congress and the legislatures change it if they choose to do that.

I think it is a fair assertion to say that there was a clear choice in 1980, and again in 1984 concerning this concept. I would say the vast majority of the American people believe Congress, not the courts, ought to make the laws.

I also think there is growing concern in this country about the rights of victims as well as the rights of criminals, a belief that our system has swung too far in protecting criminals at the expense of law-abiding citizens.

In very general terms, I think it is fair to assert that those issues were to some extent contested in 1980 and 1984.

Many newspapers have editorialized against Bork; but, as we have seen over and over, I think there is a general contention, and perhaps a consensus, that Judge Bork's nomination was a logical extension of the election of Ronald Reagan as President.

Now, what kind of debate have we had? We have had some reasonable debate, some not so reasonable, and we all want to define which is which. But I would like to point out the parts of the debate that I think go well beyond advice and consent.

We have had advertisements run that have said, in essence, that Judge Bork's confirmation would likely allow States to impose family quotas for population purposes or to sterilize anyone they chose. Perhaps the opening shot of this debate was the following statement, made on the floor of the Senate:

> Mr. 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 citizens' doors in midnight raids, schoolchildren could not be taught about evolution.

And the statement goes on and on.

Having watched some of the hearing, having tried, to the extent that anybody with mortal eyes, can try to look at the entire debate, I cannot, in my mind, come to the conclusion nor really understand how others could come to the conclusion that anything in Judge Bork's life would lead one to think that he would support, rule on the basis of, or try to promote the resegregation of America. I see absolutely nothing in this man's life that could ever prompt me to believe either that or the notion that Judge Bork's confirmation would mean giving States the power to sterilize anybody they chose.

It is very interesting that one of the great Supreme Court Justices, Oliver Wendell Holmes, who has been called forth as an example of a great Justice, did rule, in a case in Alabama, that three generations of "idiots" was enough to allow the constitutional sterilization of those who were deemed to be in that category. I do not think we would ever confirm anybody today who had made that ruling. Oliver Wendell Holmes would never have been on the bench if he were coming before us today, based on his record.

In the attack on Judge Bork that we have seen in the country, in advertising, and that we have seen to some degree here in the Senate, there is an inconsistency; and rather than trying to point out why the argument is not right, which has to do with all these legal opinions which often contradict each other, depending on how you interpret them, let me just make my point about contradiction.

On the one hand, a point is made that Bork is an extremist, that he is out of the mainstream of American thinking, that his views on the great judicial issues of our time are so extreme that he should not be confirmed. In fact, in paid advertising such as we have never seen on a judicial nomination, that is the principal thesis. But, when you get down to the bottom line and you look at the real opposition, you find that while he is portrayed as an extremist on one hand, the basic objection to Bork comes down to something that is in total contradiction of this extremist picture that is printed.

In fact, in what is the committee staff's response to the White House analysis of Judge Bork's record, a response that came out on September 2, on page 11, we really get down to what the bottom line is here. This says:

> When a nominee such as Judge Bork could dramatically change the direction of the Supreme Court, each Senator has both a right and a constitutional duty to consider whether the judicial philosophy of that nominee is desirable.

I submit to Members of the Senate that if you are an extremist, how are you going to tilt the balance in the U.S. Supreme Court? How can you be this radical, this extremist, and your one vote out of nine tilt the balance in the U.S. Supreme Court?

Now, I could go into a long discussion about why the extremist view is in no way borne out by the facts. We

have all heard the facts presented. In Judge Bork we have a person who has been a distinguished law professor, Solicitor General, a member of the D.C. Appellate Court, and who has a record of basically mainstream rulings. Not one of his opinions has been overturned by the Supreme Court. That did not sound like a radical to me.

In terms of ruling with the majority on a court that was predominantly liberal and Democratic when Judge Bork was appointed, and which is now only roughly 50-50, he has ruled with the majority 94 percent of the time. That is more often than most Members of the Senate vote with our own leadership. Is that an extremist view? Well, it may be or it may not be, but I am not going to follow that rabbit trail, because I think that is not the issue.

The issue, if Bork were an extremist, the fundamental argument against him would be false. The fundamental concern, we all know, is that Judge Bork's nomination—as it says right here on page 11 of the response to the White House analysis of Bork's record—could dramatically change the direction of the Court.

You do not dramatically change directions of a nine-member decisionmaking unit if you are one extremist.

The argument here is that Judge Bork's nomination means that for the first time in 30 years the Court would have a majority that believed, in general terms in strict construction of the Constitution, which brings me to my principal point.

What we are doing here and what has occurred in the country is not what our Founding Fathers envisioned. Instead, we have had an effort to refight the 1980 and 1984 election.

Judge Bork has not been attacked because he lacks ability or because he lacks integrity. He has been attacked by exactly the same groups who opposed Ronald Reagan's election in 1980 and who opposed Ronald Reagan's election in 1984, groups trying to win in the Senate what they could not win at the ballot box. They are trying to prevent the democratic process from working in terms of a person who was elected as a conservative, as a strict constructionist of the Constitution; they are trying to prevent, by redebating those issues, a person who reflects the President's judicial philosophy from going to the bench. The reason is that the American people through the election process, as reflected in the appointment process, have started to change the direction of the Supreme Court.

Now, I do not think this serves the process. I do not think that this serves the process because we are seeing the injection of political debate into the confirmation process. How can the judiciary be independent if political issues dominate confirmation?

I have been concerned about this in appointments in general. Every time someone comes before the Senate in confirmation, we are trying to tie him down on some issue to force that nominee to carry out our will in return for granting him confirmation. I do not believe that is what the Founding Fathers had in mind.

I do not believe that those who have orchestrated this attack on Judge Bork are going to be successful. I am confident that the President is going to nominate someone, if Judge Bork is not confirmed, who will be conservative, who will be a strict constructionist of the Constitution. And I am also convinced that unless something very wrong occurs, the next nominee is going to be confirmed, principally because it is one thing to go out and say, "Look, I am not against Bork because Bork is a strict constructionist of the Constitution, and I am not against Bork because he believes that the Courts ought not to be making the law to suit some special interest they agree with, and I am not against Bork because of my position on the death penalty, 'or' I am not against Bork because I think it is fundamentally wrong for the person who believes in the sanctity of human life to serve on the Supreme Court."

People are not going to go out and say that they are against Bork because there is something wrong with Bork.

But if the President sends up someone who shares the same values, after all that old argument will not wash, and people will stop making it.

I would like to believe that we could have our hearts open, but we all know once we have taken a position it is hard to change. I would like to believe that Judge Bork is going to be confirmed but he probably will not be, and he is probably not going to be confirmed basically because of a philosophical dispute, a political dispute, concerning the direction of the Supreme Court.

I think this injection of politics hurts the process. I think that in Judge Bork, we have a good man who richly deserves to be on the Supreme Court. While I think Judge Bork's views on the balanced budget amendment to the Constitution are totally unenlightened, while there are many of his rulings with which I disagree, that does not change the fact, and while there are a lot of people who have come out against Judge Bork, in my opinion on political grounds, in the legal profession, since lawyers are not any more immune to politics than anybody else and some would say, they take to it easier.

The plain truth is that I believe and I think many in this Nation believe that Judge Bork was perhaps the most qualified candidate in a quarter of a century. He will probably not get to serve because of a political campaign that has been mounted against him in what was not supposed to be a political process.

Finally, I want to just sound one more alarm: I am deeply concerned that Bork was especially vulnerable to attack because he is brilliant, because he is outspoken, because he has been a teacher, because he has written extensively.

I think and I hope Members of the Senate will at least think about this as we go on to other nominations, that it is very dangerous when a person, because he is outstanding, because he does write things, because he is willing to look at new and innovative ideas, because as part of being a teacher, he is willing to make provocative statements, I think the fact that he is more vulnerable to attack than people who never write anything and people who never say anything, to people who do not stand out from the crowd intellectually, I think that is a real danger because I think it is clear that as a result of this decision we will assure that Presidents in the future will be less likely to nominate the most brilliant candidate, less likely to nominate the candidate whose position is part of the public record, less likely to appoint the candidate who has written a comprehensive book when the nominees very skills, brilliance, and willingness to speak out make him vulnerable to political attack.

So, I am concerned that not only are we turning what was supposed to be a debate about qualifications and integrity into a debate about political agenda, but I am deeply concerned that we are going to have fewer and fewer people appointed who ever wrote anything, who ever took a provocative position, who ever had an intellectual leadership role in forming public opinion, and I think that is a potential tragedy for America because the job of serving America is a job that deserves the very best. I would be willing to predict today that the President's next nominee will not have written as much as Judge Bork, will not have been on the cutting edge of the intellectual debate as Judge Bork has.

Now, what this means is we will not get the best, the keenest minds. We run the risk of affecting lower court decisions as people posture to get in a position that some day they might be confirmed to the Supreme Court. And we are in danger of inducing our best minds to not enter into debate about the issues on which the future of America depends.

I hope the day never comes when the only way to be confirmed to a Federal post is to never have written anything, to have never exposed your thought process, to have never engaged in a discussion of a controversial

issue. We are all losers if that happens.

I yield the floor.

Mr. LEAHY and Mr. WALLOP addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont.

The Senator will suspend.

Let me say that I know there is no agreement formally or informally and no rules or requests; it is a matter of discretion of the Chair. The Chair, this Presiding Officer, does feel that when there are two Senators seeking simultaneous recognition, it is only fair to go from one party to the other party and from one who has spoken for the nomination to one against the nomination.

The Senator from Vermont.

Mr. WALLOP. Will the Senator yield just for an observation?

Mr. LEAHY. I yield if I can do so without losing the floor.

Mr. WALLOP. I have no intention of taking the floor.

I would just say to the Chair, I have no problem with his pursuit of fairness, but I think the rule, in fact, does state that that Senator on his feet seeking recognition first is to be recognized. I was, in fact, standing here during the time the Senator was on the phone, and long before he had his podium I had my podium. I have no objection to the Chair's pursuit of fairness, but I do not believe it should be done by violating the rules.

Mr. LEAHY addressed the Chair.

The PRESIDING OFFICER. The Senator will suspend. The Chair is the one that opened up this discussion. He realizes that. But the rule states that the Senator who is first heard in seeking recognition is the one to be recognized. The Chair, in his statement to the Senator from Wyoming, knows he has been on the floor, as has the Senator from Vermont. It is the opinion of the Chair that the Senator from Wyoming and the Senator from Vermont sought simultaneous, audible, appropriate recognition. The Chair only thought, so that there would be no misunderstanding, that because there was simultaneous attempts to have the floor, I chose the Senator from Vermont because of the reason the Chair has stated, in fairness both to the parties and those who are for or against the nomination.

The Senator from Vermont.

Mr. LEAHY. Mr. President, I thank the Chair for noting that. I would point out to the Senator from Wyoming that I have been on the floor off and on since 9 o'clock this morning hoping to be recognized. But I realized that some of the leaders in this debate were speaking and that we were going back and forth from proponent to opponent to proponent to opponent. So I waited until a proponent had spoken. I had no intent to cut off the amount of time that the proponent of the nomination wished to speak. I waited my turn. I might mention to the Senator from Wyoming that I sought recognition now, because shortly after I speak I have to go and chair a hearing where we are trying to get some of President Reagan's judicial nominations through. If I am not there, they will just have to be delayed until sometime next month or the month after. I am holding this hearing to try to help the administration get their nominations through.

But, in any event, I have been here for several hours waiting while the proponents and opponents spoke. I waited patiently and was willing to wait as long as the last proponent spoke.

Mr. President, I rise in support of the recommendation of the Judiciary Committee that the Senate withhold its consent to the President's nomination of Judge Robert Bork to be an Associate Justice of the Supreme Court.

I have already stated in detail here on the Senate floor my reasons for opposing this nomination. In fact, those reasons are also outlined in my separate views and they have been printed, along with the committee report. That report is on every Senator's desk. In the interest of time, I am not going to restate my reasons here today.

I have spoken about this nomination here on the Senate floor once on August 6 before the Judiciary Committee hearing began and again on September 30, the day those hearings concluded. I stated on both of those previous occasions that the central issue in this nomination is the question of Judge Bork's judicial philosophy: His approach to the Constitution, and to the role of the courts in discerning and enforcing its commands. The focus of the proceedings in the Judiciary Committee was an examination of Judge Bork's judicial philosophy. The committee's conclusions about that judicial philosphy led it to recommend that the Senate should withhold its consent to this nomination.

These issues of judicial philosophy have been at the heart of our debate on this nomination up until now. They should be at the heart of the debate in which we are now engaged here on the Senate floor. But, for the most part, that is not the debate in which we have been engaged here since yesterday when the proponents of this nomination finally consented to bring this issue to the Senate floor.

Mr. President, I have often said that the Senate should be the conscience of the Nation. I believe we should help mold and reflect that conscience in our debate here on the Senate floor. I was 34 when I first came to this Senate and made such commitments 13 years ago. I feel far more strongly about that today than I did then.

We have been told several times during this debate the same thing that the President of the United States told us in his speech last Wednesday: That this debate is not about the judicial philosophy of Judge Bork. Instead it is, in the President's words, about "the process that is used to determine the fitness of those men and women selected to serve on our courts."

I know a little bit about that process. I have served in the Senate for 13 years and I have seen us exercise our duty to advise and consent. I have served on the Judiciary Committee for more than 8 years. During that time, close to 400 nominations to the Federal courts have been considered by the committee. The overwhelming majority of them, perhaps 95 percent, have been approved by the committee and then confirmed by the Senate, with my support. This includes 318 nominations made by President Reagan. In fact, I have supported all but a tiny handful of the 318 nominations made by President Reagan. So has nearly every single Senator on both sides of the aisle.

My personal involvement in this process has deepened this year with the establishment of the Judiciary Committee's judicial nominations task force. As the chairman of that task force, I have presided at a great majority of the confirmation hearings held on nominations to the lower Federal courts. This year, the committee has recommended that the Senate consent to 28 judicial nominees, and 27 of these have been confirmed.

In fact, the Bork nomination is the first nomination the committee has reported unfavorably during this Congress.

Let me reiterate that, Mr. President, This year, the committee has recommended that the Senate consent to 28 judicial nominees and 27 have been confirmed. The Bork nomination is the first one the committee has reported unfavorably during this Congress.

Our task force is continuing its work. This afternoon, while this debate is going on, a hearing will be held on other judicial nominees. Tuesday, on the eve of this debate, a hearing was held on three judicial nominees. More are scheduled to be heard within the next few days.

What I am saying, Mr. President, is that President Reagan has been very successful when he submitted his judicial nominees to the advice and consent process of the U.S. Senate. But now that the President is about to lose a big one—and there is no doubt in anybody's mind he is about to lose—he has discovered some serious defects in the process. A few Senators have also made a similar discovery. As a result, we have the debate in which we are

now engaged, a debate not on Judge Bork, but a debate on "the process."

This debate is not about Judge Bork, the man. It has never been about Judge Bork, the man. Robert Bork the man has my admiration and respect. I admire his scholarship, his intellect, his skill in crafting judicial opinions. I respect his personal decency and integrity, his unparalleled forthrightness in answering the most probing and far-ranging questions by members of the Judiciary Committee.

In his testimony during the hearings, he set a high standard that future nominees are going to find hard to match.

But the issue before the Senate is not Robert Bork, the man. The issue is the judicial philosophy of Robert Bork, his approach to the Constitution, and to the role of the Supreme Court in discerning and enforcing its commands.

In this bicentennial year of our Constitution, this is a debate over the future of our Constitution. It is a debate about our rights and liberties as American citizens. It is a debate about the Supreme Court as the ultimate guardian of these rights and liberties. It is a debate about the preservation and vitality of that essential role of the Supreme Court as this Nation embarks on its third century of constitutional self-government.

That is why the Senate Judiciary Committee spent so much time learning about the judicial philosophy of Judge Bork.

But more importantly, Mr. President, while the Senate Judiciary Committee has been learning about the judicial philosophy of Judge Bork the American people have been learning right along with us.

Last month Judge Bork testified before the Judiciary Committee for 5 days. Millions of Americans watched those hearings on television. Millions more followed in the press.

They heard what the members of the Judiciary Committee heard and they saw what we saw.

Judge Bork told the Judiciary Committee he still does not think that the Constitution gives Americans a right to privacy, a "right to be let alone" by their Government.

The American people head him defend that view, just as those of us who sit as Senators on the Judiciary Committee heard him.

Justice Bork told the Judiciary Committee last month that he has finally decided that Government discrimination against women is unconstitutional, at least if it is "unreasonable" discrimination.

He said that for the first time at those hearings. As recently as a month before he was nominated he had maintained his long-held view that the equal protection clause, the constitutional guarantee of equality, did not apply to sex discrimination.

The American people heard his newly expressed views on the subject just as the Senators on the Judiciary Committee heard him.

Judge Bork told the Judiciary Committee last month that he has finally accepted most of the Supreme Court precedents that protect our freedom of speech. This, too, was a departure from the views that Judge Bork has expressed for many years prior to his nomination to the Supreme Court.

The American people heard Judge Bork's newly expressed views on the first amendment just as the members of the Judiciary Committee heard them for the first time.

After hearing 5 days of testimony from Judge Bork, the committee heard 7 more days of testimony from witnesses, both supporting him and opposing him. Sixty-two of those witnesses urged us to give our consent to the nomination. Forty-eight of those witnesses urged us to withhold our consent. With few exceptions the testimony on both sides was well reasoned and throughtful and I think it was valuable to the committee in reaching its conclusion.

Mr. President, the hearings were only part of the process by which the Senate carried out its constitutional responsibility to advise and consent on this nomination. Before the gavel fell on September 15, opening the hearings, the members of the Judiciary Committee took the time to study the extensive written record of Judge Bork's judicial philosophy. We read thousands of pages of his speeches, articles, interviews, and judicial decisions. In fact, I spent a good part of the month of August in Vermont doing nothing but reading those articles.

This preparation provided the essential context in which the committee evaluated Judge Bork's testimony, including his views on equality and free speech, views which, as I have said, he announced for the first time at the hearing.

But we also took time to hear from the people, the people of the 50 States who elected the 100 Members of the Senate and who count on us to do our duty under the Constitution. Two hundred Forty million Americans are going to be affected by our decision on the Bork nomination. Only 100 of those 240 million Americans will get to vote in this nomination. That makes it all the more important that the Senate look at the nomination seriously and carefully, and then vote one way or the other on this nomination.

We have heard from the people. We heard from them on preprinted postcards and letters, and that is the kind of mail a Senator weighs—literally weighs—rather than reads.

I go into my own office and say: "What have we got on the preprinted ones?" And we have a big sack one way and a big sack the other way. You can lift them up and weigh them, and say, OK, I know which way it is going."

But more importanly we heard from the American people in other ways. In my home State of Vermont I heard from the people about the Bork nomination every day for the last 3 months. They talked to me at town meetings and civic functions. When I was mowing my lawn, someone would come up to me and talk about the Bork nomination. In the supermarket, when I went to church, when I walked down the street to get a paper, when I went to my son's school—whatever I was doing in Vermont, somebody would come up and talk to me about this nomination. Whether it was in small towns or on city sidewalks, the people of Vermont let me know what they thought about Judge Bork.

When I was back here in Washington I received hundreds and thousands of thoughtful and thought-provoking letters and telephone calls from the people of my State on both sides of the issues.

I have never in 13 years here in the Senate encountered an issue on which the people of my State made such an effort to contact me personally and talk with me directly. There has never before been an issue where I could count on the fact that soon as I set foot in the State—and that is almost every week—people within minutes would come up to me and express a view either for or against the nomination. No other issue that we have had here in 13 years has caused so much comment.

Every one of these Vermonters agreed that the decision on the nomination of Judge Bork was one of the most important issues facing the Senate. Many thought the Senate should confirm Judge Bork, but many others had their doubts. They reminded me that a Supreme Court Justice does not serve just to the end of the term of this or any other President. A Supreme Court Justice serves for life. Vermonters were concerned about the legacy of freedom, of equality, of liberty that our generation will leave to our children. And I shared their concerns.

The record before the Senate is a record of the past; what Judge Bork has said and done up to today. But the Senate's decision is a referendum on the future.

I read the thousands of pages of articles and speeches and decisions written by Judge Bork. I listened to his testimony. I heard the other witnesses. I was there for almost all of the hearings.

At the end of the committee process I was not satisfied that the confirmation of Judge Bork would be in the

best interests of the American people and of our Constitution. I concluded that the confirmation of Judge Bork would pose too great a risk for the future of the ideals—freedom, equality, and liberty—that "we the people" have emboided in our Constitution. A majority of the members of the Judiciary Committee reached the same conclusion.

It was a hard decision, one that will disappoint many of our constituents. But in the end I believe that it was the right decision.

The members of the Judiciary Committee made that decision on the record. We decided on the basis of Judge Bork's writings and on the basis of what we saw and heard at the hearings. We based our decision, in short, on the same evidence that the American people saw for themselves as they watched these historic hearings.

We did not base our decision on public opinion polls. We did not make up our minds because of newspaper, radio, or television advertising. We did not arrive at this difficult decision by examining the fundraising appeals of groups for or against Judge Bork.

We based our decision on the record. We explained our decision when the committee voted and in the committee report that is on every Senator's desk.

The American people elected Ronald Reagan as President, but they also elected the 100 Members of the U.S. Senate. The Constitution—that magnificent charter whose bicentennial we celebrate this year—tells us that the selection of Justices of the Supreme Court is too important to leave to one branch of government. It tells us that the President and the Senate are equal partners in that crucial decision.

The President carried out his part when he nominated Judge Bork. But now it is up to the Senate to carry out its constitutional duties.

That is the process by which the Judiciary Committee reached its decision. It is a process hallowed by 200 years of constitutional tradition. It is the process that the President of the United States unfortunately chose to denounce in his speech last Wednesday, when he said:

> The confirmation process became an ugly spectacle marred by distortions and innuendos, and casting aside the normal rules of decency and honesty.

Mr. President, I listened to every word of that speech. I was as troubled by it as I have ever been by a speech by any President.

This is a serious charge for a President to make against the Senate of the United States.

We in the Senate must take it seriously. We cannot just dismiss it as the cry of a sore loser who wants to change the rules of the game when he finally loses one.

So I ask the President, "Where did we in the Senate went wrong?" When did this process, by which more than 300 of the President's nominees to the Federal bench have been confirmed, turn ugly? When did it become indecent? What makes it dishonest?

Did we go wrong back in June when Justice Powell retired and this vacancy was created? Did we go wrong at the very beginning of the process of advise and consent?

The Constitution does not simply say the Senate must consent to Presidential nominations. It says we must advise and consent.

We might ask, how did the President seek the Senate's advice on this vacancy? He sent Howard Baker and Attorney General Meese to the Senate with a long list of possible nominees. There is nothing wrong with that. Judge Bork was at the top of that list. The Senate leadership replied that some of us knew enough about Judge Bork's record to predict that a Bork nomination would not have smooth sailing. It would be a difficult decision. It would spark in the words of the chairman of the Judiciary Committee, a contentious debate.

The Chief of Staff and the Attorney General went back down Pennsylvania Avenue and the next day the President announced he would nominate Judge Bork. Is that where the process went wrong? When the Senate leadership was presented with that list, should they have bitten their tongues and told the President, "We do not care. Take your pick. We will rubber-stamp whomever you send."

That is not what any President should desire. Certainly that is not what 240 million Americans, represented by the 100 men and women in this Chamber, should ever expect.

Should we have done instead what the Constitution tells us to do, to give the President our advice? That is exactly what we did. That was not ugly. That was not indecent. That was not dishonest.

Obviously, the President's mind was already made up. He ignored the preliminary advice of the Senate. He nominated Judge Bork anyway. And the Constitution gives him that right. The Constitution does not limit in any way, shape, or manner whom the President can nominate. It does not limit the President in any way because the Constitution contains a check and balance. The Constitution says the Executive, the President, can nominate somebody. But that person does not become a judge with life tenure unless the U.S. Senate advises and consents. That is the check and the balance, and that is why the Constitution gives any President so much leeway.

After the nomination was made, we heard from some of the supporters of this nomination that the Senate should not consider Judge Bork's judicial philosophy. We were told that our only job was to make sure that the nominee was competent and law-abiding. Any further inquiry, we were told, would be ideological, and somehow improper.

That is a tough argument for anybody to make. The proponents of that argument want us to ignore 200 years of constitutional history. That history tells us that the Senate has often considered and debated the judicial philosophy of nominees to the Supreme Court. In fact, after those debates, one-fifth of these nominees have not been confirmed.

The proponents of the argument also want us to ignore the recent testimony of the Attorney General, who told the Judiciary Committee in March that it was appropriate for the Senate to inquire into "how the nominee, if confirmed, would go about interpreting how the commands of the Constitution applied to the cases that may come before him or her." Indeed, the proponents of this argument would want us to ignore the President himself, who said he nominated Judge Bork because the nominee has a philosophy that the President said he agreed with, a philosophy of judicial restraint.

Now at the urging of many Senators, conservatives and liberals alike, the Senate rejected the specious arguments that judicial philosophy is irrelevant.

In that instance, the process did not go wrong. It did not become ugly, indecent, or dishonest.

Or should we simply have said let us take the nominee's pulse, examine his résumé, and send him on to the Supreme Court? If he seems intelligent, healthy, and law-abiding, then should he automatically go to the Supreme Court?

I think the Constitution demands far more of us.

It is not ugly to insist that judicial philosophy be a central issue in this debate. Nor is it indecent to take the time to learn about Judge Bork's approach to the Constitution. Nor is it dishonest to prepare for the hearings by studying the written record of this nominee who has been a prolific writer and lecturer, both before and since becoming a judge.

What about the hearings themselves? Judge Bork testified for 5 full days. He answered virtually every question. He was never cut off. Once in a while, he thought it was improper to reply and his decision was respected. The distinguished chairman of the committee, Senator BIDEN, protected his rights all the way through. Time and time again, he told him he could have whatever time he wanted to frame his answers. In fact, the distinguished ranking member of the committee, Senator THURMOND, went out of his way at the end of the hearings to compliment the chairman of the

committee for his fairness. That compliment was deserved.

There was nothing ugly in allowing the American people to get a chance to judge the nominee, and to judge whether the committee dealt fairly with him? It was not indecent that more than 100 additional witnesses had an opportunity to testify, the majority of them in support of the nomination. Nor was it dishonest for the committee to conclude that the decision on this nomination was so important that it should be made by the full Senate, all 100 of us, rather than allowing it to die in the Judiciary Committee, even though a majority of the committee members voted against this nomination.

Today, Mr. President, the Senate is ready to vote. All but a few Senators have declared their position, and the outcome is assured. Is it ugly to point out that the Senate must move on to other difficult issues on its agenda? Is it indecent to note that the longer we delay this vote, the longer the ninth chair of the Supreme Court is going to remain vacant? Is it dishonest to state that the Senate is ready to do its duty under the Constitution to advise and consent?

This debate is the culmination of the process by which the Senate has carried out its constitutional duty. It is the same process by which more than 300 of President Reagan's nominations to Federal courts, including three Supreme Court nominations, have received the consent of the Senate. The President has asked for our consent to the nomination of Judge Bork, and we in the Senate will refuse that consent. That will complete the process as far as this nominee is concerned, a process which regrettably the President has called ugly, indecent, and dishonest.

Maybe the President did not see the Members of the Senate preparing for the Judiciary Committee hearing, or listening closely to the concerns of articulate and well-spoken American citizens. But I saw that. The American people saw that. And we know it was not ugly.

Maybe the President did not follow the 12 days of hearings on this nomination. Maybe he did not hear the testimony of Judge Bork and the questions, fair questions, probing questions, thorough questions, by the members of the Judiciary Committee. But I heard that. The American people heard that. We know it was not indecent.

Maybe the President did not hear Senator after Senator explaining why they had decided Judge Bork should not be confirmed.

But I heard them. The American people herd them speaking from the floor of the Senate. And we know that their statements were not dishonest.

The President said in his speech last Wednesday that the rejection of the nomination of Judge Bork will "permanently diminish the sum total of American democracy." If he would have watched the proceedings and heard the Senators, he would have known that for the past few weeks democracy at its best has been at work.

We have seen the Senate carry out its role under the Constitution, not to rubberstamp this or any President's choice, but to consider seriously whether the President's choice is in the best interests of all Americans.

We have seen the American people involved and engaged in an important debate on the future direction of the Supreme Court. After all, this Court is the ultimate guardian of our constitutional liberties. The people have been heard.

Some of the voices on both sides of this issue have been strident. That is what happens when a democratic society debates the crucial issues of the day. But most of the voices have been serious and they have been sincere. The Senate has listened as well as participated in this debate.

The Bork nomination is over, but the ninth chair at the Supreme Court remains vacant. The President is angry. He announced last week that he will send up another nominee that the Senate, in his words, "will object to just as much."

That is his constitutional privilege. The Senate also has a constitutional responsibility. The next nominee will be examined thoroughly, fairly, and objectively. That is the process that has worked very well for this country for 200 years. I, for one, would not seek to change it.

There is one important difference between the process by which we have considered this nominee and the process by which we have considered more than 300 others since this administration began. Most judicial nominations are considered in relative obscurity. Most judicial nominations hearings attract little public interest. But on this nomination, which is so important to the future of our constitutional rights and liberties, the American people have taken center stage.

Newspapers have been filled with copy about this nomination almost from the moment Justice Powell retired. Millions of Americans read those articles and editorials both for and against Judge Bork. They saw the television coverage. They listened to the radio. They understood that the decision on this nomination was the most important decision in the field of constitutional rights in decades. They took seriously their responsibilities as citizens of a self-governing republic. And millions of American citizens mobilized either in support of or in opposition to this crucial nomination. They wrote, called, and telegraphed their elected representatives. They organized in groups to spread their viewpoint, pro and con, to their fellow citizens. Some dug into their own pockets to place advertisements in the mass media to influence us one way or the other.

We have heard a lot in this debate about those advertisements. We have heard that they are inaccurate, that they contained distortions; that they have polluted the advise and consent process. I am not here to defend or condemn those ads.

But let us put this debate in the proper perspective. Every debate on a controversial issue gives rise to advertisements about the issue. Pick up the paper, Mr. President, virtually any day the Senate is in session, and you will find an advertisement for or against some legislative proposal, urging readers to write to us, either for or against the proposal. Certainly when the appropriations bills are being considered, the local media enjoy a windfall. At that time of year, there will be an awful lot of ads that are designed only to reach 535 people—the Members of Congress.

Sometimes those ads are misleading and sometimes those ads are straightforward. Sometimes the letters that are generated as a result of these ads are difficult to understand because they bear so little relationship to the issue before Congress, but it is perfectly all right for people and organizations to raise issues in advertisements in the hopes of persuading Members of Congress to "see it their way."

In this case there were extremes. But I think the American people rejected the extremes.

I found some of these public relations tactics personally abhorrent, I think most Americans did. On the other hand, because a number of groups both for and against Judge Bork, raised the issue of this nomination in public debate, they helped to bring to people's attention the major constitutional debate we have had in the Senate. In that sense, some of the groups that have advertised both for and against this nomination did a service for the American people.

They helped to get Americans to pay attention. Americans can tell a slick ad from a straightforward recital of the facts. Because there was so much discussion of this nomination by both the proponents and the opponents of Judge Bork, millions of the American people started to think about it and decided they would make up their own minds. They watched the hearings. They listened to the hearings. They read about the hearings. They heard articulate, well-informed, well-meaning people speak for Judge Bork and articulate, well-informed, well-meaning people speak against him. Then the American people made up their own minds based on what they saw and heard. That decision is reflected

in the decision by a majority of the 100 Members of the Senate opposed to the nomination of Judge Bork.

At the beginning of this process I made up my mind that I would decide based on the record of the hearings. I would decide based on the record of what Judge Bork himself said about his judicial philosophy, not on what some interest group might have said about that philosophy, reached their decisions in the same way.

Democracy can sometimes get just a tad hectic. Certainly debate in a democracy can sometimes be raucous. I would not have it any other way. I would not suggest that controls be put on the public debate. Ultimately we are going to have the debate in the Senate Chamber where each one of us will have to explain our own vote and our own reasons. That is really where the debate will end and the issue will be decided.

The public debate, even if it sometimes goes to extremes helps focus attention on the debate in the Senate. I have found over and over again we do not give enough credit to the wisdom of the American people. They will decide, listening to the debate, what is right and what is wrong, and whether we have made the right decision.

Some countries do not have this kind of public debate. I would hate to live in a country where people cannot state their views—even extreme views—on either side of an issue. That insight is hardly original with me. I think it was well stated by a prominent legal scholar who has devoted a good deal of time to thinking about the nature of public debate in a society dedicated to freedom of speech. Let me quote what that authority said. He said:

> 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 assessments. Perhaps it would be better if disputation were conducted in measured phrases and calibrated assessments, and with strict avoidance of the ad hominem; better, that is, if the opinion and editorial pages of the public press were modeled on the Federalist Papers. But that is not the world in which we live, ever have lived, or are ever likely to know, and the law of the First Amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate.

I am sure, Mr. President, those who have studied this matter recognize the author of those words: Judge Robert Bork, in his concurring opinion in the case of Ollman versus Evans.

One other passage from this opinion is relevant to this debate. It concerns freedom of the press, but it applies just as well to the freedom of advocacy groups to bring their viewpoint to the marketplace of ideas:

> The American press is extraordinarily free and vigorous, as it should be. It should be, not because it is free of inaccuracy, oversimplification and bias, but because the alternative to that freedom is worse than those failings.

I could not agree more, Mr. President.

The public debate over the nomination of Judge Bork has certainly not been "free of inaccuracy, oversimplification, and bias." No public debate about important issues in a democracy ever meets that standard. The debate in the U.S. Senate on any subject, from widgets to the Constitution, never entirely meets the standard. The testimony before the Judiciary Committee on this nomination was on the whole excellent and well-reasoned, but even that record does not meet the standard of complete freedom from inaccuracy, oversimplification, and bias.

Our democratic system is based on the principle that a free marketplace of ideas is the best guarantee of wise decisionmaking. The people of the United States have elected us to the U.S. Senate because they have some confidence in our ability to separate the wheat from the chaff, to respond to the meritorious arguments and discard the rest. I believe the record will show that we have done just that in the debate over this nomination.

Certainly many shoddy goods have been brought to the marketplace of ideas in this great national debate. But these wares have not found many takers here in the U.S. Senate.

My final observation on this topic concerns the origin of those distasteful displays in the marketplace of ideas. For too many of these regrettable but inevitable moments in this debate have come to us courtesy of the proponents of this nomination, not its opponents.

It was not the opposition to this nomination that advanced the argument that the power to advise and consent was really only a duty to rubberstamp the President's choice. It was some of the proponents of this nomination who tried to pawn off that view as an accurate interpretation of the Constitution. They did not find many takers in this body.

It was not the opposition to this nomination that decided that the way to debate this nomination was to attack the integrity and the honesty of members of the Judiciary Committee. It was some of the proponents of this nomination who peddled that tawdry line in full-page ads in nationally circulated newspapers, and who planted the same bad seed in prepackaged letters to the editors of many local publications. I am glad to say that these distasteful wares found very few customers in this body.

It was not the opposition to this nomination that sought to delay the debate on the Senate floor to allow time for one last fundraising pitch to the faithful. It was some of the proponents of this nomination who put the advancement of their cause before the best interests of the Supreme Court, and of the Nation as a whole. But they didn't find very many takers in this body, even among those who agreed with them that Judge Bork ought to be confirmed.

I do not lay the responsibility for any of these low tactics at Judge Bork's door. I am convinced that they were devised without his knowledge or participation. Had he been asked, I am sure he would have disapproved. Those who seized upon these tactics obviously did not care that their actions demean the high office to which Judge Bork has been nominated.

I mention them here only because in our condemnation of the tactics of distortion, we must be careful not to engage in a distortion of our own. Neither side of this debate has a monopoly on truth. By the same token, neither side has a monopoly on falsehood.

Mr. President, the issue before the Senate is the nomination of Judge Bork. That issue has been considered on its merits; it should be decided on its merits. The quality of the public debate over this nomination—the fundraising appeals, the preprinted postcards, the advertisements—is largely irrelevant to this debate. But to the extent that it does enter into the debate, I urge the Senate to bear these observations in mind. These activities are common and legitimate features of public debate in a modern democracy. Inaccuracies and distortions in a great public debate are part of the price we pay for a democratic society; and, as Judge Bork himself has noted, that is a price well worth paying. And to the extent that distortions and personal attacks did enter into this debate, they were introduced by both sides.

But, Mr. President, I am convinced whether there are on either side, ultimately each Senator has made up his or her mind, either for or against the nomination of Judge Bork, based on the record itself, based on what they heard and read. So did the American people. Mr. President, I am heartened by the fact that from what I have read, from letters that come to my office, and from statements being made around the country it seems that the American people discarded the irrelevant statements, and the misleading advertisements. Instead they based their decision on what they heard in that hearing and the debate that they have heard here in the Senate.

So I do not think advertisements on either side of this issue really influenced the American people. But if indeed they whetted the interest of the American people, if indeed they directed the attention of the American people to these almost unprecedented

hearings, then that fact makes even the personal attacks, whether on members of the committee or on other participants in the process, less important. If, ultimately, these advertisements helped direct the attention of the American people to these hearings—to one of the most significant recent examples of the Constitution at work—then they were worth it.

Advertisements will not decide this debate. Advertisements did not make up the minds of 100 men and women in this Chamber. A hearing of unprecedented fairness, of unprecedented thoroughness, was the most important factor in that decision.

Mr. SIMON. Will my colleague yield?

Mr. LEAHY. I yield.

Mr. SIMON. I commend the Senator and I associate myself with his remarks. I commend Senator LEAHY for his leadership in this whole matter.

Mr. President, to begin I would like to commend Chairman BIDEN for conducting scrupulously fair hearings. Over 12 days the committee had the opportunity to question 110 witnesses. Judge Bork himself testified for more than 30 hours, creating an unprecedented record. This gave me a chance to discuss my concerns with Judge Bork:

Could he be fair and open-minded? Carved in stone above the Supreme Court are the words "Equal Justice Under Law." I want a nominee who will make those words live, who will symbolize justice. I do not want someone with an ideological mission of either the right or the left.

Would Judge Bork be sensitive to civil rights? Much of our Nation's progress in this area has depended on the vision and courage of the Supreme Court. I want a nominee who can be a leader on civil rights, not someone who will drag his feet.

Would Judge Bork be sensitive to civil liberties? Freedom is much easier to give away than to protect. I want a nominee who will be willing to preserve freedom, even against public opinion.

Would Judge Bork be sensitive to our traditions of separation of church and state? My father was a Lutheran minister. I understand the yearning for values in our society. But I do not believe Government should promote religion. I want a nominee who understands the importance of our traditions in this area.

Above these specific concerns I had one overarching question: Would Judge Bork have compassion? The heart must not overrule the head, but the Supreme Court decides some close cases. I want a nominee who has a feeling for how legal theories will affect real people.

After carefully looking at his writings over 25 years, listening to Judge Bork's own testimony, reviewing the testimony of the 110 witnesses, and hearing from my constituents, I have concluded that I cannot support Judge Bork.

Judge Bork believes that "What a court adds to one person's constitutional rights, it subtracts from the rights of others." As I told Judge Bork in the hearings, "I have long thought it fundamental in our society that when you expand the liberty of any of us, you expand the liberty of all of us." Judge Bork's response to me: "I think, Senator, that is not correct."

The disagreement reveals Judge Bork's basic misunderstanding of the Constitution and its role in protecting the fundamental freedoms of all Americans. You cannot read the Constitution like the Tax Code. Majestic phrases—liberty, equality, freedom—were intended by the Framers to protect individuals against unreasonable Government power.

As Justice Harlan so eloquently put it, "Liberty is not a series of isolated points pricked out in terms of the taking of property, the freedom of speech, press, and religion. It is a rational continuum which, broadly speaking, includes a freedom from all substantial, arbitrary impositions and purposeless restraints."

I do not believe Judge Bork would advance that continuum, or expand rights for individuals. On the contrary, the philosophy he applies would cut back protection of fundamental liberties.

The President is entitled to nominate a conservative; I expect that. But the Senate has the responsibility to judge the qualifications of any nominee.

Judge Bork clearly has an intellectual understanding of the letter of the law and of the Constitution, but I believe he would snuff out its spirit. I regret that I must vote against his confirmation.

Mr. WALLOP. Mr. President, I note, with some wry amusement, the comment of the Senator from Vermont, before he started his statement, that if he did not get his opportunity to speak, the confirmation of additional judges this afternoon might well be in jeopardy. I hope they are still waiting for him, an hour and 15 minutes later.

Mr. LEAHY. I tell my friend from Wyoming that indeed if I had had to wait longer to speak, we would have missed that hearing. Now I will get there on time.

I notice that Senator THURMOND is not here. I suspect that he is also going to be able to make it on time.

I thank the Senator from Wyoming for observing the normal comity that has permitted this debate to go on, and that now permits Senator THURMOND and me to attend the hearing.

Mr. WALLOP. I certainly hope that the opening statement in the hearing is somewhat more curtailed than the one we have just been privileged to hear.

Mr. LEAHY. It will be less than 20 seconds, I tell the distinguished Senator.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. WALLOP. Mr. President, the Senator from Vermont suggested in his remarks that he took issue with what the President of the United States had said about this hearing process being ugly and distorted, and asked the rhetorical question, "Where did it go wrong?"

Let me suggest that perhaps in addition to watching the hearing process, the President may have read the Boston Globe, and heard the Senator from Massachusetts boast of his war room and his control center, which made the decision to delay the confirmation process over the August break in order to allow the public-interest groups to gain purchase with their campaign of vilification and distortion.

Perhaps the President was aware of what is clearly an ongoing and curious double standard, when the Senator from Vermont suggests that this process was about the judicial philosophy of Judge Bork. I would have to quote from the Commandant of the war room, Senator KENNEDY, in the nomination of Justice O'Connor, when he said:

> It is offensive to suggest that a potential Justice of the Supreme Court pass some presumed test of judicial philosophy. Even more offensive to suggest that a potential Justice must pass a litmus test of any single issue interest group.

Or, the remarks of the chairman of the committee, on the nomination of Abner Mikva, when he said:

> The real issue is your competence as a judge and not whether you voted rightly or wrongly on a particular issue. If we take that attitude, we fundamentally change the basis on which we consider the appointment of persons to the bench.

Or, the remarks of the Senator from Ohio [Mr. METZENBAUM] to a witness opposing the nomination of Ruth Bader Ginsburg:

> You don't mean that every nominee up for confirmation ought to have his or her views explored as to what his or her positions are on all of the controversial issues that may come before these jurisdictions? You don't actually mean that, do you?

Perhaps the President, in his sense of fair play, thought that those in opposition to the confirmation of Judge Bork might be at least persuaded to have some consistent standards by which they evaluated nominees. But it is, of course, in this day and age, a little too much to expect, I suppose.

It is curious to the Senator from Wyoming that the Senator from Vermont, in his remarks, cites Judge Bork's decisions on free speech, while the committee, which he says did such a careful and thorough job, takes spe-

cific issue with Judge Bork's decisions on free speech. It is wonderful that you can have it one way to supply that particular form of prejudice and the other way to cite the record of the committee. So the double standard exists.

Mr. President, I rise again today to join in this debate on the nomination of Judge Bork to the Supreme Court. Some have little doubt as to the outcome of the vote on this matter, but I believe the debate to be important, that the record needs to be set straight, and that minds could be changed, were it to be that anybody would choose to listen.

I do not know why Gregory Peck, in the twilight of a famous movie career would lie and have his lie filmed and presented across the country. I do not know why people from the American Way or the ACLU or the NEA or the NAACP would campaign with lies and distortions. It is beyond me. But it is not beyond us to examine the basis of these charges and not simply come to an opinion.

It is interesting to me that the Senator from Vermont said that the Judiciary Committee had come to a conclusion. I do not think that is the case. I think the committee started with a conclusion and came to a justification.

I would commend Judge Bork for his willingness to take this fight to the final battle.

As the Wall Street Journal stated it He said it was his "refusal to die a death of a thousand libels" than to die that death in silence.

I hope the country who has now, according to all polls, come to the conclusion that the hearing process was catastrophically unfair, will at least be persuaded to thank Judge Bork for his principled courage in seeing the fight through.

Much has been made of the politicization of this nomination and much should have been made. I certainly know, and have seen it here, that the confirmation process is rarely, if ever, totally devoid of politics.

But this particular nomination has been politicized by the completely unprincipled and frenzied smear campaign, complete with calculated television and newspaper advertising, that are not distinguishable from Presidential or senatorial election campaigns.

Unable to challenge Judge Bork's sterling credentials, those institutions based their assault on creating an irrational fear that this one man, by himself, could somehow or another destroy our Republic.

And the war room, of which the Boston Globe described in detail, saw to it that the confirmation process was delayed long enough so that this campaign could have its effect on polls and public anxiety.

So it is a new kind of politics that has stampeded its way into the Senate and threatened our advise-and-consent role. The campaign's powerful effect on this body is sadly evident in statements made by Senators in recent weeks.

These are colleagues whose fine judgment I normally respect, even in disagreement, but they leave me in this instance puzzled by their argument. They seem inconsistent and contrived. Perhaps as a nonlawyer, I cannot see their lines of reasoning but their conclusions do not readily flow from their stated presumptions.

For example, the Senator from Tennessee [Mr. SASSER] on this floor said of Judge Bork he:

> Revealed himself to be a complex and brilliant scholar. He has a searching intellect that has resulted in some truly profound inquiries into the Nation's judicial heritage * * * I have no doubt that Judge Bork is a man of the highest intellectual and moral integrity. I am convinced that his intellectual and political odyssey has been absolutely sincere. Yet, within moments, the Senator went on to say, * * * the question must be clear and alarming: who is the real Robert Bork and how can we possibly predict with any reasonable degree of certainty what kind of justice he will be?

This man of the highest intellectual and moral integrity. He went on to say:

> Mr. President, I am not convinced that Judge Bork has abandoned the radical judicial agenda he has charted out very carefully through 25 years of deeply considered scholarship. And, now, to be fair about it, Judge Bork has subsequently recanted these radical views. And if we are to believe his testimony before the Judiciary Committee * * * and so on.

How can a Senator believe that a man "of the highest intellectual and moral character" lied to the Judiciary Committee? It cannot be argued both ways. If Judge Bork is an honest man, as the Senator states him to be, then no other conclusion can be arrived at. There has to be another reason for opposing him.

And my friend from Louisiana, Mr. BREAUX, said on this floor of Judge Bork:

> The personal credentials of Judge Bork are impressive: law professor, court of appeals judge and, from all evidence, a man of high moral principle and honesty.

But he goes on to explain that it is Judge Bork's lack of predictability that troubles him.

Do we want predictable judges who, by the way, are a rare commodity on the Court, or do we want honest ones? And has anyone in this body been able to predict anything but that a reputation for high moral principles and honest behavior and integrity are the only predictable things that we should base our decision on? Could anyone in this body even predict the questions that may be presented to the Court, let alone the answers to those questions?

My colleague from Texas, Mr. BENTSEN, said:

> * * * When President Reagan nominated Robert Bork to the Supreme Court, it quickly became apparent that the President had selected a jurist of substantial intellect and unchallenged integrity who would nevertheless be an extremely controversial nominee.

The Senator said he has problems with Judge Bork on the issues of privacy and civil rights, issues which Judge Bork addressed in detail in the hearings.

And I would ask again, was the Judge Bork of unchallenged integrity lying when he gave the committee his views on those issues? Or is there some other reason for the Senator's opposition? If it is so that the issues of privacy and civil rights are the issue, from what basis would the Senator depart from the judgments of Judge Bork? Surely, we are owed the reasoning where in my friend would have judged differently.

The Senator from Vermont here in front of the gallery and the Senate, only a few minutes ago, talked of Judge Bork's finding no right to privacy, and that is an absolute fabrication of the hearing record, of the public record, of the judicial record of this nominee.

And surely the Senator from Vermont, or the chairman of the committee, or the distinguished Senator from Alabama, a former judge, would not say that some blanket right of privacy exits for all Americans, that you can sodomize, that you can indulge in incest, that you can indulge in spouse abuse merely because your bedroom door is shut.

No such right exists in our Constitution and no such right was found by Judge Bork and no such right should be found by the Senator from Vermont or any of his critics.

You cannot plot and plan the overthrow of the Government or the assassination of your neighbor or the mayor or anyone in the privacy of your own home and be free and absolutely protected by the Constitution of the United States. That is absurd on its face.

To suggest that such a right exists is to suggest that America itself is in peril by a Constitution which protects you against lawlessness merely because your bedroom door is shut.

To state otherwise is an absolute distortion and fabrication of the law.

The Senator from Tennessee, Mr. GORE, said of Judge Bork, "I respect Judge Bork as a man of integrity and intellect."

How often these phrases come back and come back.

He went on to say, "He is neither a racist nor a bigot." Yet the Senator opposes this confirmation because "Judge Bork does not understand the Constitution as most Americans do."

I would suggest that most Americans do not understand the Constitution as most judges and lawyers and Supreme

Court Justices do, because that is their training and it is not the training of most Americans. But clearly a man of Judge Bork's intellect and integrity has a greater capacity to understand the Constitution than most Americans and we have depended on those wisdoms of our judges to understand the Constitution better than do we.

If we all understood it to perfection, what on Earth would we need judges for? What would be there to judge if each of us understood it precisely the same as everyone else? There is nothing left to judge.

So to say that the standard for opposition is because he does not understand as most Americans do is a thin, thin line of reasoning.

And the Senator goes on to explain his view that the Supreme Court "must not only ensure that the laws are fairly applied, but that the laws themselves are fair."

I wonder who would suggest that believing something to be fair is the test for its constitutionality? There are greatly differing views as to what is and is not fair. That again is what comes before the Court to be judged.

Each side in contested issues believe that their side is fair and the Court is asked to judge which side is correct, not fair, under the interpretation of the law or the mandates of the Constitution.

And the Senator from Kentucky, Mr. [FORD] contends that Judge Bork "lacks the necessary humanitarian feel for the true spirit of human rights and human liberties."

Now, who can believe that Justices on the highest court in our land should make rulings based on their subjective humanitarian feelings, rather than on the basis of objective constitutionality.

The junior Senator from Florida, Mr. [GRAHAM] recognizes that "Judge Bork has dedicated a lifetime to scholarly pursuits and judicial application. He has repeatedly defined a set of deeply held convictions which inform his decision. His intellect is formidable. His articulation of his views is forceful." Yet he comes down against him because "his inattention to the human consequences of adjudication is seen as a threat by many * * *"

I would ask again a rhetorical question: Should Supreme Court Justices decide cases on the basis of perceptions of groups, or should they apply the terms of the Constitution? Are we asking now, with such a standard, that the judges become second-guessers to the legislative process?

Mr. Chiles, is "satisfied that Judge Bork has the capacity. He seems to be a highly intelligent, perhaps brilliant legal scholar. I do not question his competence nor his integrity." Once again, those words. But the Senator comes down against Judge Bork because "his is a much narrower view of individual rights guaranteed by the Constitution."

And one would have to, in fairness, ask: narrower by whose view? Narrower by what objective standard? And by what objective standard can anyone be so judged? Is it on the basis of Judge Bork's passionate beliefs reflected when he sided time after time with the NAACP against his own administration when he was Solicitor General?

The senior Senator from Louisiana says, "What comes through is a brilliant professor, a fine lawyer." I think I would hire him as my solicitor general, if given a chance. And I think he is honest. I have no quarrel with his honesty." But he opposes Judge Bork because his scholarship is "devoid of moral content."

Now, how can someone be honest and be full of integrity and have his scholarship "devoid of moral content?" I ask America to look at what is taking place here. These are contrivances, not reasonings.

He goes on to say that Judge Bork:

> Misses the experience and the feeling and the spirit and moral content of the law.

And, again I ask: Is the Constitution a matter of the good feelings of individual judges, or a written document changed only by the democratic process of amendment? Does this Senator accuse Judge Bork of being immoral or amoral? Surely such a heavy accusation deserves substantiation if it is to stay.

And why would the Senator from Louisiana want to hire such a man, who is devoid of moral content, as his Solicitor General if given a chance?

And my respected and revered friend from Alabama [Mr. HEFLIN], supported the nomination of Justice Rehnquist as Chief Justice, despite accusations raised about his "alleged insensitivity to the rights and struggles of minorities, women, and disadvantaged citizens." This is from my friend's statement on Judge Rehnquist.

> In making that decision, the Senator said "but I cannot believe that if one of the members of the Court felt that elevation of William Hubbs Rehnquist to be Chief Justice would be detrimental to the institution itself that he or she would have remained silent * * * but to me the fact that Justice Rehnquist has earned the respect of those in the community in which he lives, the Supreme Court of the United States, was most persuasive.
>
> I wonder why the Senator did not find the opinions of former Chief Justice Warren Burger and of Justices White and Stevens equally persuasive in their support for Judge Bork? Or the opinion of his colleague on the Court of Appeals, former Congressman Abner Mikva, who said, "I think Abraham Lincoln would have liked Judge Bork."

Perhaps among the most expressive remarks are those from the junior Senator from Georgia:

> I promised the people of Georgia that I would not flock to any banner, that I would consider all the evidence presented and let the decision rest with my conscience. As I have done so, I have grown to have great respect for Judge Bork. I admire his intelligence and, especially, his candor, his readiness throughout his career to withstand public controversy and political pressure.
>
> We need, throughout our Government, but especially in the Courts—we need men and women who will stand up against noisy but narrow special interests that do not necessarily represent the overall welfare of our country. That is one issue that should not be lost on us, regardless of the outcome of this nomination. Many moot issues have been raised on the periphery of these proceedings, by both sides. I am appalled by the way this became a plebescite. We do not elect Justices to the Supreme Court in this country * * * we should not conduct national referendums. And I can sum up the effect of these campaigns on me: Those who attacked Judge Bork made me often yearn to confirm him. Those who campaigned for him by attacking his opponents turned me against the nomination.
>
> I, too, am appalled by the way this has become a plebescite. And I am troubled and puzzled by what my colleagues are saying, by the double-standard and inconsistency so prevalent in the campaign against Judge Bork. The judge is criticized for being unpredictable, yet the chairman of the Judiciary Committee, Senator BIDEN, himself earlier rejected this argument: "What dawned on me was that no one, Mr. President, in the approximately 200-year history of the Court, has been accurately able to predict what a Justice of the Supreme Court would be like prior to that Justice's being appointed to the Supreme Court. It is something of a futile exercise for us to stand on the floor of the Senate, with all due respect to my colleagues on both sides of the aisle, and assure our fellow Senators what this judge is going to be like."

The problem is that Justice O'Connor's standard in the eyes of the Senator from Delaware, is a different standard than, apparently, that which we are holding Judge Bork to.

The Senator further detailed the standards by which judges should be judged:

> Our review, I believe, must operate within certain limits. We are attempting to answer some of the following questions:
>
> First, does the nominee have the intellectual capacity, competence, and temperament to be a Supreme Court Justice?
>
> Second, is the nominee of good moral character and free of conflict of interest that would compromise her role as a member of the U.S. Supreme Court?
>
> Third, will the nominee faithfully uphold the laws and Constitution of the United States of America? We are not attempting to determine whether or not the nominee agrees with all of us on each and every pressing social issue of the day.
>
> Indeed, if that were the test, no one would ever pass this committee, much less the full Senate.

That is the standard by which a recent predecessor nominee to the Supreme Court was judged by the chairman of the committee. But, alas, that, too, was a standard that now seems only to have applied to Justice O'Connor—not, one presumes, solely because she was the first woman nominee to the Court.

Even the Senator from Massachusetts, who set such a savage tone for the last few months of attack by his "Robert Bork's America" speech, had a different standard of conduct for the confirmation of Justice O'Connor which I previously mentioned at the beginning of my statement. He further stated that:

The disturbing tactic of diversion and distortion and discrimination practiced by the extremists of the "new right" have no place in these hearing and no place in our national democracy.

Would to God, that standard still applied in the mind of the Senator from Massachusetts. I certainly agree and would with equal passion add that the distortion and diversion we have seen for the last several weeks has no place in our national democracy. The orchestrated campaign of lies and distortion and fear-mongering offends this Senator profoundly, as it should offend those of my colleagues who, by their own statements, time after time, repeat that Robert Bork is a man of high moral character, great intellect and scholarship, and unchallenged integrity.

Lest anyone question whether there has been such a campaign and such an attack, remember the accusations. Morton Halpern of the ACLU said that Judge Bork's nomination "is a grave threat to the Constitution"—Washington Post, September 1, 1987. The Ohio AFL-CIO, quoted in the Cleveland Plain Dealer, asked, "Would Bork return to the days of robberbarons like Jay Gould, who said he could hire half the workers to kill the other half?" The September newsletter of the National Education Association ranted:

Bork is a man who cavalierly disregarded the rule of law and executed order the apparent purpose of which was to frustrate an investigation into criminal wrongdoing in high office. Certainly, such a man does not possess the requisite moral fiber to sit on this country's highest court.

People for the American way screamed in a fund-raising letter: "The nomination of Judge Robert Bork to fill Justice Powell's seat is one of the greatest threats to civil rights and liberties in three decades.

An article in the New Republic contended that Judge Bork's position would permit laws that "impose abortions—on welfare mothers, say, or single mothers." The New Yorker shrieked that Judge Bork's jurisprudence would let stand laws "requiring everyone of every race to be blond" and "enforcing a majoritarian preference that all single mothers should be sterilized. Or all women with an IQ below 130. Or all mothers under 18."

Edwin Yoder in the Washington Post correctly concluded that "this twaddle is what Adlai Stevenson used to call "white-collar McCarthyism.'"

The public campaign against Judge Bork has been well-orchestrated. It has been run by a war room in the Senate of the United States, boasted about in the Boston Globe. It has been a campaign of shrill vindictiveness. Indeed it is as Yoder noted, the closest thing we have seen to McCarthyism in 35 years. Vigorous, sometimes heated, political debate is part of the proud tradition of this great Republic. But character assassination, the vicious willingness to defame and destroy an individual with whom one disagrees is not, and that is what America has been treated to in these last few months.

Those are not politics or tactics of which sincere and conscientious opponents of Judge Bork can be proud. People for the American Way screamed in a fund-raising letter:

The nomination of Judge Robert Bork to fill Justice Powell's seat is one of the greatest threats to civil rights and liberties in three decades * * *.

Mr. President, if this is so, ought we not send for the Articles of Impeachment? How can America sleep when such an ogre is loose anywhere within our judicial system? And he is. He is a judge in the second-highest court in America, approved unanimously twice by this same crowd of vilifiers gathered in these proceedings.

Sadly, Judge Bork's opponents have been willing to defame him in order to defeat him. They offer no proof; no standard of comparison; no judgment that they would have made in the cases they cite that would have been different; no reasoning why his views are so consistently upheld by those on the Supreme Court he seeks to join—the Court his opponents say he seeks to join in order to destroy.

That one man, somehow or another, has such a powerful intellect that he can dominate to the point of suffocation every other mind on that Court is absurd on its face and the opponents know it.

Most within this Chamber conceded that Judge Bork is a powerful intellectual, a man of honesty, morality, integrity. His scholarly, legal, and judicial credentials are unchallenged. Most who have met him like him. Most concede he is qualified by virtually any standard to which one can hold him.

The more moderate of Judge Bork's opponents chose to preface their statements of opposition with praise for the judge. Then they argue that they fear he will turn back the clock on civil rights, that he does not concede equal protection to women, that he has not changed from his scholarly writings of 25 years ago—though Senators are conceded to have done so—or that he does not demonstrate the necessary—in their view—human kindness and sense of fairness or sensitivity of spirit. Or that he is not predictable, the while predicting dire consequences from his confirmation. Or that he lacks proper temperament. Or that he doesn't understand the Constitution the way "most Americans" do.

Mr. President, these are not reasons for opposing the confirmation of Judge Bork. They are excuses. The junior Senator from Louisiana said:

This decision, Mr. President, cannot be a political decision. It cannot be a popularity contest. It cannot be decided by adding up numbers in a poll or merely counting the mail we received. My decision must be based on whether this nominee is and of himself is the right person for the job.

Yet Louisiana newspapers—including the Ville Platte Gazette—the day after the Senator spoke those words on the Senate floor, quote the Senator in a very political statement:

Those who helped us get elected—the Black voters—are united in their opposition to Bork, and don't think for a moment that we are going to ignore that.

And the Washington Post on the same day ran a lengthy story an "How the South was Swayed," describing the senior Senator from Louisiana telling a meeting of his colleagues that:

You're going to vote against it—the nomination—because you're not going to turn your back on 91 percent of the black voters . . . and I know how you're going to vote, and you, and you, and you.

A political decision, Mr. President, is precisely what we have before us. Surely if this nomination turned on whether in and of himself Robert Bork was qualified to serve on the Supreme Court, there would be little left today to debate. That, I regret, is not the case.

This is a strong man, of not only powerful intellect and integrity, but with an admirable and proven sense of decency and honor. I admire and respect his decision to press forward with this nomination to what he must believe is almost a foregone conclusion on the floor. It is rare, indeed, that one can find a man or women who combines intellect, decency, and honor with a deeply-held set of principles and the courage to live by them, consistently and at cost to his own advancement. Traits, I fear, which are all too rare in this body.

I am not proud of what is expected to occur in this Chamber later this week. Failure to confirm this unquestionably and undeniably qualified man will be a great loss to our Nation. The politicization of this nomination will only serve to diminish our advice and consent role as well.

I would only hope and pray and ask, as we go down these roads, that statements that have been made about what it is, and is not, within our reach to judge in the nomination of a Supreme Court Justice at least be the same from one nomination to the next; and that the double standard not be so blatantly prescribed as herein it has been.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Maine.

Mr. MITCHELL. Mr. President, earlier I described in detail my reasons for voting against the nomination of Judge Bork to the Supreme Court. I will not repeat that statement in its entirety here. I will say that after listening to the debate which began yesterday, my convictions have been strengthened.

Much of the debate in the Senate since yesterday has not been about the merits of the nomination. Rather, it has focused on the process by which the nomination has been considered. And it has been an effort to create a myth.

It is a myth that prior to this nomination the legal philosophy and views of Supreme Court nominees were not considered.

It is a myth that only because Judge Bork is a conservative have so-called "liberals and special interests groups" injected consideration of his legal philosophy and views into the confirmation process.

It is a myth that to have done so has politicized a process that was previously nonpolitical.

Each of these assertions is contrary to fact.

Each of these assertions is contrary to history.

Unfortunately, there has been distortion and exaggeration in this matter. It has come from both sides.

President Reagan said American are sick of courts "inventing rights for criminals." He has plainly implied that those who oppose the nominee want "liberal judges whose decisions protect criminals." Over and over, the President has played upon the people's fear of crime in criticizing opponents of the nomination.

But opposition to Judge Bork has nothing to do with his views on criminal law.

In the hearings, Judge Bork himself said that criminal law had never been a specialty of his. His record confirms it. In all his voluminous writings, Judge Bork rarely mentioned and never emphasized the criminal law. His focus has been on other areas of the law, not on criminal procedure or criminal law.

For the President to claim that his nominee's failure to win majority approval has something to do with criminal rights or criminal law is without any basis in fact.

It is a revival of his failed 1986 election campaign rhetoric. It does no credit to the President or to his nominee.

In election campaign speeches last year, President Reagan sought to politicize the judicial nominating process. He traveled all over the country in support of his party's Senate candidates and he made judicial selection a political issue.

He charged that "over and over, the Democratic leadership has torpedoed our selection of judges" even though the Senate has confirmed most of the President's nominees and his appointees now total more than a quarter of all sitting Federal judges.

The President is angry that his social agenda lacks majority support in the country and the Congress. So he is trying to place on the courts judges who he hopes will support his agenda.

There is nothing improper or unusual about that. All Presidents seek judicial nominees who share their principles. President Reagan is just as entitled as any other President to use ideology as a major factor in his choice of nominees. It is precisely what he said he would do. It is what the American people expect him to do.

But he cannot fairly use ideology as a factor in making nominations and then criticize Senators for using ideology as a factor in considering his nominations. His right to pick nominees politically is uncontested. He has exercised that right repeatedly. But he cannot then fairly accuse others of politicizing a process which he has made openly political from the beginning.

Throughout his career, President Reagan has made no secret of his belief that the courts should be subject to political factors.

In 1980 and in 1984, as well as in 1986, he promised he would choose judges based upon their view. He has kept that promise.

Last year, of the California court system, under which voters may reject sitting justices, the President said, "That's what I call a good system."

In 1968, President Johnson nominated Supreme Court Justice Abe Fortas to be Chief Justice and Federal District Judge Homer Thornberry to succeed Fortas as an Associate Justice. Mr. Reagan, then a candidate for President, opposed the right of President Johnson, then a lame duck, to nominate anyone to the position.

Nineteen sixty-eight was an election year. Republicans expected to win the Presidency.

Within 24 hours of President Johnson's Supreme Court nominations, 19 Republican Senators, including then-Senator Howard Baker, circulated a statement which said:

> It is the strongly held view of the undersigned Republican Senators that the next Chief Justice of the United States should be selected by the newly elected President of the United States after the people have expressed themselves in the November elections. We will, because of the above principle, and absolutely with no reflection on any individuals involved, vote against confirming any Supreme Court nominees by the incumbent President.

Nineteen Senators pledged themselves to vote against any nominee regardless of that nominee's qualifications until after the elections.

Mr. BIDEN. Will the Senator yield for a question?

Mr. MITCHELL. I yield.

Mr. BIDEN. What was the month of that?

Mr. MITCHELL. I believe it was June 1968.

It is difficult to conceive of how the Supreme Court nomination process could be made any more political than saying that the Senate would reject any nominee, regardless of qualification, until after the next election.

Yet, that is exactly what happened in 1968. And some of those who now support the Bork nomination urged then that the philosophy of judicial nominees is important and should be considered.

Senator Robert Griffin, Republican of Michigan, who led the fight against that nomination, repeatedly acknowledged that the nominee's qualifications weren't the issue.

Senator Howard Baker said:

> I have no question concerning the legal capability of Justice Fortas. . . . there are, in my opinion, more important considerations at this time. . . . The appointment of the Chief Justice really ought to be the prerogative of the new administration . . . In my opinion, the judicial branch is not an isolated branch of government . . . [I]t is and must be responsive to the sentiment of the people of the nation.

Those were the words of then Senator Howard Baker when a Democratic President nominated a Chief Justice in the Supreme Court.

Our distinguished colleague, Senator THURMOND, stressed that "a man's philosophy, both his philosophy of life and his philosophy of judicial interpretation, are extremely important."

President Johnson's nominations were withdrawn. They were never voted down. In fact, more Senators were for them than against them. But they were defeated by a filibuster by a minority of Senators who openly proclaimed that they would vote against any nominee, regardless of that nominee's qualifications.

There were, of course, other factors present in the case of President Johnson's nominations that are not present here. But those factors were admittedly irrelevant to those Senators who said they would oppose any nominee, regardless of qualifications, and who insisted that no choice could be made until after the election.

Today, an absolute majority of the Senate has expressed a view against this nominee. Extensive, sober, and fair hearings were held. Yet an effort is being made here to create the impression that it's all political, it's never happened before, and it's creating a precedent. But for raw politics, this confirmation process doesn't come

close to the Fortas fight. And the precedent goes far beyond that.

In the 200 years since the Constitution was written, 26 nominations to the Supreme Court have been rejected or withdrawn because of Senate opposition—almost 25 percent. Indeed, far more Supreme Court nominations have been rejected by the Senate than nominations for any other position.

They have been rejected for reasons ranging from principled opposition to a nominee's philosophy to blatant politics.

Our first President, George Washington, saw his nominee, John Rutledge, rejected by the Senate in 1795. Washington was so certain of his confirmation that he gave Rutledge a recess appointment and had the commission papers drawn up and ready to execute.

Washington had reason to be confident. Rutledge had been confirmed to the Supreme Court in 1790. He had been a delegate to the convention which wrote the Constitution. And when he resigned from the Court in 1791, he did so to become chief justice of South Carolina. There was no question about his ability or experience.

Yet the Senate rejected him because of his strong attack on the Jay Treaty with Great Britain, a controversial issue at the time.

That was the first, but not the last time the Senate rejected a nominee for policy reasons.

In 1811, President Madison's nomination of Alexander Wolcott was rejected by a Senate in which Madison's own party controlled 28 of the 34 seats.

Wolcott's rejection reflected both ability and politics, in particular his strong enforcement of the embargo during the war with Britain.

By contrast, President John Quincy Adams' nomination of John Crittenden in 1829 failed on purely partisan grounds. Crittenden was rejected because Adams was a lame duck President, having already lost the election to Andrew Jackson.

The effort being made by President Reagan today, to shift the Court in a direction he prefers, is nothing new. In 1937, after his landslide victory, President Franklin Roosevelt, the most popular President in our history, proposed to use his popularity to shift the Supreme Court in a direction he preferred.

He tried to pack the Court. His plan was to add a new Justice for every Justice over age 70 who refused to retire.

But despite his enormous popularity in the country, despite his overwhelming influence over the Congress, and despite the widespread acceptance of his legislative goals and policies, the Nation and the Congress rejected President Roosevelt's court-packing plan.

I accept the efforts of Judge Bork's supporters to persuade undecided Senators to their view. Similarly, I accept his opponents making a similar effort.

Both sides engaged in an elementary aspect of our Nation's political life—a free, open and vigorous debate of opposing views. Now, because their side lost, some are trying to disparage debate as "politics." They are missing the point.

The nomination of men and women to the Supreme Court is a proper matter of broad public concern, for it is at the nominating process that the public, through its elected representatives, exercises its only opportunity to influence the Court.

The often-repeated concern about unelected judges writing law or influencing policy reflects a real concern in a system whose governing bodies—except for the judiciary—are intended to be responsive to the public from which ultimate sovereignty flows.

Independence from the political process was intentionally made a permanent feature of the judiciary to assure the continuity of law, free from political or public pressure. It was also to ensure that protection of the rights of minorities would be in the hands of men and women who need not take popularity polls into account as they rule on cases involving unpopular defendants or unpopular causes.

Popular persons and popular causes need little protection—their very popularity is their insulation. But minorities, whether of race, religion, or opinion, are not so insulated. They need and have always needed the institutional safeguard of the law. They especially need the Supreme Court.

Ours is a nation under law. It has existed as such for 200 years because we respect the rule of law, whether or not we agree with a particular ruling.

The legitimacy of dissent and disagreement in American political life was established from the very beginning. Three of the delegates at Philadelphia 200 years ago refused to sign the new Constitution. Almost half of the ratifying States conditioned their acceptance on the passage of a Bill of Rights.

Those founders understood that the right to dissent, the right to disagree is essential if we are to preserve our liberties.

The right to disagree if fundamental to the legitimacy, not only of the Supreme Court, but of the Congress and the Presidency itself.

No President in our history has every obtained a unanimous vote. Those who dissent in an election are not disenfranchised when the election is over.

The mandate of the winner in a democracy is a circumscribed and limited mandate. It is—as it should be—tested again and again against individual issues and over time.

No other method preserves legitimacy. And nothing short of legitimacy can enjoy the freely granted public support upon which a free nation must rest.

In the debate over Judge Bork, feelings are deep and opinions are divided. But nothing will be added to Judge Bork's stature or to the stature of the Supreme Court by rhetorical excess which disparages the Senate's role in the confirmation process.

There are valid and persuasive reasons on which those Senators who support this nomination can draw. There are equally valid and persuasive reasons to oppose the nomination. They are what should be debated here. We could then hopefully learn from each other.

Instead, we are being treated to an effort to use the unfortunate circumstances of this nomination to create a myth for avowedly political purposes. The result is, by any measure, a personal tragedy for the nominee, a political tragedy for the President and an institutional tragedy for the Senate.

Mr. President, I yield the floor.

Mr. PACKWOOD addressed the Chair.

Mr. HECHT addressed the Chair.

The PRESIDING OFFICER. The Chair is going to recognize the Senator from Nevada. The Chair would note that when Senators seek recognition at the same time, the Chair in this debate has attempted to go from opponents to proponents. Consequently, the Chair would recognize the Senator from Nevada.

Mr. PACKWOOD. Will the Chair yield for a question?

The PRESIDING OFFICER. It would.

Mr. PACKWOOD. Is the Chair going to preside past 2 o'clock?

The PRESIDING OFFICER. It depends on when the next individual arrives, but that has been the——

Mr. PACKWOOD. So long as the policy is to go back and forth, I am willing to wait until the Senator from Nevada is done. But if the Senator is then in the chair, I will be on my feet when he finishes and would appreciate recognition.

The PRESIDING OFFICER. All people in the chair have attempted to follow this informal rule of going from one side to the other, which we thought was the fairest way to do it.

The Senator from Nevada.

Mr. HECHT. Mr. President, I rise today in support of the nomination of Judge Robert H. Bork to be an Associate Justice on the U.S. Supreme Court. At the outset, Mr. President, I would like to say that I am very disappointed with the way this confirmation has been handled on both sides of the issue. Cheap political attacks and partisan campaign tactics have no place in the Supreme Court nominat-

ing process. As U.S. Senators, it is our job to consider the facts, weigh the testimony, and make a decision on the merits of the nomination. It is not our job to give in to political pressure, or to sit on the fence and hope it goes away.

As all who are privileged enough to serve in this body know, when our constituents feel strongly about an issue they do not hesitate to contact us directly. I can honesty say that my office has received more letters, postcards, and telephone calls about the Bork nomination than on any issue before the Senate in quite a while. Additionally, on my recent statewide tour during the August recess, I found interest in, and support for, the confirmation of Judge Bork to be widespread throughout the State.

This volume of communication, Mr. President, indicates the importance of this nomination to my constituents. While I have received communications from Nevadans in opposition to the nomination, a clear majority of the correspondence has, in fact, strongly supported confirmation of Judge Bork. The people simply aren't buying these cheap, political attacks. In fact, at this point, I ask unanimous consent that an editorial from one of Nevadas finest newspapers, the Elko Daily Free Press, entitled "Here's what Americans Actually Have Said on Bork," be inserted into the RECORD.

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

[From the Elko (NV) Daily Press, Oct. 5, 1987]

HERE'S WHAT AMERICANS ACTUALLY HAVE SAID ON BORK

As Congress procrastinates its way toward a showdown vote on the nomination of Robert Bork to the U.S. Supreme Court, members of the anti-Bork clique have escalated their propaganda effort to a frenzied pitch.

When President Ronald Reagan announced his nomination of Bork those many months ago, raucous spokesmen for several narrow-interest groups quickly boasted they were prepared to spend millions of dollars in opposition to Bork's announcement. At the time, we wondered where the opportunity would come to squander millions of dollars, one way or the other, on what was supposed to be a staid deliberation during which members of the United States Senate would decide whether or not they would give their consent to the nomination, as provided in the U.S. Constitution.

As the scheme unfolded, it became readily apparent where all those special-interest dollars would be spent. Senate leaders connived with the splinter-group kooks to stall the hearings, so the rabble-rousers would have ample time to throw their money about in laying the groundwork for the frenzy of misinformation we have witnessed during the past week or so.

The much-touted hearings before the committee fizzled as a vehicle for arousing public animosity toward Bork; So the anti-Bork clique was forced to fall back on its reserve tactic of rigged "public opinion polls." These are expensive, because those who fabricate these attempts to manipulate public sentiment demand big bucks for manufacturing big lies.

The heavy investment by the kook-element bore fruit last week in a series of announcements of the findings of phony polls. Various pollsters delivered what they were paid to deliver—conentions that a majority of Americans opposed the nomination of Bork, for various fanciful reasons that has been predetermined.

But the exercise was so blatantly contrived we believe it was futile, no matter how many millions of kook dollars it might have cost.

The reason for this conclusion was identified the other day by Lars-Erik Nelson, a syndicated columnist whose commentary is distributed by Tribune Media Services.

He observed the same left-wing malcontents who now are busily manufacturing "public poll" results in their attempt to bolster their warped viewpoint were the same left-wing malcontents who issued strident warnings during the election years of 1980 and 1984. The repeated warnings was to the effect that if Ronald Reagan were to be elected as president, he would nominate "conservative" judges to the Supreme Court.

The American people responded to the warning decisively. In Nelson's words: "Reagan won both elections."

Those of course, were valid samplings of public opinion in the United States, in marked contrast to the "public opinion polls" contrived during the past few days and weeks on the topic of Robert Bork.

In two consecutive presidential elections, the American people were called upon to make a choice that specifically—in fact, thanks to the frenzied left-wing contingent, vociferously—included the prospect of President Reagan naming "conservative" judges to the federal bench. The American people made that choice with enthusiasm, most recently in 1984 when they accorded President Reagan a landslide re-election victory.

They have not spoken on the issue since, because the people of the United States speak at the voting booth, not through those insidiously rigged "public opinion polls." Regarding the elevation of "conservative" judges to the Supreme Court, they have spoken forcefully: Majorities of the voters in 49 states have given Reagan a mandate to nominate the likes of Robert Bork to the Supreme Court.

Mr. HECHT. Mr. President, I believe it is also relevant to remind my colleagues of the number and stature of individuals who have testified before the Judiciary Committee or made public announcements in support of the Judge. This distinguished list begins with former President Gerald Ford and former Chief Justice Warren Burger—two individuals whose credibility, experience and legal knowledge is renowned—and continues through seven former U.S. attorneys general, and numerous other individuals who are variously Democrat, Republican, liberal, moderate, and conservative.

But it is vital to remember that the nominee's qualifications, not public opinion or special interests, should lead Senators to support or oppose his nomination. It has been said by many that Judge Bork is perhaps the best qualified, most legally well-rounded nominee for a position on the Supreme Court in a long while. The Judge has been a member of the Armed Forces, a practicing attorney, a professor of law, a Solicitor General of the United States, and a Federal appellate court judge. I daresay his credentials for a seat on the Court are beyond reproach. And in that regard, Mr. President, I urge my colleagues to take the time, as I have, to thoroughly evaluate—or reevaluate—this nominee's qualifications. I think most will agree, upon piercing the veil of extreme and misplaced partisanship which has characterized this nomination from the outset, that Judge Bork is not the judicial extremist which some interest groups have attempted to portray.

In fact, in his 5 years on the bench, not one of the more than 100 majority opinions written by Judge Bork has been reversed by the Supreme Court. Nor has that Court reversed any of the over 400 majority opinions in which the Judge joined. This is evidence of a mainstream judicial temperament. Moreover, the Court adopted the reasoning of several of Judge Bork's dissents when it reversed appeals court opinions with which the Judge had disagreed. These facts speak highly of the Judge's ability to make judicial determinations in a manner consistent with the highest court of the land, and attest to his merit for a position on that court.

In past years, 7 out of 10 of Judge Bork's colleagues on the bench were appointed by democratic administrations, and 5 of his 10 present colleagues were. But in spite of this, in the hundreds of cases the Judge has heard, he has written only nine dissents and seven partial dissents from majority opinions. Obviously, this is not the record of a right wing ideologue unable to arrive at nonpartisan decisions.

Mr. President, in further evidence of the bipartisan support for this nomination, witness the statement of one who has risen above the conservative-versus liberal fight which has underlied Judge Bork's consideration. No lesser statesman than my distinguished colleague and good friend from South Carolina, FRITZ HOLLINGS, who, may I remind my colleagues, opposed this President in the last Presidential campaign—recently announced that he would not be caught up in the blind anti-Bork stampede, and would instead support the nomination in recognition of the Judge's tremendous legal and moral qualifications.

To address some of the specific allegations made by this nominee's opponents, I would first note that an analysis of Judge Bork's record simply shows no basis for their irrational statements that he would seek to roll back existing judicial precedents.

Judge Bork has faithfully applied the legal precedents of both the Supreme Court and his own circuit court throughout his time on the bench. While the Judge may have disagreed with certain court decisions in professorial writings, that does not mean he feels it within his power or calling to overrule them. In fact, Judge Bork has repeatedly faulted politicized, result-oriented jurisprudence of both the left and the right. Speaking of his adherence to precedence, Judge Bork testified during Senate consideration of his appeals court nomination:

I think the value of precedent and of certainty and of continuity is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious.

He further stated that even questionable prior precedent ought not be overturned when it has become part of the political fabric of the Nation.

Mr. President, one of Judge Bork's most relevant attributes is his belief in the philosophy of judicial restraint. This doctrine holds that judges should faithfully interpret the Constitution and statutes, adhering to the language and history of those documents, rather than engaging in subjective interpretations toward ends which they, the judges, consider to be most appropriate. And as we all realize, in reaching their decisions, judges may create new, or expand upon present, law. I concur in the philosophy of judicial restraint, since it is more democratic in my eyes than representatives who are elected to office—and periodically reevaluated by voters at reelection time—should hold the authority to make the law, as opposed to certain members of the judicial branch who are appointed to their positions for life.

Moving to a discussion of Judge Bork's civil rights record, we see a clear record of strong support for increased recognition and protection of basic civil rights. In fact, during his tenure as U.S. Solicitor General, he argued before the Supreme Court for more expansive interpretations of civil rights laws in some of this country's most significant cases on that logic. Among those cases were: Beer versus United States in which Solicitor General Bork urged a broad interpretation of the Voting Rights Act to strike down an electoral plan he believed would dilute black voting strength, and Washington versus Davis in which he argued that an employment test with a discriminatory "effect" was unlawful under title VII of the Civil Rights Act.

Mr. President, quite frankly, I could continue indefinitely citing Judge Bork's impressive record, and correcting the distortions propagated by liberal groups opposing his nomination. I am a businessman, not a lawyer. But even I can see that the legal arguments listed above are not those of a far-right ideolog. I can also see, Mr. President, that the partisan opposition to Judge Bork is actually aimed at undermining this President.

Just 1 year ago, the leaders of his opposition were publicly touting Judge Bork as a great legal mind they would support for an opening on the Supreme Court. Now, eager to take advantage of an embattled administration, these same individuals have done an about face and are attacking Judge Bork for everything they can find, even digging up articles he wrote two decades ago. I am sure that a look into the histories of some of those opposed to Judge Bork would reveal some interesting actions and philosophies espoused in their earlier years.

But rather than add fuel to the fire of what has already become an intensely—and inappropriately—political debate, I would instead simply urge that my colleagues take a long, hard look at Judge Bork's record and qualifications for this position, rather than becoming a part of the blind opposition to this nomination. I would also like to remind my colleagues that changing your mind when you are wrong is a virtue, not a vice. I implore you who have succumbed to inappropriate and unethical political pressure to reconsider your position. Judge Bork has given us the opportunity. He has bravely stood on principle and demanded a full accounting in the Senate, to clear his name and force the fence-sitters to take a stand. I salute him.

President Reagan has sent us a nominee qualified in every respect. That is his right, and his duty, under the Constitution. Our duty is to consider only the Judge's merits and qualifications, not political pressure, in the confirmation process. Judge Robert Bork deserves to be confirmed.

Several Senators addressed the Chair.

The PRESIDING OFFICER (Mr. BINGAMAN). The Senator from Oregon.

Mr. PACKWOOD. Mr. President, the year was 1215; the document, the Magna Carta, article 39:

No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

The same document, article 40:

To no one will we . . . delay right or justice.

The year 1679, Parliament, the Habeas Corpus Act:

. . . Whensoever any person . . . shall bring any habeas corpus directed unto any sheriff . . . for any person in his . . . custody . . . the said officer . . . shall bring or cause to be brought the body of the party so committed . . . and shall then likewise certify the true cause of his detainder or imprisonment . . .

Mr. President, the American Bar Association, in its book "Sources of Our Liberties," in referring to the Habeas Corpus Act of 1679, says:

The Habeas Corpus Act created no new right and introduced no new principle. Instead, it strengthened a right already existing. . .

The Magna Carta states again:

In future, no official shall place a man on trial upon his own unsupported statement.

Finally, Mr. President, in the common law—this is not from the Parliament, this is not from the Magna Carta—but in the common law of The pleas of autrefois acquit and autrefois convict:

A man shall not be brought into danger . . . for one and the same offense more than once.

Mr. President, the reason I read those documents is to enforce something that has been forgotten, I think, in this debate. In every instance, whether it was the Magna Carta, the common law, The Pleas of Autrefois Acquit and Autrefois Convict, whether it was the statute concerning justice and sheriffs, or the Habeas Corpus Act, or the English Bill of Rights; the rights set forth in those documents were not new rights granted by the government. They were confirmations of existing rights inherent in the people that the government was trying to take away.

So in the Magna Carta, which was basically a contract or compact between the nobles and the king, there is nothing that was not presumed to already exist as a right of the nobles. They thought the king was trying to take away their rights. By this compact between the nobles and the king, they, in essence, said to the government: "You can't take away these rights that inhere in us as individuals."

In the English Bill of Rights, in 1689, it was an act of Parliament, but again not creating new rights but confirming rights that existed in individuals which the government was trying to take away, and it was therefore necessary to pass an act of Parliament saying these rights are reconfirmed.

The same is true in The Pleas of Autrefois Acquit and Autrefois Convict. The court did not say at that time: "Here we go. For the first time in the history of this country we are now saying that you are protected against double jeopardy." That is what the plea was—you cannot be tried twice for the same crime. It was not a court saying, "We decided to come up with a new right; call it double jeopardy." The court said: "You always had this right, and now the king is trying to take it away from you and try you twice and three times, and henceforth

we are going to confirm that right, and the king cannot do it."

It is important to understand what the courts were saying at that time, because the common law courts were not making law, nor did they ever claim to make law. They found law. Often, they would have to wait until the right case was presented before them. But when they made decisions that said to the king, "You can't try this man a second time," what they were saying was: "That right has always existed in that man." If the king didn't try to abuse it, we wouldn't have to have that court decision or an act of Parliament, because those rights are inchoate, they are inherent. So long as the government doesn't try to take them away from you, you don't need to pass any restriction on the government trying to take them away from you. But when the government tried, then the Parliament or the courts or the nobles felt compelled to attempt to put their rights in writing.

Mr. President, in this sense, the Anglo-Saxon law is unique. Ours is a heterogeneous country. We are ethnically diverse, with peoples from all over the world populating this country; but from the standpoint of the law, we are Anglo-Saxon—straight derivative from England.

The Anglo-Saxon law has a concept that is unique; the right of the individual is superior to the right of the State. You find that concept existing only throughout those countries which have an Anglo-Saxon common law heritage. You do not find this common law concept in the so-called Napoleonic Code countries, where there is much more of a preference for the power of the state over the right of the individual. They may be free countries in the sense we understand free countries—they have free elections and a reasonably free press. But in the code countries there is a decided preference where you have to make a choice between the two, the power of the state verus the right of the individual. In Anglo-Saxon countries, where they have to make a choice between the two, there is a decided preference for the right of the individual over the power of the state.

The founders of this country understood that very well. They were quite familiar with English history. They were quite familiar with what was regarded as the normal rights of Englishmen. Of course, they regarded themselves as Englishmen at the time. Yet, they discovered that because we were colonies, we were denied some of the rights that were otherwise assumed inherent in Englishmen.

And they saw a government in England trying to take away the rights in this country which would have been granted as a matter of right to anyone freeborn in England.

So when we adopted the Constitution our founders well understood the concept that men and women are born inherent with certain rights that the Government cannot take away, should not take away. They are yours. They belong to you.

And they also understood England's history that, from time to time, the king would try to take away those rights. Therein, whether it is the Habeas Corpus Act or the Magna Carta or the English Bill of Rights or the petition of rights you had, from time to time, to put those rights down in writing.

And we did copy from the English, sometimes in different words, but the concept is there.

Let me quote again Article 39 of the Magna Carta.

> No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of this standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

What did our founders say in the Bill of Rights?

> No person shall be deprived of life, liberty, or property, without due process of law * * *.

Magna Carta again:

> To no one will we * * * delay right or justice.

What do we say in the sixth amendment?

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

Magna Carta:

> In future, no official shall place a man on trial upon his own unsupported statement.

What did we say in our Bill of Rights? "No person shall be compelled in any criminal case to be a witness against himself * * *".

Bail, almost word for word. The English bill of rights in 1689:

> That excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted.

Our Bill of Rights:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Double jeopardy, found in the common law under the Pleas of Autrefois Acquit and Autrefois Convict:

> A man shall not be brought into danger * * * for one and the same offense more than once.

Our fifth amendment to the Constitution:

> No person shall be subject for the same offence to be twice put in jeopardy of life or limb * * *.

Mr. President, over and over and over, we wrote into the Constitution words almost identical or words meaning the same thing as the principal documents of English liberty, and we did it not because we thought we were creating rights. We did it not thinking that the Constitutional Convention could give rights to people. We did it because we knew what the English experience was. That said you had rights but the government would try to take them away. So we were going to reconfirm them just as England reconfirmed them over roughly 500 years, from the time of Magna Carta in 1215 to their bill of rights in 1689.

And how many times have we heard that the Constitutional Convention created a government of limited powers, not citizens of limited powers? The power remained in the citizenry and the rights were unlimited, unless for the sheer necessity of government. Some rights had to be limited in order for the government to function in a collective society, and that is the only limitations there were.

And if that Constitution did not put limits on you, then you had all of the rights that anyone could ever have.

Professor Kurland, when he testified, could not have said it any better.

> Liberty was, indeed, the watchword of the national convention and of the state ratifying conventions as well.
>
> The Constitution did not create individual rights. The people brought them to the convention with them and left the convention with them, some enhanced by constitutional guarantees. The Bill of Rights, in guaranteeing some more, made sure that none was adversely affected.

The Bill of Rights in guaranteeing more made sure that none was adversely affected.

And that is why, Mr. President, we added the ninth amendment to the Constitution. That ninth amendment says that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Now at the time, of course, of the adoption of the Constitution, we did not have a Bill of Rights in it. It came 4 years later. It was an interesting debate as to why we did not have the Bill of Rights in the original Constitution. Madison, Hamilton, and Wilson had grave misgivings about a Bill of Rights. They had the very fear, that is an understandable fear, that if you set out in the Bill of Rights the freedom of speech, freedom of press, right to petition, right to assemble, freedom against self-incrimination, freedom against illegal search and seizure, then the argument would be made those are the only rights you have and anything left out of this document, you do not have.

So when the Constitutional Convention met, Madison, Wilson, and Hamilton argued against the inclusion of a Bill of Rights for that reason. James Wilson says it well in the ratifying conventions in Pennsylvania in arguing for the Constitution, yet explaining why there was no Bill of Rights.

[W]ho will be bold enough to undertake to enumerate all the rights of the people?—and when the attempt to enumerate them is made, it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted. So it must be with a bill of rights, and an omission in stating the powers granted to the government, is not so dangerous as an omission in recapitulating the rights reserved by the people.

Madison echoed that argument. Most of the ratifying conventions echoed that argument.

Two years later, in 1789, a Bill of Rights was introduced. Madison introduced it, but in introducing it Madison says:

It has been objected also against a 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 laudable arguments I ever heard against the admission of a bill of rights into this system but I conceive that it be guarded against and I attempted it,

He then makes reference to the ninth amendment, by saying everything not listed here which basically is a codification of the rights that already exist, if we forgot to mention them, then they exist in the people. The fact that we did not mention them does not mean the people do not have them.

Now the document is complete. The Bill of Rights is added.

Our background is in the common law. Our courts were common law courts. To this day, courts make decisions where they find law. Do you think that our founders intended, with their background, that what had been 500 years of common law suddenly stopped and the courts could no longer find law or interpret it if you wish. Critics, if they do not like this process, call it making law. Do you think our founders really used the terms "due process," "equal protection," "commerce among the States," and had in their mind exactly the way they think those terms should have been interpreted 5 years hence, 10 years hence, 50 years hence, 200 years hence? I do not think so.

I think what they intended was to create a court structure insulated by life tenure from Presidents who might want to remove judges or Congresses who might want to remove judges. They would then say to the courts, as new situations arise that we did not foresee, we intend that you should continue to find the law, not make it, but to find it.

A classic example of that in our day is Brown versus the Board of Education, a decision in 1953 that eliminated school segregation.

It was a direct reversal of Plessy versus Ferguson in 1896. In Plessy versus Ferguson, the U.S. Supreme Court had held that you could segregate the races, blacks here, whites here, and that separate but equal was constitutional.

Then in Brown versus Board of Education, about 60 years later, the Court says, "We now find that you cannot segregate the races, black here, whites here. That is not constitutional."

Mr. President, there had been no change in the law in those intervening years, no change in the Constitution, no statute passed. The U.S. Supreme Court, acting as a common law court, found that, for whatever reason, Plessy versus Ferguson was no longer the law and Brown versus the Board of Education was. And to this day, I know of almost no one that criticizes the Brown versus the Board of Education decision.

No, Mr. President, I think our founders full well understood what they were doing. They also understood that we can all be swept off of our feet by transitory passions. They had seen it in their lifetimes. They were familiar with it in history. And so they thought that rights and, Mr. President, especially minority rights, dissident opinions, those who are different, would best be protected by the courts—not by Congress, not by the President, not by the whims of current elections, but by the courts, peopled by judges with lifetime tenure who could not be threatened by the political process.

And, indeed, our founders again understood well. They understood themselves better than most of us realize. It did not take them a decade before many of them still in Congress voted for the passage of the Alien and Sedition Acts in 1798. Those acts said that you could be hauled off to jail for writing or speaking ill of the Government. The very people who created our Constitution, who adopted the bill of rights, within a decade of passing the bill, were taking away your rights of free speech and free press.

Fortunately, that law, Mr. President, was sunsetted and ran out before it was ever fully tested in court. But I would like to think that the Court would have found that law unconstitutional had they a chance to deal with it.

Then you can go right to our history and you can see us being swept off our feet. And by us, I mean the President and Congress, mostly. Andrew Jackson, in his prohibition of the mailing of abolitionist pamphlets said:

I had a right to do this. This kind of literature is divisive to the country and I am going to try to stop it from being mailed.

That is a Presidential effort to limit speech.

The Palmer Red raids. Woodrow Wilson and Attorney General Palmer rounded up Communists in 1919 and 1920, whatever they believed Communists were. We did not know much about it. There had been a revolution in Russia and we were frightened to death in this country. Because we were frightened, then it was all right to trim people's rights a bit because it was for the collective good of the country.

The Joe McCarthy era prompted a congressional abuse of our liberty; the Watergate era, a Presidential abuse. Always we had the courts to defend us. In the 1950's, they said you cannot haul people before this Congress and make them give up their right against self-incrimination. You had the courts protecting our rights in Watergate.

The only times, perhaps that the court ever seriously fell down were in the cases involving the internment of Americans of Japanese ancestry during World War II. And that is a situation which those of us from the West may be more familiar with than those in the East.

We had a long history of Asian settlements in the West for over a century now. First came the Chinese, who worked on the railroads, and then the Japanese arrived before the turn of the century. What you had in 1942 was a liberal President, Franklin Roosevelt, signing an order saying that it was all right to intern Americans of Japanese ancestry.

Mr. President, I said Americans of Japanese ancestry. These were not aliens. These were not green card workers. These were not naturalized Americans. These were native-born Americans. And, to his eternal discredit, although he admitted it later in life, one of the principal supporters of that decision of the Government's right to intern Americans of Japanese ancestry was then California Attorney General Earl Warren. And the Court, in a shameful decision, upheld the Government's right.

No, our founders understood well passion will sweep us off our feet. We should create a Constitution which had a limited government. It gave that government limited powers and any powers the Constitution did not give the government, the government did not have and any other rights not stated were kept by the people. And, just to make sure, we are going to enumerate some of the rights which are unstated that the government might try to abuse, so the government understands it: Freedom of the press, speech, assembly, religion. You cannot take those away. You are not supposed to take them away anyway, but, to make sure you understand it, Mr. Government, we are going to put those in the Bill of Rights.

And now we come down to the issue of privacy and the views of Judge Bork on privacy and whether or not our founders intended a right of privacy.

Bear in mind, Mr. President, there is no constitutional provision that says all citizens have a right of privacy. That is not an enumerated right.

So the question is: Can you infer that right at the time of the founding of this Constitution? And I think, without question, you can. Our founders, again, intended that individuals kept every right they had, every right even unthought of, unless the Constitution specifically took it away to give it to the Government so that they had sufficient powers to govern. It is really a question of how you look at the Constitution and the convention as to where you come out today.

I think that Judge Bork views the constitutional rights as almost exclusionary, and unless they are stated or can be directly inferred, you do not have them. I base this conclusion partly on his testimony, but frankly, more on the meetings that I had with him in my office.

I come to just the opposite conclusion, Mr. President; just the opposite conclusion. Every right that you could conceivably have that is not specifically taken away, you keep. And that puts the judge and me poles apart as to how you look at rights in this country.

And the more I watch Government operate and the more I read history, the more I realize the danger we face from men and women of good will, usually zealous, who are convinced they are right; they know they are right. In some cases, they are convinced that God talks to them and tells them what is good for this country. And they just are so convinced it is good that they want to write it into law. So that if they cannot change our thoughts, at least they can change our actions to comport with what they know is right. And they are so convinced they are right, if that takes a little trimming and cutting of the Constitution, so be it, because the end justifies the means.

Mr. President, I am not accusing Judge Bork of that type of thinking. I want to make very clear that I do not think he believes the end justifies the means. But I think he does believe that if you cannot find the right specifically in the Constitution, then legislative bodies are entitled to do what the majority wants.

And, if that steamrollers over somebody's rights, tough luck. Because the founders did not specifically put it in the Constitution.

Mr. President, is that what our founders intended when they argued against the inclusion of a Bill of Rights in 1787? They argued against it because they were afraid if they stated things in the Bill of Rights and by mischance left something out, we lost those rights. That is not what they intended.

What they meant, and they said it so clearly in the ninth amendment, is you have every right you can possibly have. We will enumerate a number so that the Government understands you have got those rights. We will limit your rights a bit in this document so that the Government can operate. Beyond that, they are all yours and the Government cannot take them away.

On the right of privacy here is what Judge Bork said, quoting from notes of a meeting in my office. I do not have a transcript of this, in the sense of a judicial transcription. But, on September 10 in my office he said the following: "Our founders never intended the right of privacy to be covered by the Constitution. Unless rights are specifically protected either by the text or historical evidence, the right isn't protected."

I emphasize, Mr. President, "the right isn't protected."

That is not the way I read it and I do not think that is what our founders intended. It is a matter of honest disagreement, not just between Judge Bork and myself, but between proponents and opponents of Judge Bork on this floor; between constitutional scholars. But I do not know how you can misread the Constitutional Convention, the comments in the ratifying conventions, the Federalist Papers and the fact that it was only 2 years later that we put the Bill of Rights in. It is clear what we intended by it and what we meant to protect by it. I do not know how you can come to any other conclusion than that which says that any right the Government does not take away by the Constitution, you get to keep.

Here is where Judge Bork says, again:

> Courts must accept any value choice that the legislature makes unless it runs clearly contrary to the choice made in the framing of the Constitution.

I will say it once more, and then move on to the specific right of privacy. I would say State legislatures or the Congress cannot take away any of your rights, any of your rights, unless specifically permitted in the Constitution. Only when a court, acting in a common law capacity 100 years after the convention, 150 years after the convention, must weigh an action of a legislative body against the absolute necessity of a power to the Government for its vital existence, only then are they forced to weigh individual rights versus the power of the State.

I emphasize again, Mr. President, what the common law tradition has been in this country and in England. Our tradition is to tilt on the side of individual rights. Countries that live under the Napoleonic Code tilt on the side of the power of the State.

So, when you come to the rights of privacy and you weigh the cases and you think of what our founders intended in every case, before you trim the right to privacy, I think you have to ask: Is this act of the legislature or is this act of Congress so critical to the Government of this country that this country cannot exist without it?

Mr. President, the question in privacy cases is not whether the Government has the right to take away an individual's right to privacy just because the Government does not like what the individual is doing but instead that the governmental interest is so compelling that our system cannot survive without it.

Judge Bork, for the better part of his adult life, has criticized the privacy doctrine. He has said that it has no constitutional foundation. Mr. President, I have made the argument that I think it has a clear constitutional foundation and that foundation is the ninth amendment and that foundation is what our founders intended. Under that amendment, you get to keep every right, private right and otherwise, unless it is taken away from you. I think on privacy, Judge Bork would say: "If you can't find it enumerated, you have not got it."

I find it interesting that he has spent the better part of his adult career criticizing the right of privacy; interesting that in my office in our meetings and in his hearings he would say time and again: "I agree with the result in many of the cases but I disagree with the reasoning."

So let us take just a minute to say what the right of privacy is as best we can define it. It is not a new right. The right to privacy did not start with Roe versus Wade.

Mr. President, the first case that privacy was used was in 1923. It was Meyer versus Nebraska. Nebraska had passed a law that schools could not teach foreign languages. The case went to the Supreme Court. The Supreme Court said that is wrong, and they used some wonderful language when they threw out Nebraska's statute. They said:

> * * * The right of the individual * * * to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy these privileges long recognized at common law is essential to the orderly pursuit of happiness by free men.

Let me emphasize again, Mr. President: "* * * These privileges long recognized at common law—is essential to the orderly pursuit of happiness by free men."

In that case the Supreme Court was not creating new law. The Supreme Court was confirming a common law right of privacy that has existed inherent and inchoate in the citizen from the time of the founding of this country. There would never be a need for a court decision on that right until the

Government tried to take it away. Then the Court said: You cannot do that.

Another early case on privacy came out of Oregon and is one I am slightly more familiar with. The case, Pierce versus Society of Sisters, came 2 years after Meyer versus Nebraska.

My dad was a lobbyist in the Oregon Legislature during the twenties and he told me the passion and the fear that existed then. The Ku Klux Klan controlled the Oregon Legislature for two sessions in the midtwenties. At that time, the Klan was a very anti-Catholic, anti-black, anti-Jewish, and anti-private education organization. Most private education, if it existed, was Catholic education.

Believe it or not, Mr. President, the Oregon Legislature passed a law outlawing private education. You could not send your child to private schools. That case went all the way to the Supreme Court. The Supreme Court said: You cannot do that, Oregon. So long as a school is created that meets the minimum standards that the State requires for all schools, then where you send your child to school is a private decision that the Government cannot take away from you.

Now, Mr. President, can you find in the Constitution any place enumerating something that says you have a right to send your child to the school you want? No, you cannot. The Court found it inherent in the right of parents to decide where to send their child to school. And the Government could not take that right away.

Mr. President, I ask unanimous consent to submit a list of 26 cases running from 1923 to 1987 that has been compiled by the Library of Congress, Congressional Research Division, the privacy cases.

I would call to the attention of the President that Roe versus Wade, the decision legalizing abortion, is one of the privacy cases located in the middle of this long list.

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

LEADING DECISIONS OF THE SUPREME COURT RECOGNIZING A CONSTITUTIONAL RIGHT OF PRIVACY BASED ON SUBSTANTIVE DUE PROCESS

*Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

*Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

*Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

*Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

*Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

*Roe* v. *Wade*, 410 U.S. 113 (1973).

*Doe* v. *Bolton*, 410 U.S. 179 (1973).

*Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

*Bellotti* v. *Baird*, 428 U.S. 132 (1976). (Bellotti I).

*Whalen* v. *Roe*, 429 U.S. 589 (1977).

*Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977).

*Carey* v. *Population Services International*, 431 U.S. 678 (1977).

*Beal* v. *Doe*, 432 U.S. 438 (1977).

*Maher* v. *Roe*, 432 U.S. 464 (1977).

*Poelker* v. *Doe*, 432 U.S. 519 (1977).

*Colautti* v. *Franklin*, 439 U.S. 379 (1979).

*Bellotti* v. *Baird*, 443 U.S. 622 (1979). (Bellotti II).

*Harris* v. *McRae*, 448 U.S. 297 (1980).

*Williams* v. *Zbaraz*, 448 U.S. 358 (1980).

*H.L.* v. *Matheson*, 450 U.S. 398 (1981).

*City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

*Planned Parenthood Association of Kansas City* v. *Ashcroft*, 462 U.S. 476 (1983).

*Simopoulos* v. *Virginia*, 462 U.S. 506 (1983).

*Thornburgh* v. *American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169 (1986).

*Bowers* v. *Hardwick*, 106 S.Ct. 2841 (1986).

*Turner* v. *Safley*, 107 S.Ct. 2254 (1987).

Source: Congressional Research Service, Library of Congress, September 14, 1987.

Mr. PACKWOOD. Now, Judge Bork says he agrees with the result in Meyer, the foreign language case. He agrees with the result in Pierce, that you have the right to send your child to a private school. He says he agrees with the results of the Griswold case, the contraceptive case out of Connecticut. He agrees with the conclusion. He does not agree with the reasoning. Yet when I talked with Judge Bork, and asked him what method of reasoning he would use to come to those same conclusions, I found him lacking.

When I asked Judge Bork first about Pierce versus Society of Sisters, he said that could have been decided on a freedom of religion basis. I said, "Your Honor, it could not be decided on a freedom of religion basis because there was a second plaintiff in the case. The co-plaintiff was a nonsectarian military academy and you could not have used freedom of religion for a nonsectarian school."

He said, "Then perhaps we would have to reach that conclusion on Freedom of Association or something like that. * * *"

Then I asked him, I said, "Judge, I know you do not like the abortion case. What if you were a lawyer in Chicago in 1970 and a woman came to you who was pregnant and wanted to have an abortion. The woman wanted you to bring a case for her in Federal court, guaranteeing her right to make a choice on abortion. You disagreed with privacy, and didn't think that would wash with the court. What would have been the theory of your brief representing the plaintiff?"

He did not have one.

Mr. President, while I may quarrel with whether or not Judge Bork agrees or disagrees with the right of a woman to make a choice on abortion, what I most fear is that a man who has spent a lifetime opposing privacy cases, saying he agrees with the results but not the reasoning, and is unable to come up with an alternative method of reasoning.

I think I understand why. It is one of those bolts of lightning that hit you every now and then and turns out to be a good idea. I called the Library of Congress.

As an aside, I have to say the Library of Congress is an extraordinary organization. Of all the privileges that come with being a U.S. Senator, access to that facility and the exceptionally bright people who work there, is one of the extraordinary privileges of a lifetime.

I talked to John Killian, the Senior Specialist on Constitutional Law, and I said, "Mr. Killian, I am curious. Can you tell me if there are any cases in the history of the Supreme Court where the Supreme Court made a decision confirming a particular liberty and later decided they did not like their reasoning in that case? However, because they wanted to still reach the same result, they reached the same result in another case by using a new method of reasoning, dismissing their old one?"

Here is what he said and I ask unanimous consent to have it printed in the RECORD.

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

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
*Washington, DC, September 21, 1987.*

To: Honorable Robert Packwood Attention: Jill Luckett

From: American Law Division.

Subject: Supreme Court decisions protecting individual liberties.

This memorandum responds to your inquiry whether we can identify any cases in which the Supreme Court has held protected against governmental abridgment a claim of individual liberty and in which subsequently the Court has decided the ground relied on cannot support the decision but another ground does support the same result. As we have previously reported, we have not been able to find such a case.

JOHNNY H. KILLIAN,
*Senior Specialist,*
*American Constitutional Law.*

Mr. PACKWOOD. Mr. President, I asked Judge Bork on September 10 when he was in my office about this matter.

I asked the Library of Congress to come up with a case where the Supreme Court guaranteed a particular liberty using a particular method of reasoning and then in a subsequent decision abandoned that method of reasoning while continuing to defend the civil liberty but on different grounds. Judge, they could not come up with a case. Can you?

Judge BORK: I cannot think of one now but I would think they exist. I will ask some of my law school professor friends if they can come up with a case and I will send it along to you if I can come up with one.

Judge Bork has never sent me such a case. Mr. President, such a case does not exist.

So when Judge Bork says, "I do not like the right of privacy but, I do like

the results," then I say, "How do you get the results?"

No answer.

If anything, it was basically my belief in the right of privacy, which caused me to reach the decision to oppose Judge Bork. If anything, the nomination hearings confirmed the meetings in my office, both of which took place prior to the hearings. In the hearings, he recanted a bit on the first amendment and decided it could cover commercial and artistic speech. He recanted a bit on equal protection of the laws, and said it could cover more than race. He never recanted on the right of privacy.

From day one until the end of his appearance before the committee, there was never any question in his testimony as to what he thought about the right of privacy. For him, it had no constitutional foundation. It had no constitutional foundation, despite the fact that the founders of this country said, "Every right that God can ever give to anybody is inherent in you and you can keep it unless the Government has taken it away from you in the Constitution."

Mr. President, if you cannot bring yourself to support a decision based on its reasoning, then, of course, you may ask the prospective nominee, "Can you support the decision based on stare decisis, that it is the law and should continue to exist even if you disagree with it?"

Both in my office and before the committee, these are basically the standards he set down for stare decisis: Private expectation; institutional dependency; age of the thing; fabric of the Nation; how internalized the right.

The judge referred to any number of situations where he said stare decisis ought to apply because the decision was so interwoven into the fabric of the country that even if he disagreed with it, it should not be overturned. He cited commerce cases, legal tender cased, first amendment cases, incorporation of the bill of rights, equal protection. In all of those, he could accept stare decisis in some areas even though he disagreed with the decision. But, again, he did not mention any privacy cases.

He mentioned the decision in Brown versus The Board of Education, but he said, "Of course, that is a case I agree with, however."

Then he mentioned Hart of Atlanta, a civil rights case which he had disagreed with at the time it was written. He mentioned Bolling versus Sharp, which was a school desegregation case in the District of Columbia, but he said based on stare decisis, he would support it. No privacy cases.

Now, Mr. President, it has come to the sharp issue currently found in privacy cases, that is the issue of abortion. I suppose I do not have to tell anybody in this body my views on that subject. I introduced in this Senate in 1970 a bill to legalize abortion nationally, 3 years before the Roe versus Wade decision. I spent 20 years before I came to this body working to ensure that a woman would have that right to choose. I regard it as very important.

I do not rest my opposition to Judge Bork solely on this one privacy right. I rest my opposition on the fact that I think he would undo all of the privacy cases if he could.

I was in the committee room in 1981 when Judge Bork testified on Senator HELMS' human life bill, in which he said, "I am convinced, as I think most legal scholars are, that Roe versus Wade is itself an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority.

Mr. President, you had to be in the room. The cold transcript was not enough. You had to hear it.

Mr. President, he hates that decision. He may think that of all of the privacy cases, that is the worst. I do not know. That decision he hates, and he told me—he may have said it publicly but certainly he told me privately—had he been on the Court at the time of Roe versus Wade he would have voted no, with the minority. I think he probably said that publicly also.

Now I have the situation, as I look at the confirmation of Judge Bork, of a man for whom the privacy cases are so distasteful that his distaste almost knows no bounds. In particular, he vehemently, strongly and passionately opposes the abortion case. In no way, shape, or form can I assume that he would support it on stare decisis because all the times he mentioned the cases he lives with but does not like; he never mentioned Roe versus Wade or any other privacy case as one that he would be willing to live with.

So I have to ask myself, how will he come out on the privacy cases? What are his personal feelings? I know his feelings is passionate, but how much does he dislike that case? Will his personal feelings affect his decision?

Judge Bork said in the California Law Journal, May 1985, "Justice Robert H. Bork: Judicial Restraint Personified"—

> No judge can completely get his own morality out of a decision, because the way we understand the world is changed unconsciously by our moral framework.

(Ms. MIKULSKI assumed the Chair.)

Mr. PACKWOOD. Madam President, I think Judge Bork is right. It is an unusual person that can so separate their feelings from their actions that their feelings can be utterly de nuded. It is like separating the spirit from the body. I do not think you can do it. I do not think Judge Bork thinks you can do it. So knowing of his distaste for the privacy decisions, knowing of his intense dislike of Roe versus Wade—the abortion decision—I took the leap and I asked him about his personal feelings on abortion—his personal feelings, not his legal view about Roe versus Wade. This is what he said:

When he taught at Yale, he was aware that abortions were happening. If not prevalent, at least abortions were common. He did not have much feeling about it then, one way or the other. However, he said he has become somewhat disturbed and his views might be changing because of both the articles that he had read on fetal pain and the arguments he had seen raised that can justify other takings of life.

Now, Madam President, these are my notes that I dictated immediately after the meeting from handwritten notes that I was taking while I was meeting with Judge Bork. I had my staff person sitting in the meeting and she made her notes independent of mine, without any contact between us. Her notes say that he began to have qualms about abortion when he began to read articles on fetal pain and euthanasia. That is her word, it was not his; but I think that is what he meant because I phrased it "other arguments he had seen raised that could justify other takings of life by the State."

Madam President, I do not think Judge Bork realized that for those of us who have been involved in the prochoice fight for a long time, the words "fetal pain" and "euthanasia" are code words. Those are words for people who want to undo the right to choose. As an aside Madam President, the argument on fetal pain is a bogus argument. If anyone is going to say that those of us who are pro-choice are thereby in favor of euthanasia or let us take everybody over 70 and get rid of them because they are going to cost too much to the Social Security System or that we should sterilize all the mentally incompetents, they are making unfair charges.

So that is where I end up. Here is what I am faced with:

First. The Court premised its decision in Roe versus Wade on the right of privacy. I say it again, The Court premised its decision in Roe on the right of privacy, a line of decision, that goes back to the midtwenties. It is now a well-established constitutional right in this country.

Second. Judge Bork does not like the constitutional theory upon which the right of privacy is premised.

Third. Judge Bork finds especially pernicious the right of privacy as enunciated in Roe versus Wade.

Fourth. Judge Bork recanted on the first amendment and he has recanted on equal protection but he has never recanted on privacy.

Fifth. In mentioning stare decisis, Judge Bork mentions many cases in which he thinks stare decisis should

apply, even if he disagrees with the decision. Yet Judge Bork never mentions a privacy case as one he would sustain on the basis of stare decisis. He can find no privacy cases or mentions none.

Sixth. He admits that a judge's personal feelings are bound to creep into decisions and I think probably into his decisions. We would probably all agree that we cannot separate everything we are from everything we decide.

And lastly in my judgment, I repeat, in my judgment—I cannot prove this—I think Judge Bork now personally finds that the right of a woman to make a choice on abortion is pernicious.

You add those all together and where do I come out? Well, Madam President, I want to return to the Constitution. Madam President, do you think that our founders intended that the only rights that existed were those specifically stated in the Constitution? Furthermore, are these specific rights to apply only to those people covered in the Constitution and that never again was a court, including the Supreme Court, to exercise common law functions that were absolutely known, well-known to the founders of this country?

At the time of the adoption of our Constitution, the provision in it applied basically to white adult males who owned real property. Over the years, those protections have been extended to blacks and other minorities, the insane, criminal defendants, children, and women, although not fully or we would not be arguing over the equal rights amendment today. What do you think our founders intended when they adopted this document? They knew full well they were not giving full representation to some people and denying rights to others but do you think they intended in 1787 that rights existed for white adult males and nobody else ever forever?

I do not think that is what they intended.

Do you think that our founders intended that the only rights you had as an individual were those rights specifically enumerated in the Constitution and any other unstated right the State legislative body or the Congress could take away from you? I do not think that is what they intended. I think what they saw was a Supreme Court exercising common law functions, finding law—not making it, but finding it. I think they understood exactly what they were doing and the Supreme Court has, for over 200 years, done what the founders intended.

Mr. NICKLES. Will the Senator yield?

Mr. PACKWOOD. I am just about to conclude. So, Madam President, you can pay your money and take your choice. I come down on the side of the Constitution that says everyone in this country, man or woman, black or white, comes into this world with inchoate, inherent rights that the Government cannot take away, and if those rights are not specifically stated in the Constitution you still have them. I find Judge Bork on the other side; the only rights you have are those that the Constitution specifically gives you, not others.

Madam President, we are celebrating this year our 200th anniversary of the U.S. Constitution. But I think we would be wiser to realize that we are celebrating not 200 years of our history, but really 700 years of Anglo-Saxon history, in which men and women have fought and been tortured, forfeited their property, and died so that we could say what we want, do what we want, and be what we want without interference from the Government. I hope that as we celebrate the Constitution this year, we would remember those 700 years of the fight to confirm and expand the liberties and rights of our Constitution and that we would cherish it, preserve it, protect it, and pass it on to our children a bit more secure than we received it from our parents.

Madam President, I yield the floor.

Mr. NICKLES. Madam President, will the Senator yield for a question?

Mr. PACKWOOD. Sure.

Mr. NICKLES. I want to compliment my fellow colleague for his statement and also for a lot of the homework that he has done, particularly concerning the right of privacy, and also about the Library of Congress. I would echo the Senator's comments because I think he has done an outstanding job in many areas in congressional and legislative research. We talk about the right of privacy. I read the 10th amendment which says that all other rights and powers are reserved to the States and to the people.

I could certainly see the right of privacy being incorporated in many decisions, but is it synonymous that if you believe in the right of privacy, then you also believe that that legalizes abortion? Are they one and the same? If you support privacy, does that mean you support abortion?

Mr. PACKWOOD. I did not mean to make this debate on abortion rights nor do I intend to. My good friend from Oklahoma and I have debated this subject before. What I said about the right of privacy is this: That you have all of the rights that you can have as an individual when you are born in this country or become a citizen of this country. The Government cannot take those rights away. But I will make this argument, if the Senator wants, on the subject of abortion so long as he understands it is not the sole linchpin upon which I rest my answer.

At the time of the founding of this country, individuals had a private right of abortion. It was not illegal. It was not illegal before 4 to 5 or 6 months of pregnancy. It was not outlawed. Our founders both in the State conventions and in the Constitutional Convention of the country saw no reason to outlaw abortion.

Here is the reason. They assumed you had the right. It was common. They knew it. People practiced it. You had a number of court decisions, State court decision in the 1810's, 1820's, and 1830's confirming the right.

So, if the Senator's question is this: At the time of the founding of this country did people practice abortion? The answer is "yes."

Mr. NICKLES. That was not my question.

Mr. PACKWOOD. Let me finish. Did our founders know of it? Yes. Was it a private right that existed that they knew of? Yes. It was a private right held by individuals, yes. Did they see any reason to prohibit it? No. That was a right that existed.

So the question becomes was there anything in the Constitution that takes away that right that existed? I would say no. The Roe versus Wade decision happens to be hinged on privacy by historical precedent. No one can argue with the fact that at the time of the founding of this country it was not illegal, it was practiced, admitted, and accepted.

Mr. NICKLES. That was not my question. It is not my purpose to debate abortion with my good friend and colleague from Oregon. We have debated abortion in the past year and I am sure we will debate it many times in the future. But the Senator made a very strong argument concerning the right of privacy.

I would like to think, as a Senator, that I favor the right of privacy, but I do not want to favor that right if it is considered synonymous with legalizing abortion.

I heard the Senator make a statement that he introduced legislation 3 years before Roe versus Wade to legalize abortion. If abortion is going to be legalized I think Congress should legalize it.

The Constitution says Congress shall pass all laws. So I think that is the correct way to go. But when you have done so much homework concerning the right of privacy, I was concerned that a lot of people might infer that that positively means that the Constitution legalizes abortion.

Many legal scholars would take quite the opposite viewpoint. We can debate that issue another day. But I wanted to make sure if this Senator said, yes, I support the right of privacy, people would not be thinking that that is synonymous with legalizing abortion or other issues.

Quite the contrary, if you go back to the Constitution, the 10th amendment says it reserves all other rights and powers to the States and the people. Some of the States exercized that right and did restrict abortion which, of course, is that Roe versus Wade was dealing with.

I thank the Senator for yielding.

Mr. BIDEN and Mr. McCONNELL addressed the Chair.

The PRESIDING OFFICER. Does the Senator from Oregon yield?

Mr. PACKWOOD. I yield the floor.

Mr. BIDEN. Madam President, I am going to yield the floor but I would like to answer a question not asked of me, but I would like to speak to it since it is something that I literally spent 100, 125 hours researching by myself and dealing with in the hearings.

I think it is important for the Senator from Oklahoma to understand, at least from this Senator's perspective, that research and the records will plead what evidence I am about to say. Although the right of a woman to choose is anchored by the Supreme Court on the right of privacy, as the Senator from Oregon pointed out, that is not the essence of the privacy decisions. The difference between Judge Bork and all other Justices of the past 70 years is that Judge Bork is the only person, had he been put on the Court, who would have denied the existence of a generalized right to privacy. Every other Justice, Harlan, Black, Frankfurter, every other Justice, even the ones who disagreed in Roe versus Wade, have found our generalized right to privacy.

The distinction has to be made here. If there is an imaginary line, on one side of that line is no right of privacy, and the other side of the line is that there is a right of privacy in the Constitution, the debate for the last 70 years has taken place on this side of the line. And it has gone all the way from recognizing only the right to send your child to a parochial school, or have your child taught German in the State of Nebraska, or a married couple to use contraceptives in the privacy of their bedroom. It has gone all the way from that to some arguing that the right of privacy extends to consensual homosexual conduct.

The debate has taken place on this side of the line; that is, how far to extend it. No one on the Court has failed to crossed the line. Judge Bork is the only one who sits on the other side of the line. As I said last night in the debate, everyone else has crossed the Rubicon. Judge Bork has not even put a boat in the water.

There are other scholars who shared Judge Bork's opinion. But none of them has been on the Court in the last 70 years. Judge Bork would be the first in 70 years.

I refer my colleagues to page 35 of the committee report which is on their desks. Professor Sullivan of Harvard University said it more succinctly and with more articulation I suspect. As Professor Sullivan testified, Judge Bork's views on privacy place him in a lonely position. And I quote Professor Sullivan.

> On the scope of the right to privacy, good and reasonable, fair-minded men and women differ greatly, and in good faith, and that has happened, it is happening now, and I expect it to continue as long as there is a right of privacy to argue about.
>
> But there has been no disagreement on the Supreme Court, for 75 years, that there exists some right to privacy, and it is that disagreement of Judge Bork that we are focusing on.
>
> There are two sides to the issue on its scope, but there have not been, in our jurisprudence, two sides of the issue as to its existence, and that is what puts Judge Bork outside the mainstream.

The mainstream on the issue of privacy.

So I say to my friend from Oklahoma who has a view against the right of a woman to choose, I find myself somewhere between the Senator from Oregon and the Senator from Oklahoma on that issue. You need not even look at the abortion issue to conclude that there is a right to privacy, and if you conclude there is a right to privacy in the Constitution, you need not come to the conclusion that that means there is a right to abortion.

I yield the floor.

Mr. NICKLES. I thank the Senator for his clarification.

Mr. McCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. McCONNELL. Madam President, I had originally planned to speak at some length on this subject, as others have. I have been sitting here, listening with considerable interest to the comments of my friend from Oregon, Senator PACKWOOD, and others, and it has proved a great history lesson for those of us charged with the responsibility of advising and consenting to Supreme Court nominations.

As we all know, on the 200th anniversary of the Constitution, we look back to that document and honor its framers and think back to the debates they had. In examining the particular portion of the Constitution which applies to this exercise, the advice and consent role, I might say that this particular Senator has focused on this issue for quite some time. I have been a member of the Senate for only 2½ years, but have dealt with Supreme Court nominees for 18 years, going back to 1969.

During that earlier time, I was a legislative assistant to a Senator on the Judiciary Committee during the Haynsworth-Carswell period. We struggled then with the question of what advice and consent meant.

As an idealistic young lawyer in those days, I wrote an article for the University of Kentucky Law Review entitled "Haynsworth and Carswell: A New Senate Standard of Excellence," which attempted to codify an appropriate role for the Senate, with respect to its advice and consent responsibility.

Mr. President, I ask unanimous consent to have printed in the RECORD my 1970 article.

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

HAYNSWORTH AND CARSWELL: A NEW SENATE STANDARD OF EXCELLENCE

(By A. Mitchell McConnell, Jr.)

"All politicians have read history: but one might say that they read it only in order to learn from it how to repeat the same calamities all over again."—Paul Valery.

With the confirmation of Judge Harry A. Blackmun by the United States Senate on May 12, 1970, the American public witnessed the end of an era, possibly the most interesting period in the Supreme Court history. In many respects, it was not a proud time in the life of the Senate or, for that matter, in the life of the Presidency. Mistakes having a profound effect upon the American people were made by both institutions.

The Supreme Court of the United States is the most prestigious institution in our nation and possibly the world. For many years public opinion polls have revealed that the American people consider membership on the Court the most revered position in our society. This is surely an indication of the respect our people hold for the basic fabric of our stable society—the rule of law.

To the extent that it has eroded respect for this highest of our legal institutions, the recent controversial period has been unfortunate. There could not have been a worse time for an attack upon the men who administer justice in our country than in the past year, when tensions and frustrations about our foreign and domestic policies literally threatened to tear us apart. Respect for law and the administration of justice has, at various times in our history, been the only buffer between chaos and order. And this past year this pillar of our society has been buffeted once again by the winds of both justified and unconscionable attacks. It is time the President and the Congress helped to put an end to the turmoil.

The President's nomination of Judge Harry Blackmun and the Senate's responsible act of confirmation is a first step. But before moving on into what hopefully will be a more tranquil period for the High Court, it is useful to review the events of the past year for the lessons they hold. It may be argued that the writing of recent history is an exercise in futility and that only the passage of time will allow a dispassionate appraisal of an event or events of significance. This may well be true for the author who was not present and involved in the event. However, for the writer who is a participant the lapse of time serves only to cloud the memory. Circumstances placed a few individuals in the middle of the controversies of the past year. In the case of the author the experience with the Supreme Court nominees of the past year was the

direct result of Senator Marlow W. Cook's election in 1968 and subsequent appointment to the powerful Senate Judiciary Committee. This committee appointment by the Senate Republican leadership, and Supreme Court nominations by President Nixon, brought about an initial introduction to the practical application of Article II, section 2 of the Constitution which reads, in part, that the President shall "nominate and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court."

The purpose of this article is to draw upon the events of the past year in suggesting some conclusions and making some recommendations about what the proper role of the Senate should be in advising and consenting to Presidential nominations to the Supreme Court. The motivations of the Executive will be touched upon only periferally.

Initiated by Senator Robert P. Griffin, Republican of Michigan, the senatorial attack upon the Johnson nomination of Justice Abe Fortas to be Chief Justice which resulted in blocking the appointment had set a recent precedent for senatoral questioning in an area which had largely become a Presidential prerogative in the twentieth century. The most recent period of senatorial assertion had begun. But there had been other such periods and a brief examination of senatorial action on prior nominations is valuable because it helps put the controversial nominations of the past two years in proper perspective.

Joseph P. Harris, in his book, "The Advice and Consent of the Senate," sums up the history of Supreme Court nominations by pointing out that approximately one-fifth of all appointments have been rejected by the Senate. From 1894 until the Senate's rejection of Judge Haynsworth, however, there was only one rejection. In the preceding 105 years, 20 of the 81 nominees had been rejected. Four of Tyler's nominees, three of Fillmore's, and three of Grant's were disapproved during a period of bitter partisanship over Supreme Court appointments. Harris concludes of this era:

"Appointments were influenced greatly by political consideration, and the action of the Senate was fully as political as that of the President. Few of the rejections of Supreme Court nominations in his period can be ascribed to any lack of qualifications on the part of the nominees; for the most part they were due to political differences between the President and a majority of the Senate."

The first nominee to be rejected was former Associate Justice John Rutledge, of South Carolina. He had been nominated for the Chief Justiceship by President George Washington. The eminent Supreme Court historian Charles Warren reports that Rutledge was rejected essentially because of a speech he had made in Charleston in opposition to the Jay Treaty. Although his opponents in the predominantly Federalist Senate also started a rumor about his mental condition, a detached appraisal reveals his rejection was based entirely upon his opposition in the Treaty. Verifying this observation, Thomas Jefferson wrote of the incident:

"The rejection of Mr. Rutledge is a bold thing, for they cannot pretend any objection to him but his disapprobation of the treaty.* * *

On December 28, 1835, President Andrew Jackson sent to the Senate the name of Roger B. Taney, of Maryland, to succeed John Marshall as Chief Justice. As Taney had been Jackson's Secretary of the Treasury and Attorney General, the Whigs in the Senate strongly opposed him. Daniel Webster wrote of the nomination: "Judge Story thinks the Supreme Court is gone and I think so, too." Warren reports that ". . . the Bar throughout the North, being largely Whig, entirely ignored Taney's eminent legal qualifications, and his brilliant legal career, during which he had shared . . . the leadership of the Maryland Bar and had attained high rank at the Supreme Court Bar, both before and after his service as Attorney General of the United States."

Taney was approved, after more than two months of spirited debate, by a vote of 29 to 15 over vehement opposition including Calhoun, Clay, Crittenden, and Webster. He had actually been rejected the year before but was re-submitted by a stubborn Jackson.

History has judged Chief Justice Taney as among the most outstanding of American jurists, his tribulations prior to confirmation being completely overshadowed by an exceptional career. A contrite and tearful Clay related to Taney after viewing his work on the Court for many years:

"Mr. Chief Justice, there was no man in the land who regretted your appointment to the place you now hold more than I did; there was no Member of the Senate who opposed it more than I did; but I have come to say to you, and I say it now in parting, perhaps for the last time—I have witnessed your judicial career, and it is due to myself and due to you that I should say what has been the result, that I am satisfied now that no man in the United States could have been selected more abundantly able to wear the ermine which Chief Justice Marshall honored."

It is safe to conclude that purely partisan politics played the major role in Senate rejections of Supreme Court nominees during the nineteenth century. The cases of Rutledge and Taney have been related only for the purpose of highlighting a rather undistinguished aspect of the history of the Senate.

No implication should be drawn from the preceding that Supreme Court nominations in the twentieth century have been without controversy because certainly this has not been the case. However, until Haynsworth only one nominee has been rejected in this century, President Woodrow Wilson's nomination of Louis D. Brandeis and the events surrounding it certainly exhibit many of the difficulties experienced by Judges Haynsworth and Carswell as Brandeis failed to receive the support of substantial and respected segments of the legal community. William Howard Taft, Elilm Root, and three past presidents of the American Bar Association signed the following statement:

"The undersigned feel under the painful duty to say . . . that in their opinion, taking into view the reputation, character and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a Member of the Supreme Court of the U.S."

Hearings were conducted by a Senate Judiciary subcommittee for a period of over four months, were twice-reopened, and the record of the hearings consisted of over 1500 pages.

The nomination of Brandeis, like the nomination of Haynsworth, Carswell and to some extent Fortas (to be Chief Justice) quickly became a cause celebre for the opposition party in the Senate. The political nature of Brandeis' opposition is indicated by the fact that the confirmation vote was 47 to 22; three Progressives and all but one Democrat voted for Brandeis and every Republican voted against him.

The basic opposition to Brandeis, like the basic opposition to Haynsworth and Carswell, was born of a belief that the nominee's views were not compatible with the prevailing views of the Supreme Court at that time. However, the publicly stated reasons for opposing Brandeis, just as the publicly stated reasons for opposing Carswell and Haynsworth, were that they fell below certain standards of "fitness."

Liberals in the Senate actively opposed the nominations to the Court of Harlan Fiske Stone in 1925 and Charles Evans Hughes five years later, for various reasons best summed up as opposition to what opponents predicted would be their conservatism. However, it was generally conceded by liberals subsequently that they had misread the leanings of both nominees, who tended to side with the Progressives on the Court throughout their tenures.

No review of the historic reasons for opposition to Supreme Court nominees, even as cursory as this one has been, would be complete without mention of the Parker nomination. Judge John J. Parker of North Carolina, a member of the United States Court of Appeals for the Fourth Circuit, was designated for the Supreme Court by President Hoover in 1930. Harris reports that opposition to Parker was essentially threefold. He was alleged to be anti-labor, unsympathetic to Negroes, and his nomination was thought to be politically motivated.

Opposition to Haynsworth and Carswell followed an almost identical pattern except that Judges Parker and Carswell were spared the charges of ethical impropriety to which Judge Haynsworth was subjected. All three nominees, it is worthy of note for the first time at this point, were from the Deep South.

As this altogether too brief historical review has demonstrated, the Senate has in its past, virtually without exception, based its objections to nominees for the Supreme Court on party or philosophical considerations. Most of the time, however, Senators sought to hide their political objections beneath a veil of charges about fitness, ethics and other professional qualifications. In recent years, Senators have accepted, with a few exceptions, the notion that the advice and consent responsibility of the Senate should mean an inquiry into qualifications and not politics or ideology. In the Brandeis case, for example, the majority chose to characterize their opposition as objecting to his fitness not his liberalism. So there was a recognition that purely political opposition should not be openly stated because it would not be accepted as a valid reason for opposing a nominee. The proper inquiry was judged to be the matter of fitness. In very recent times it has been the liberals in the Senate who have helped to codify this standard. During the Kennedy-Johnson years it was argued to conservatives in regard to appointments the liberals liked that the ideology of the nominee was of no concern to the Senate. Most agree that this is the proper standard, but it should be applied in a nonpartisan manner to conservative southern nominees as well as northern liberal ones. Even though the Senate has at various times made purely political decisions in its consideration of Supreme Court nominees, certainly it could not be successfully argued that this is an acceptable practice. After all, if political matters were relevant to senatorial consideration it might be sug-

gested that a constitutional amendment be introduced giving to the Senate rather than the President the right to nominate Supreme Court Justices, as many argued during the Constitutional Convention.

A pattern emerges running from Rutledge and Taney through Brandeis and Parker up to and including Haynsworth and Carswell in which the Senate has employed deception to achieve its partisan goals. This deception has been to ostensibly object to a nominee's fitness while in fact the opposition is born of political experience.

In summary, the inconsistent and sometimes unfair behavior of the Senate in the past and in the recent examples which follow do not lead one to be overly optimistic about its prospects for rendering equitable judgments about Supreme Court nominees in the future.

CLEMENT F. HAYNSWORTH, JR.: INSENSITIVE OR VICTIMIZED?

"For the great majority of mankind are satisfied with appearance, as though they were realities, and are often more influenced by the things that seem than by those that are."—(Author unknown.)

The resignation of Justice Abe Fortas in May of 1969 following on the heels of the successful effort of the Senate the previous Fall in stalling his appointment to be Chief Justice (the nomination was withdrawn after an attempt to invoke cloture on Senate debate was defeated) intensified the resolve of the Senate to reassert what it considered to be its rightful role in advising and consenting to presidential nominations to the Supreme Court.

It was in this atmosphere of senatorial questioning and public dismay over the implications of the Fortas resignation that President Nixon submitted to the Senate the name of Judge Clement F. Haynsworth, Jr., of South Carolina, to fill the Fortas vacancy. Completely aside from Judge Haynsworth's competence, which was never successfully challenged, he had a number of problems from a political point of view, given the Democrat-controlled Congress. Since he was from South Carolina his nomination was immediately considered to be an integral part of the so-called southern strategy which was receiving considerable press comment at that time. His South Carolina residence was construed as conclusive proof that he was a close friend of the widely-criticized senior Senator from that state, Strom Thurmond, whom in fact, he hardly knew. Discerning Senators found offensive such an attack against the nominee rather than the nominator, since the southern strategy would be only in the latter's mind, if it existed. Nevertheless, this put the nomination in jeopardy from the outset.

In addition, labor and civil rights groups mobilized to oppose Judge Haynsworth on philosophical grounds. Some of the proponents of the Judge, including their acknowledged leader Senator Cook, might have had some difficulty on these grounds had they concluded that the philosophy of the nominee was relevant to the Senate's consideration. Senator Cook expressed the proper role of the Senate well in a letter to one of his constituents, a black student at the University of Louisville who was disgruntled over his support for the nominee. It read in pertinent part as follows:

". . . First, as to the question of his [Haynsworth's] view on labor and civil rights matters, I find myself in essential disagreement with many of his civil rights decisions—not that they in any way indicate a pro segregationist pattern, but that they do not form the progress pattern I would hope for. However, as Senator Edward Kennedy pointed out to the conservatives as he spoke for the confirmation of Justice Thurgood Marshall.

"I believe it is recognized by most Senators that we are not charged with the responsibility of approving a man to be Associate Justice of the Supreme Court only if his views always coincide with our own. We are not seeking a nominee for the Supreme Court who will express the majority view of the Senate on every given issue, or on a given issue of fundamental importance. We are interested really in knowing whether the nominee has the background, experience, qualifications, temperament and integrity to handle this most sensitive, important, responsible job.

"Most Senators, especially of moderate and liberal persuasion, have agreed that while the appointment of Judge Haynsworth may have been unfortunate from a civil rights point of view, the ideology of the nominee is the responsibility of the President. The Senate's judgment should be made, therefore, solely upon grounds of qualifications. As I agree with Senator Kennedy and others that this is the only relevant inquiry, I have confined by judgment of this nominee's fitness to the issue of ethics of qualifications?"

The ethical questions which were raised about Judge Haynsworth were certainly relevant to the proper inquiry of the Senate into qualifications of appointment. Also distinction and competence had a proper bearing upon the matter of qualifications, but Judge Haynsworth's ability was, almost uniformly, conceded by his opponents and thus was never a real factor in the debate. A sloppy and hastily drafted document labelled the "Bill of Particulars" against Judge Haynsworth was issued on October 8, 1969, by Senator Birch Bayh of Indiana, who had become the de facto leader of the anti-Haynsworth forces during the hearings on the nomination before the Judiciary Committee the previous month. This contained, in addition to several cases in which it had been alleged during the hearings that Judge Haynsworth should have refused to sit, several extraneous and a few inaccurate assertions which were swiftly rebutted two days later by Senator Cook in a statement aptly labelled the "Bill of Corrections." This preliminary sparring by the leaders of both sides raised all the issues in the case but only the relevant and significant allegations will be discussed here, those which had a real impact upon the Senate's decision.

First, it was essential to determine what, if any, impropriety Judge Haynsworth had committed. For the Senator willing to make a judgment upon the facts this required looking to those facts. The controlling statute in situations where federal judges might potentially disqualify themselves is 28 U.S.C. § 455 which reads:

"Any Justice or Judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, *in his opinion* for him to sit on the trial, appeal, or other proceeding therein. [Italic added.]

Also pertinent is Canon 29 of the American Bar Association Canons of Judicial Ethics which provides: "A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved." Formal Opinion 170 of the American Bar Association construing Canon 29 advises that a judge should not sit in a case in which he owns stock in a party litigant.

The first instance cited by Judge Haynsworth's opponents as an ethical violation was the much celebrated labor case, *Darlington Manufacturing Co.* v. *NLRB*, argued before and decided by the Fourth Circuit in 1963. The Judge sat in this case contrary to what some of his Senate opponents felt to have been proper. The facts were that Judge Haynsworth had been one of the original incorporators, seven years before he was appointed to the bench, of a company named Carolina Vend-A-Matic which had a contract to supply vending machines to one of Deerling-Millikin's (one of the litigants) plants. In 1957, when Judge Haynsworth went on the bench, he orally resigned as Vice President of the Company but continued to serve as a director until October, 1963, at which time he resigned his directorship in compliance with a ruling of the U.S. Judicial Conference. During 1963, the year the case was decided, Judge Haynsworth owned one-seventh of the stock of Carolina Vend-A-Matic.

Suffice it to say that all case law in point, on a situation in which a judge owns stock in a company which merely does business with one of the litigants before him, dictates that the sitting judge not disqualify himself. And certainly the Canons do not address themselves to such a situation. As John P. Frank, the acknowledged leading authority on the subject of judicial disqualification testified before the Judiciary Committee:

"It follows that under the standard federal rule Judge Haynsworth had no alternative whatsoever. He was bound by the principle of the cases. It is the Judge's duty to refuse to sit when he is disqualified, but it is equally his duty to sit when there is no valid reason not to . . . I do think it is perfectly clear under the authority that there was virtually no choice whatsoever for Judge Haynsworth except to participate in that case and do his job as well as he could."

This testimony by Mr. Frank was never refuted as no one recognized as an authority on the subject was discovered who held a contrary opinion.

The second situation of significance which arose during the Haynsworth debate concerned the question of whether Judge Haynsworth should have sat in three cases in which he owned stock in a parent corporation where one of the litigants before him was a wholly owned subsidiary of the parent corporation. These cases were *Farrow* v. *Grace Lines, Inc.*, *Donohue* v. *Maryland Casualty Co.*, and *Maryland Casualty Co.* v. *Baldwin*.

Consistently ignored during the outrage expressed over his having sat in these cases were the pleas of many of the Senators supporting the nomination to look to the law to find the answer to the question of whether Judge Haynsworth should have disqualified himself in these situations. Instead, the opponents decided, completely independent of the controlling statutes and canons, that the Judge had a "substantial interest" in the outcome of the litigation and should, therefore, have disqualified himself. Under the statute, 28 U.S.C. § 455, Judge Haynsworth clearly had no duty to step aside. Two controlling cases in a situation where the judge actually owns stock in one of the litigants, not as here where the stock was owned in the parent corporation, are *Kinn-*

*car Weed Corp.* v. *Humble Oil and Refining Co.* and *Lampert* v. *Hollis Music, Inc.* These cases interpret "substantial interest" to mean "substantial interest" in the outcome of the case, not "substantial interest" in the litigant. And here Judge Haynsworth not only did not have a "substantial interest" in the outcome of the litigation, he did not even have a "substantial interest" in the litigant, his stock being a small postion of the shares outstanding in the parent corporation of one of the litigants. There was, therefore, clearly no duty to step aside under the statute. It is interesting to note that joining in the *Kinncar Weed* decision were Chief Judge Brown and Judge Wisdom of the Fifth Circuit whom Joseph Rauh, a major critic of the Haynsworth nomination, had stated at the hearings on the nomination "would have been heroic additions to the Supreme Court."

But was there a duty to step aside in these parent-subsidiary cases under Canon 29? The answer is again unequivocally No. The only case law available construing language similar to that of Canon 29 is found in the disqualification statute of a state. In *Central Pacific Railroad Co.* v. *Superior Court*, the state court held that ownership of stock in a parent corporation did not require disqualification in litigation involving a subsidiary. Admittedly, this is only a state case, but significantly there is no federal case law suggesting any duty to step aside where a judge merely owns stock in the parent where the subsidiary is before the court. Presumably, this is because such a preposterous challenge has never occurred even to the most ingenious lawyer until the opponents of Judge Haynsworth created it. Therefore, Judge Haynsworth violated no existing standard of ethical behavior in the parent-subsidiary cases except that made up for the occasion by his opponents to stop his confirmation.

There was one other accusation of significance during the Haynsworth proceedings which should be discussed. It concerned the Judge's actions in the case of *Burnswick Corp.* v. *Long*. The facts relevant to this consideration were as follows: on November 10, 1967, a panel of the Fourth Circuit, including Judge Haynsworth, heard oral argument in the case and immediately after argument voted to affirm the decision by the District Court. Judge Haynsworth, on the advice of his broker, purchased 1,000 shares of Brunswick on December 20, 1967. Judge Winter, to whom the writing of the opinion had been assigned on November 10, the day of the decision, circulated his opinion on December 27. Judge Haynsworth noted his concurrence on January 3, 1968, and the opinion was released on February 2. Judge Haynsworth testified that he completed his participation, in terms of the decision-making process, on November 10, 1967, approximately six weeks prior to the decision to buy stock in Brunswick. Judge Winter confirmed that the decision had been substantially completed on November 10. Therefore, it could be strongly argued that Judge Haynsworth's participation in *Brunswick* terminated on November 10. However, even if it were conceded that he sat while he owned Brunswick stock it is important to remember that neither the statute nor the canons require an automatic disqualification, although Opinion 170 so advises. And the facts show that his holdings were so miniscule as to amount neither to a "substantial interest" in the outcome of the litigation under 28 § 455 or to a "substantial interest" in the litigant itself. Clearly, once again, Judge Haynsworth was guilty of no ethical impropriety.

As mentioned earlier there were other less substantial charges by Haynsworth opponents but they were rarely used by opponents to justify opposition. These which have been mentioned were the main arguments used to deny confirmation. It is apparent to any objective student of this episode that Haynsworth violated no existing standard of ethical conduct, just those made up for the occasion by those who sought to defeat him for political gain. As his competence and ability were virtually unassailable, the opponents could not attack him for having a poor record of accomplishment or for being mediocre (an adjective soon to become famous in describing a subsequent nominee for the vacancy). The only alternative available was to first, create a new standard of conduct; second, apply this standard to the nominee retroactively making him appear to be ethically insensitive; third, convey the newly-created appearance of impropriety to the public by way of a politically hostile press (hostile due to an aversion to the so-called southern strategy of which Haynsworth was thought to be an integral part); and fourth, prolong the decision upon confirmation for a while until the politicians in the Senate reached to an aroused public. Judge Haynsworth was defeated on November 21, 1969, by a vote of 55-45. Appearance had prevailed over reality. Only two Democrats outside the South (and one was a conservative—Bible of Nevada) supported the nomination, an indication of the partisan issue it had become, leading the Washington Post, a lukewarm Haynsworth supporter, to editorially comment, the morning after the vote:

"The rejection, despite the speeches and comments on Capitol Hill to the contrary, seems to have resulted more from ideological and plainly political considerations than from ethical ones. It is impossible to believe that all Northern liberals and all Southern conservatives have such dramatically different ethical standards."

CARSWELL: WAS HE QUALIFIED?

"Even if he was mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Cardozos Frankfurters and stuff like that there."—Senator Roman Hurska, March 16, 1970.

The United States Senate began the new year in no mood to reject another nomination of the President to the Supreme Court. It would take an incredibly poor nomination, students of the Senate concluded, to deny the President his choice in two successive instances. Circumstances, however, brought forth just such a nomination.

Subsequent to the defeat of Judge Haynsworth, President Nixon sent to the Senate in January of 1970 the name of Judge G. Harrold Carswell, of Florida and the Fifth Circuit. Judge Carswell had been nominated to the Circuit Court by President Nixon the year before, after serving 12 years on the U.S. District Court for the Northern District of Florida at Tallahassee to which he had been appointed by President Eisenhower.

He, too, faced an initial disadvantage in that he came from the south and was also considered by the press to be a part of the southern strategy. This should have been, as it should have been for Haynsworth, totally irrelevant to considerations of the man and his ability, but it was a factor and it immediately mobilized the not insignificant anti-south block in the Senate.

Many were troubled at the outset of the hearings about reports of a "white supremacy" speech Carswell had made as a youthful candidate for the legislature in Georgia in 1948, and later by allegations that he had supported efforts to convert a previously all-white public golf course to an all-white private country club in 1950, thus circumventing Supreme Court rulings. There were other less substantial allegations including lack of candor before the Senate Judiciary Committee (which had also been raised against Judge Haynsworth) but all of these were soon supplanted by what became the real issue—that is, did Carswell possess the requisite distinction for elevation to the High Court.

In attempting to determine by what standards Judge Carswell should be judged, some who had been very much involved in the Haynsworth debate attempted to define the standards which had been applied to the previous nominee. Kentucky's Marlow Cook called his standard the "Haynsworth test" and subsequently defined it as composed of essentially five elements, (1) competence; (2) achievement; (3) temperament; (4) judicial propriety and (5) non-judicial record.

Judge Haynsworth himself would not have passed this test had he in fact been guilty of some ethical impropriety—that is, if his judicial integrity had been compromised by violations of any existing standard of conduct. His record of achievement was only attacked by a few misinformed columnists and never really became an issue. And his competence, temperament and the record of his life off the bench was never questioned, but a breakdown in any of these areas might have been fatal also.

The judicial integrity component of the "Haynsworth test," previously described as a violation of existing standards of conduct for federal judges, was never in question in the Carswell proceedings. It was impossible for him to encounter difficulties similar to those of Judge Haynsworth because he owned no stocks and had not been involved in any business ventures through which a conflict might arise. Certainly, his non-judicial record was never questioned, nor was it a factor raised against any nominee in this century. Disqualifying non-judicial activities referred to here could best be illustrated by examples such as violations of federal or state law, or personal problems such as alcoholism or drug addiction—in other words, debilitating factors only indirectly related to effectiveness on the bench.

However, all the other criteria of the "Haynsworth test" were raised in the Carswell case and caused Senators seeking to make an objective appraisal of the nominee some difficulty. First, as to the question of competence, Ripon Society Report and a study of the nominee's reversal percentages by a group of Columbia law students revealed that while a U.S. District Judge he had been reversed more than twice as often as the average federal district judge and that he ranked sixty-first in reversals among the 67 federal trial judges in the south. Numerous reversals alone might not have been a relevant factor; he could have been in the vanguard of his profession some argued. This defense, however, ignored simple facts about which even a first year law student would be aware. A federal district judge's duty in most instances is to follow the law as laid down by higher authority. Carswell appeared to have a chronic

inability to do this. No comparable performance was ever imputed to Judge Haynsworth even by his severest critics.

Second, in the area of achievement, he was totally lacking. He had no publications, his opinions were rarely cited by other judges in their opinions, and no expertise in any area of the law was revealed. On the contrary, Judge Haynsworth's opinions were often cited, and he was a recognized expert in several fields including patents and trademarks, habeas corpus cases, and labor law. In addition, his opinions on Judicial administration were highly valued; he had been called upon to testify before Senator Tydings' Subcommittee on Improvements in Judicial Machinery on this subject in June of 1969.

In addition to his lack of professional distinction, Judge Carswell's temperament was also questionable. There was unrebutted testimony before the Judiciary Committee that he was hostile to a certain class of litigants—namely, those involved in litigation to insure the right to vote to all citizens regardless of race pursuant to the Voting Rights Act of 1965. There had been testimony that Judge Haynsworth was anti-labor and anti-civil rights, but these charges alleged not personal antipathy but rather philosophical bias in a certain direction such as Justice Goldberg might have been expected to exhibit against management in labor cases. Such philosophical or ideological considerations, as pointed out earlier, are more properly a concern of the President and not the Senate, which should sit in judgment upon qualifications only.

And finally, a telling factor possibly revealing something about both competence and temperament was Judge Carswell's inability to secure the support of his fellow judges on the Fifth Circuit. By contrast, all Fifth Circuit judges had supported Judge Homer Thornberry when he was nominated in the waning months of the Johnson presidency, even though that was not considered an outstanding appointment by many in the country. All judges of the Fourth Circuit had readily supported Judge Haynsworth's nomination. Therefore, it was highly unusual and significant that Judge Carswell could not secure the support of his fellow judges, especially when one considers that they must have assumed at that time that they would have to deal with him continually in future years should his nomination not be confirmed. His subsequent decision to leave the bench and run for political office in Florida seeking to convert a wave of sympathy over his frustrated appointment into the consolation prize of a United States Senate seat only tended to confirm the worst suspicions about his devotion to being a member of the Federal Judiciary.

Judge Carswell, then, fell short in three of the five essential criteria evolving out of the Haynsworth case. This compelled a no vote by the junior Senator from Kentucky and he was joined by several other Senators who simply could not, in good conscience, vote to confirm despite the wishes of most of their constituents. Of the southern Senators who had supported Haynsworth, Spong, of Virginia, and Fulbright, of Arkansas, switched. Gore, of Tennessee and Yarborough, of Texas, voted no again and the only Democrat outside the south of liberal credentials who had supported the Haynsworth nomination, Gravel, of Alaska, joined the opponents this time.

Judge Carswell was defeated 51-45 on April 8, 1970 by essentially the same coalition which had stopped Judge Haynsworth. The justification for opposition, however, as this article seeks to demonstrate, was much sounder. Some undoubtedly voted in favor of Carswell simply because he was a Southern conservative. Others, no doubt, voted no for the same reason. The key Senators who determined his fate, however, clearly cast their votes against the Hruska maxim that mediocrity was entitled to a seat on the Supreme Court.

HARRY M. BLACKMUN: CONFIRMATION AT LAST

"The political problem, therefore, is that so much must be explained in distinguishing between Haynsworth and Blackmun, and when the explanations are made there is still room for the political argument that Haynsworth should have been confirmed in the first place."—Richard Wilson, Washington Evening Star, April 20, 1970.

President Nixon next sent to the Senate to fill the vacancy of almost one year created by the Fortas resignation, a childhood friend of Chief Justice Warren Burger, his first court appointment, Judge Harry A. Blackmun, of Minnesota and the Eighth Circuit. Judge Blackmun had an initial advantage which Judges Haynsworth and Carswell had not enjoyed—he was not from the South. Once again, in judging the nominee it is appropriate to apply Senator Cook's "Haynsworth test."

Judge Blackmun's competence, temperament, and non-judicial record were quickly established by those charged with the responsibility of reviewing the nomination, and were, in any event, never questioned, as no one asked the Judiciary Committee for the opportunity to be heard in opposition to the nomination.

In the area of achievement or distinction, Judge Blackmun was completely satisfactory. He had published three legal articles: "The Marital Deduction and Its Use in Minnesota;" "The Physician and His Estate;" and "Allowance of In Forma Pauperis in Section 2255 and Habeas Corpus Cases." In addition, at the time of this selection he was chairman of the Advisory Committee on the Judge's Function of the American Bar Association Special Committee on Standards for the Administration of Criminal Justice. Moreover, he had achieved distinction in the areas of federal taxation and medicolegal problems and was considered by colleagues of the bench and bar to be an expert in these fields.

The only question raised about Judge Blackmun was in the area of judicial integrity or ethics. Judge Blackmun, since his appointment to the Eighth Circuit by President Eisenhower in 1959, had sat on three cases in which he actually owned stock in one of the litigants before him: *Hanson* v. *Ford Motor Co.*, *Kotula* v. *Ford Motor Co.*, and *Mahoney* v. *Northwestern Bell Telephone Co.* In a fourth case, *Minnesota Mining and Manufacturing Co.* v. *Superior Insulating Co.* Judge Blackmun acting similary to Judge Haynsworth in *Brunswick*, bought shares of one of the litigants after the decision but before the denial of a petition for rehearings.

As previously mentioned, Judge Haynsworth's participation in *Brunswick* was criticized as violating the split of Canon 29 and the literal meaning of Formal Opinion 170 of the ABA, thus showing an insensitivity to judicial ethics, but Judge Blackmun acted similarly in the 3M case and was not so criticized. Except as it could be argued in *Brunswick*, Judge Haynsworth never sat in a case in which he owned stock in one of the litigants but, rather, three cases in which he merely owned stock in the parent corporation of the litigant-subsidiary, a situation not unethical under any existing standard, or even by the wildest stretch of any legal imaginations, except those of the multi-Haynsworth leadership.

Judge Blackmun, on the other hand, committed a much more clear-cut violation of what could be labelled the "Bayh standard." Senator Bayh, the leader of the opposition in both the Haynsworth and Carswell cases, ignored this by breach of his Haynsworth test with the following justification:

"He [Blackmun] discussed his stock holdings with Judge Johnson, then Chief Judge of the Circuit, who advised him that *his holdings did not constitute a "substantial interest"* under 28 USC 455, and that he was obliged to sit in the case. There is no indication that Judge Haynsworth ever disclosed his financial interest to any colleague or to any party who might have felt there was an apparent conflict, before sitting in such case." [Italic added.]

Judge Haynsworth did not inform the lawyers because under existing Fourth Circuit practice he found no significant interest and, thus, no duty to disclose to the lawyers. In any event, Judge Blackmun did not inform any of the lawyers in any of the cases in which he sat, either. Judge Blackmun asked the chief judge his advice and relied upon it. Judge Haynsworth was the chief judge.

Chief Judge Johnson and Chief Judge Haynsworth both interpreted that standard, as it existed, not as the Senator from Indiana later fashioned it. That interpretation was, as the supporters of Judge Haynsworth said it was, and in accord with Chief Johnson who described the meaning of 28 U.S.C. § 455 to be "that a judge should sit regardless of interest, so long as the decision will not have a significant effect upon the value of the judge's interest.

In other words, it is not interest in the litigant but interest in the outcome of the litigation which requires stepping aside. But even if it were interest in the litigant, the interests of Blackmun were de minimis and the interests of Haynsworth were not only de minimis, but were one step removed—that is, his interest was in the parent corporation where the subsidiary was the litigant. Furthermore, the case law, what little there is, and prevailing practice dictate that in the parent-subsidiary situation there is no duty to step aside.

As John Frank pointed out in the Judiciary Committee during the Haynsworth hearings, where there is no duty to step aside, there is a duty to sit. Judge Haynsworth and Judge Blackmun sat in these cases because under existing standards, not the convenient ad hoc standard of the Haynsworth opponents, they both had a duty to sit. But it is worth noting that if one were to require a strict adherence to the most rigid standard—Formal Opinion 170, which states that a judge shall not sit in a case in which he owns stock in a party litigant—Judge Haynsworth whom Senator Bayh opposed had only one arguable violation, *Brunswick*, while Judge Blackmun whom Senator Bayh supported had one arguable violation, *3M*, and three clear violations, *Hanson*, *Kotula* and *Mahoney*.

The Senator from Indiana also argued that since Judge Blackmun stepped aside in *Bridgeman* v. *Gateway Ford Truck Sales*, arising after the Haynsworth affair, a situation in which he owned stock in the parent Ford which totally owned one of the subsidiary-litigants, he "displayed a laudable recognition of the changing nature of the

standards of judicial conduct." Of course, Judge Blackmun stepped aside after seeing what Judge Haynsworth had been subjected to. Haynsworth did not have an opportunity to step aside in such situations since this new Bayh rule was established during the course of his demise. Certainly Judge Haynsworth would now comply with the Bayh test to avoid further attacks upon his judicial integrity just as Judge Blackmun wisely did in *Bridgeman*.

It is clear, then, to any objective reviewer, that the Haynsworth and Blackmun cases, aside from the political considerations involved, were virtually indistinguishable. If anything, Judge Blackmun had much more flagrantly violated that standard used to defeat Judge Haynsworth violated no existing standard worthy of denying him confirmation and he was quite properly confirmed by the Senate on May 12, 1970 by a vote of 88 to 0.

A NEW TEST CAN ONE BE CODIFIED?

"Bad laws, if they exist, should be repealed as soon as possible, still, while they continue in force, for the sake of example they should be religiously observed".—Abraham Lincoln.

It has been demonstrated that Judges Haynsworth and Blackmun violated no existing standards worthy of denying either of them confirmation. Judge Carswell's defeat, like Judge Haynsworth's, was due in part to the application of a new standard—it having been argued that mediocre nominees had been confirmed in the past, a fortiori Carswell should be also. Yet, certainly achievement was always a legitimate part of the Senate's consideration of a nominee for confirmation just as ethics had always been. The Senate simply ignored mediocrity at various times in the past and refused to do so in the case of Carswell. And in the case of Haynsworth it made up an unrealistic standard of judicial propriety to serve its political purposes and then ignored those standards later in regard to Judge Blackmun because politics dictated confirmation.

Possibly, new standards should be adopted by the Senate but, of course, adopted prospectively in the absence of a pending nomination and not in the course of confirmation proceedings. In this regard, Senator Bayh has now introduced two bills, The Judicial Disqualification Act of 1970 and the Omnibus Disclosure Act which, if enacted, would codify the standards he previously employed to defeat Judge Haynsworth. This legislative effort is an admission that the previously applied standards were nonexistent at the time. Those bills are, however, worthy of serious consideration in a continuing effort to improve judicial standards of conduct. Some standards have been suggested here and will be recounted again but first some observations about the body which must apply them.

First, it is safe to say that anti-southern prejudice is still very much alive in the land and particularly in the Senate. Although this alone did not cause the defeats of Haynsworth and Carswell, it was a major factor. The fact that so many Senators were willing to create a new ethical standard for Judge Haynsworth in November, 1969, in order to insure his defeat and then ignore even more flagrant violations of this newly established standard in May of 1970, can only be considered to demonstrate sectional prejudice.

Another ominous aspect of the past year's events has been that we have seen yet another example of the power of the press over the minds of the people. As Wendell Phillips once commented, "We live under a government of men and morning newspapers." Certainly, one should not accuse the working press of distorting the news. The reporters were simply conveying to the nation the accusations of the Senator from Indiana and others in the opposition camp. These accusations were interpreted by a misinformed public outside the south (as indicated by prominent public opinion polls) as conclusive proof of Judge Haynsworth's impropriety and Judge Carswell's racism, neither of which was ever substantiated. The press should remain unfettered, but public figures must continue to have the courage to stand up to those who would use it for their own narrow political advantage to destroy men's reputations, and more importantly, the aura of dignity which should properly surround the Supreme Court.

Some good, however, has come from this period. Senatorial assertion against an all-powerful Executive, whoever he may be, whether it is in foreign affairs or in Supreme Court appointments, is healthy for the country. Such assertions help restore the constitutional checks and balances between our branches of government, thereby helping to preserve our institutions and maximize our freedom.

In addition, the American Bar Association has indicated a willingness to review its ethical standards and has appointed a Special Committee on Standards of Judicial Conduct, under the chairmanship of Judge Traynor, which issued a Preliminary Statement and Interim Report which would update the ABA Canons of Judicial Ethics. This report was discussed in public hearings on August 8th and 10th, 1970 at the Annual Meeting of the ABA in St. Louis and may be placed on the agenda for consideration at the February, 1971, mid-year meeting of the House of Delegates. Both supporters and opponents of Judge Haynsworth agreed that a review and overhaul of the ABA's Canons of Judicial Ethics was needed. This should be valuable and useful to the Senate as the Judiciary Committee under Senator Eastland has made a practice of requesting reports on Presidential nominees to the Supreme Court by the Standing Committee on the Federal Judiciary of the ABA. This practice probably should be continued as the Senate has not, in any way, delegated its decision upon confirmation to this outside organization. Rather, it seeks the views of the ABA before reporting nominees to the Judiciary to the floor of the Senate just as any committee would seek the views of relevant outside groups before proposing legislation.

Although not central to the considerations of this article, it should be noted what the Executive may have learned from this period. President Johnson undoubtedly discovered in the Fortas and Thornberry nominations that the Senate could be very reluctant at times to approve nominees who might be classified as personal friends or "cronies" of the Executive. It was also established that the Senate would known upon Justices of the Supreme Court acting as advisors to the President as a violation of the concept of separation of powers. This argument was used very effectively against the elevation of Justice Fortas to the Chief Justiceship as he had been an advisor to President Johnson on a myriad of matters during his tenure on the Court. President Nixon learned during the Caswell proceedings that a high degree of competence would likely be required by the Senate before it approved future nominees. He also learned during the Haynsworth case that the Senate would likely require strict adherence to standards of judicial propriety.

Unfortunately, as a result of this episode, the Administration has adopted a very questionable practice in regard to future nominations to the Supreme Court. Attorney General John N. Mitchell announced on July 28, 1970 that the Justice Department would adopt a new procedure under which the Attorney General will seek a complete investigation by the ABA's Standing Committee on the Federal Judiciary before recommending anyone to the President for nomination to the Supreme Court. This Committee has already enjoyed virtually unprecedented influence in the selection of U.S. District and Circuit Judges as this Administration has made no nominations to these Courts which have not received the prior approval of this twelve man Committee. In effect, the Administration, after delegating to this Committee veto power over lower federal court appointments, has now broadened this authority to cover its selections to the Supreme Court. Complete delegation of authority to an outside organization of so awesome a responsibility as designating men to our federal District and Circuit Courts is bad enough, but such a delegation of authority to approve, on the Supreme Court level, is most unwise. Far from representing all lawyers in the country, the ABA has historically been the repository of "big-firm," "defense-oriented," "corporate-type lawyers" who may or may not make an objective appraisal of a prospective nominee. If President Wilson had asked the ABA for prior approval of Brandeis, the Supreme Court and the nation would never have benefitted from his great legal talents. The presumption that such an outside organization as the American Bar Association is better able to pass upon the credentials of nominees for the federal courts and especially the Supreme Court than the President of the United States who is given the constitutional authority is an erroneous judgment which the passage of time will hopefully see reversed. This is not to imply that ABA views would not be useful to the Executive in its considerations just as they are useful to but not determinative of the actions of the Senate (the Senate having rejected ABA approved nominees Haynsworth and Carswell).

What standard then can be drawn for the Senate from the experiences of the past year in advising and consenting to Presidential nominations to the Supreme Court? They have been set out above but should be reiterated in conclusion. At the outset, the Senate should discount the philosophy of the nominee. In our politically centrist society, it is highly unlikely that any Executive would nominate a man of such extreme views of the right of the left as to be disturbing to the Senate. However, a nomination, for example, of a Communist or a member of the American Nazi Party, would have to be considered an exception to the recommendation that the Senate leave ideological considerations to the discretion of the Executive. Political and philosophical considerations were often a factor in the nineteenth century and arguably in the Parker, Haynsworth and Carswell cases also, but this is not proper and tends to degrade the court and dilute the constitutionally proper authority of the Executive in this area. The President is presumably elected by the people to carry out a program and altering the ideological directions of the Supreme Court would seem to be a perfectly

legitimate part of a Presidential platform. To that end, the Constitution gives to him the power to nominate. As mentioned earlier, if the power to nominate had been given to the Senate, as was considered during the debates at the Constitutional Convention, then it would be proper for the Senate to consider political philosophy. The proper role of the Senate is to advise and consent to the particular nomination, and thus, as the Constitution puts it, "to appoint." This taken within the context of modern times should mean an examination only into the qualifications of the President's nominee.

In examining the qualifications of a Supreme Court nominee, use of the following criteria is recommended. First, the nominee must be judged competent. He should, of course, be a lawyer although the Constitution does not require it. Judicial experience might satisfy the Senate as to the nominee's competence, although the President should certainly not be restricted to naming sitting judges. Legal scholars as well as practicing lawyers might well be found competent.

Second, the nominee should be judged to have obtained some level of achievement or distinction. After all, it is the Supreme Court the Senate is considering not the police court in Hoboken, N.J. or even the U.S. District or Circuit Courts. This achievement could be established by writings, but the absence of publications alone would not be fatal. Reputation at the bar and bench would be significant. Quality of opinions if a sitting judge, or appellate briefs if a practicing attorney, or articles or books if a law professor might establish the requisite distinction. Certainly, the acquisition of expertise in certain areas of the law would be an important plus in determining the level of achievement of the nominee.

Third, temperament could be significant. Although difficult to establish and not as important as the other criteria, temperament might become a factor where, for example in the case of Carswell, a sitting judge was alleged to be hostile to a certain class of litigants or abusive to lawyers in the courtroom.

Fourth, the nominee, if a judge, must have violated no existing standard of ethical conduct rendering him unfit for confirmation. If the nominee is not a judge, he must not have violated the Canons of Ethics and statutes which apply to conduct required of members of the bar. If a law professor, he must be free of violations of ethical standards applicable to that profession, for example plagiarism.

Fifth and finally, the nominee must have a clean record in his life off the bench. He should be free from prior criminal conviction and not the possessor of debilitating personal problems such as alcoholism or drug abuse. However, this final criterion would rarely come into play due to the intensive personal investigations customarily employed by the Executive before nominations are sent to the Senate.

In conclusion, these criteria for Senate judgment of nominees to the Supreme Court are recommended for future considerations. It will always be difficult to obtain a fair and impartial judgment from such an inevitably political body as the United States Senate. However, it is suggested that the true measure of a statesman may well be the ability to rise above partisan political considerations to objectively pass upon another aspiring human being. While the author retains to great optimism for their future usage, these guidelines are now, nevertheless, left behind, a fitting epilogue hopefully to a most unique and unforgettable era in the history of the Supreme Court.

Mr. McCONNELL. As everyone here must be aware, the Constitution, in describing the President's role in appointing Supreme Court Justices, says the President shall nominate, and by and with the advice and consent of the Senate, shall appoint judges of the Supreme Court. Clearly, the words "advice and consent" on the one hand, and "nominate" and "appoint" on the other, are not the same thing.

The Senate, obviously one of the most political bodies in the world, has wrestled with this concept for 200 years. On some occasions we have merely engaged in raw political exercises, approving or rejecting nominees on the basic of narrow personal or political motives. Senators on both sides have spoken on this issue and have described those ignominious occasions at great length. So far, however, I have not heard a single Senator approve of such raw political exercises, or say that we should return to those days when each nomination was turned into a political free-for-all. Not one of the Senators who has spoken on this subject indicated any pride over this blemish on the Senate's August history.

In the 20th century, however, we have been a little more responsible and a little more inclined to differentiate between nominate and appoint, on the one hand, and advice and consent on the other.

In making some effort to restrain ourselves—that is, limit our inquiry—I said in my 1970 Law Journal article that a majority of the Senate seemed to have settled on the following criteria as decisive, in advising and consenting to nominees to the Supreme Court. I listed five criteria that are obviously appropriate, that no one would argue with, and that I suggested should be controlling—not merely a factor in our decision.

First, we must make sure the nominee is absolutely competent. It is, after all, the Supreme Court of the United States we are talking about here, not the police court in Hoboken, NJ.

Second, we should insist on a nominee who has attained great achievement, distinguished achievement, in his or her professional life. Again, it is the Supreme Court we are considering here.

Third, judicial temperament is essential in examining the credentials of any nominee to the Supreme Court. Obviously temperament is something the Senate ought to look at.

Fourth, conduct on the bench: Clearly, we want somebody who has handled himself properly on the bench.

Fifth and finally, I believe personal integrity, at this highest level of our judicial system, is something we should be looking for.

In applying these standards of excellence to the Haynsworth-Carswell period, I concluded in my 1970 Law Journal article that Judge Haynsworth had been erroneously denied confirmation, but that Judge Carswell had certainly not deserved confirmation. I reached these results applying the very same standards to both nominees, whereas most people had a tendency to link the two together.

In those days, it was thought that if you were against Haynsworth, you were obviously against Carswell, or you accepted them both as a package. However, applying a relatively objective standard of excellence to both nominees, one could reach a decision that Judge Haynsworth was entitled to be confirmed and Judge Carswell should be defeated. Unfortunately, both were defeated and, in both cases, politics was the controlling standard—not judicial excellence.

That sorry episode was not this Senator's last experience with nominees to the Supreme Court. I came back in 1971 from Kentucky, as a volunteer on the confirmation of William Rehnquist, who had been appointed by President Nixon to the Supreme Court. I returned again, many years later, as a member of the Senate Judiciary Committee, participating in the nominations of Justice Rehnquist to Chief Justice and Judge Scalia to Associate Justice of the Supreme Court.

I say all this, Madam President, just to make the point that this Senator has wrestled with the advice and consent issue for some 18 years, and has given a good deal of thought to what those words mean, how they should be applied, and what the responsible role of the Senate ought to be in advising and consenting to Supreme Court nominations.

Frankly, it is not an easy task for a body as inherently political as the Senate. We all know that Presidents historically have had an interest in slanting the Court one way or another. President Roosevelt did, and certainly President Reagan is doing that now. Sometimes, that may be rather offensive to us, if our philosophical leaning is in contrast to the leaning of the President.

Some Members of the Senate have argued over the years: "Why restrain yourself at all? Anything that is relevant for the President in making his nomination is relevant for the Senate in advising and consenting." But until this Bork episode, a majority of the Members of the Senate, at least during this century, have believed that the advice and consent role did imply some restraint, some parameters, some moderation of the inquiry; and most Senators have believed during this century that we should limit ourselves to the kinds of criteria I outlined earlier, en-

suring a standard of judicial excellence on the Supreme Court.

Several good reasons why the Members of this body have been reluctant to just throw all that to the wind, and say that politics is as relevant to the Senate as it is to the President, are outlined in an excellent article by Richard Friedman in the Cardozo Law Review in 1983. The title of this article is "The Transformation of the Senate Response to Supreme Court Nominations, From Reconstruction to the Taft Administration and Beyond."

Friedman writes, and I quote:

When, as during Reconstruction, Senators treat the Supreme Court as a political institution that they desire to hew to a particular ideological line, the public is likely to see the Court in the same light, and so is the Court itself.

Further, he says:

Perhaps, more importantly, if unpopular Supreme Court decisions tend to lead to nasty confirmation controversies that put the Court in an unfavorable light, then it is natural to expect that the Court will render fewer such decisions.

He goes on:

The Court is not primarily a policy-making institution. Even to the extent it may be considered one, we do not allow it to make policy becasue it is politically accountable; on the contrary, it is the Court's independence and at least the appearance of impartiality that we prize. The Court is useful in our system of government, able to play a role distinct from those of the political branches, precisely because it is, and is perceived to be, different from those branches. If the distinctions blur, so will the role of the Court.

Further in the article, Friedman says:

The Senate is a political body; a large part of a senator's job is, or should be, transformation of his beliefs or those of his constituents into public policy. It is not easy for a senator to accept willingly the nomination of a justice who likely will act contrary to those believes in decisions deeply affecting the life of the nation. But for several reasons a thoughtful senator should realize that any benefits of barring an ideological opponent from the Court are not likely to outweigh the damage done to the Court's institutional standing.

Friedman goes on:

Ideological opposition to a nominee from one end of the poltical spectrum is likely to help generate similar opposition to later nominations from the opposite end. In the long run, the result of such opposition will probably be to politicize the selection process, not to shift the Court either to the left or the right.

A second reason why opposing a Supreme Court nominee on ideological grounds is less beneficial than might appear at the time is the difficulty in predicting the nominee's judicial ideology and, a fortiori, the senator's own future assessment of that ideology. It is a commonplace that once a justice ascends the Supreme bench, he may very well surprise both admirers and critics. One survey estimates that "one justice in four has turned out to be quite different from what his appointer wanted.

Friedman goes on:

It is not surprising, then, that senators have sometimes expressed regret that they opposed the nomination of a justice whose record on the bench they later approved. And this being so, a senator should have some humility in opposing a Supreme Court nomination on ideological grounds; more than in the case of most major public issues, there is a strong possibilty that he will later rue his action * * *

Friedman concludes:

* * * there is a third reason why the senator should resist the temptation to oppose the nominee on ideological grounds: the damage that the justice can do is limited.

Is limited.

We've heard a lot of hyberbole, a lot of dire predictions about how Judge Bork is going to remake America. I tend to agree with Mr. Friedman when he says that the damage that one Justice can do is extremely limited, even if he or she harbors some views outside the judicial mainstream.

Often, of course, he or she may provide the crucial fifth vote on a decision that the reviewing Senator might find reprehensible; but that fifth vote counts no more than the votes of his more moderate colleagues, and certainly no more than the vote of the second-choice appointee—something we will soon receive—of the same appointing President.

Thus, the Senate is not likely to achieve much good by opposing a single nominee, even an extremist nominee, on the grounds that his or her votes and opinions might affect the Nation adversely, because this simply could not even be the case.

Friedman goes on:

And if senators were regularly to vote against nominees of moderate but opposing views, the selection process would become almost unimaginably politicized and the appointment power would in large part be shifted from the president to the Senate.

Madam President, I ask unanimous consent that that entire article be printed in the RECORD at this point.

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

[From the Cardozo Law Review, 1983]

THE TRANSFORMATION IN SENATE RESPONSE TO SUPREME COURT NOMINATIONS: FROM RECONSTRUCTION TO THE TAFT ADMINISTRATION AND BEYOND

(By Richard D. Friedman)*

INTRODUCTION

Since 1894, only four presidential nominations to the Supreme Court—three of them in the years 1968 to 1970—have failed to win the advice and consent of the Senate. Notwithstanding occasional outbursts of controversy, the confirmation process has, for the most part, become routine. It was not always so. From the founding of the Court through 1894, twenty-one nominees failed to win confirmation.

*Assistant Professor Law, Benjamin N. Cardozo School of Law, Yeshiva University; B.A., 1973, J.D., 1976, Harvard University; D. Phil., 1978, Oxford University. I thank Stephen W. Botein for invaluable guidance and encouragement in my work on this subject and Richard Polishuk and Michael Berman for their assistance in the final preparation of this Article.

Footnotes at end of article.

*A. The Damage Caused*

It is not surprising that ideological resistance has been most forceful when the Court's standing has been low and when its function has been viewed largely in political terms. That perceptions of the Court have strongly influenced the confirmation process is a theme running throughout this Article. That the relationship has run the other way—that the assertion of ideological objections to Supreme Court nominees has affected perceptions of the Court and its actual function—is more difficult to prove, but is strongly suggested by the experience of the late nineteenth century.[550] Rarely is public attention focused on the Court as intensely as during a confirmation struggle. Extended debates, both within and without the Senate, concerning the political philosophy of a nominee and recent decisions cannot help but diminish the Court's reputation as an independent institution and impress upon the public—and, indeed, on the Court itself—a political perception of its role. When, as during Reconstruction, senators treat the Supreme Court as a political institution that they expect to hew to a particular ideological line, the public is likely to see the Court in the same light, and so is the Court itself.[551] The actual role of the Court can be affected strongly by both the memory and the anticipation of confirmation battles. A justice who was confirmed only after a struggle in which he had to satisfy the Senate publicly as to his ideological acceptability may come to the bench with scars that will affect his judicial behavior.[552] Perhaps more importantly, if unpopular Supreme Court decisions tend to lead to nasty confirmation controversies that put the Court in an unfavorable light, then it is natural to expect that the court will render fewer such decisions.

To some perhaps, that is not a bad thing. Public understanding is all to the good, and those who view the Court's actual and proper role as a political one will generally cheer any debate that makes the public more aware of that role and encourages the court to embrace it.[553]

But, as the Reconstruction experience indicates, it would be unfortunate if the Supreme Court's place in American Government became comparable to that of the political institutions. One can embrace the core of legal realism, by acknowledging that a judge's philosophical and political beliefs profoundly influence his decisions, and still distinguish sharply between the functions of courts and those of political institutions. The Court is not primarily a policy-making institution. Even to the extent it may be considered one, we do not allow it to make policy because it is politically accountable; on the contrary, it is the Court's independence and at least the appearance of impartiality that we prize.[554] The Court is useful in our system of government, able to play a role distinct from those of the political branches, precisely because it is, and is perceived to be, different from those branches. If the distinctions blur, so will the role of the Court.[555]

It is for this reason that Franklin Roosevelt's 1937 Court-packing plan met such powerful resistance, much of it from persons sympathetic to the New Deal.[556] Congress clearly had the power to pack the

Court, and the scheme would have hastened the achievement of political goals approved by Congress. But to alter the Court's membership for political purposes would have tainted its standing as an independent institution.

B. *Ideological Consideration and Role Distinction*

One might concede that ideological control of the Court is of dubious merit and yet contend that in reviewing nominees the Senate must inevitably consider ideology because the president does so in selecting them.[557] But the roles of the president and the Senate are different, and there is no necessary symmetry in the factors that they should consider.

It is probably beneficial that a president pay at least some attention to the political tendencies of his nominees; this provides rough assurance that the justices understand, even if they do not represent, the temper of the times. And in any event, it would be unnatural for a president, in selecting among several qualified potential nominees, to put their philosophical leanings totally out of mind.

But the role of the Senate, in contrast to that of the president, is not to select. On the contrary, it is to approve or reject a choice that is constitutionally the province of another branch. For at least two reasons this distinction is significant.

First, if the Senate rejects a nominee on ideological grounds, the choice still belongs to the president, who may insist on nominating a justice to his liking ideologically.[558] In response, the Senate may back down—in which case it has accomplished nothing by its resistance.[559] Otherwise, there is a deadlock, one that is difficult to regard as beneficial for the Court or for the nation.[560] If, on the other hand, the president backs down, his nominee is effectively chosen in large measure by the Senate,[561] which thereby asserts a power it was not intended to have.[562] A Senate that consistently refuses to approve an ideologically hostile nominee is essentially denying the president his power of nomination. Such a policy resembles, though in more moderate form, the depacking of the Court by which Andrew Johnson was prevented from making any appointments.[563] And, like Court-packing, it is an attempt to control the decisions of the Court through the overly aggressive, albeit technically constitutional, exercise of a legislative power.

Second, in most cases it is not psychologically inevitable that a senator will consider a nominee's ideology. The Senate, unlike the president, does not have to choose among many candidates, all of whom are qualified for the job, and several of whom may appear to have comparable credentials. Rather, it has only to determine whether the nominee presented to it is acceptable. Usually the answer, apart from ideological criteria, is clearly affirmative. In such a case, it does not require heroic self-abnegation to decline to consider the ideological factors.

C. *The Benefits of Ideological Opposition: Less than Might Appear*

The Senate is a political body; a large part of a senator's job is, or should be, transformation of his beliefs or those of his constituents into public policy. It is not easy for a senator to accept willingly the nomination of a justice who likely will act contrary to those beliefs in decisions deeply affecting the life of the nation. But for several reasons a thoughtful senator should realize that any benefits of barring an ideological opponent from the Court are not likely to outweigh the damage done to the Court's institutional standing.

First, keeping in mind the Reconstruction nominations and the Fortas-Haynsworth-Carswell episode, a senator must consider the strong prospect of retribution.[564] Ideological opposition to a nominee from one end of the political spectrum is likely to help generate similar opposition to later nominations from the opposite end.[565] In the long run, the result of such opposition will probably be to politicize the selection process, not to shift the Court either to the left or the right. It is not surprising that both liberal and conservative senators have taken the view, when the nominee has been to their liking, that ideological opposition is generally inappropriate.[566] Nor is it surprising that they do not consistently adhere to that view when they dislike the nominee.[567] A farsighted senator would do so, however; in the long run, ideological opposition will probably not work in favor of his views substantially more often than it works against them, but it will contribute to the politicization of the Court.

A second reason why opposing a Supreme Court nominee on ideological grounds is less beneficial than might appear at the time is the difficulty in predicting the nominee's judicial ideology and, a fortiori, the senator's own future assessment of that ideology. It is a commonplace that once a justice ascends the Supreme bench, he may very surprise both admirers and critics. One survey estimates that "one justice in four has turned out to be quite different from what his appointer wanted."[568] Occasionally, as illustrated by Theodore Roosevelt's belittling of Justice Holmes, appraisals change with startling speed.[569] More often, probably, the shift is slower.

There may be several causes for such a change. Sometimes, the nominee's philosophical stance is not well understood from the start.[570] Often, his seat on the Court, by giving him a new outlook and subjecting him to a new set of influences and pressures, alters his ideology.[571] And always the nature of the Court's docket is changing; at the beginning of a justice's career it is difficult to predict what the important issues will be at the end, and there is not necessarily a correlation between the assessment that an observer will make of a justice's stances on the earlier and the later questions.[572]

It is not surprising, then, that senators have sometimes expressed regret that they opposed the nomination of a justice whose record on the bench they later approved.[573] And this being so, a senator should have some humility in opposing a Supreme Court nomination on ideological grounds; more than in the case of most public issues, there is a strong possibility that he will later rue his action or at least recognize that the consequences of defeat are not as dire as he had predicted.

Some nominees, however, have views that are so clear and so strongly held that a senator of opposite beliefs is justified in concluding that there is little prospect, especially in the foreseeable future, of conversion. Even in such a case, there is a third reason why the senator should resist the temptation to oppose the nominee on ideological grounds: the damage that the justice can do is limited. That he may have extreme views is generally of relatively minor consequence, for he cannot speak for the Court without the concurrence of half his colleagues.[574] Often, of course, he may provide the crucial fifth vote for a decision that the reviewing senator would find harmful, but his vote counts no more than those of his more moderate colleagues—and no more than would the vote of a second-choice appointee of the same president.

Thus, the Senate is not likely to achieve much good by opposing a single nominee, even an extremist one, on the ground that his votes and opinions are likely to affect the nation adversely. Ideological opposition is likely to produce substantial results only if the Senate is prepared to engage in it repeatedly. For a senator to believe that such a policy is proper, he must accept either of two propositions, or a combination of them, as true: one, that the Court is likely to be dominated by extremists or, two, that opposition on the basis of a nominee's views is appropriate regardless of how moderate these views may be.

The first proposition is almost always false as a matter of fact, and the second is unacceptable as a matter of policy. Because of the ideological unpredictability previously discussed, the moderate views of most presidents and the small probability that a majority of justices will be replaced in a single administration,[575] Court majorities rarely are in fact, or likely to become, extremist. Even the Four Horsemen[576] of the 1930's had bouts of moderation,[577] and even they had to pick up the vote of one of the Court's two moderates to form a majority.[578] And if senators were regularly to vote against nominees of moderate but opposing views, the selection process would become almost unimaginably politicized and the appointment power would in large part be shifted from the president to the Senate.

D. *An Exception at the Extremes*

Thus far this analysis has assumed that a justice's votes and opinions can have impact only to the extent that they have the concurrence of a majority of the Court. There is one sense in which this is not true, however, and it suggests that there are limited circumstances in which ideologically-based opposition to a Supreme Court nominee is appropriate. As a byproduct of its decisions, the Court performs an important educational function, stating fundamental principles of American government. All Supreme Court opinions, even lone dissents, have a measure of authority in the public eye by virtue of their high source. They thus lend legitimacy to the views they espouse. If a nominee's views are so repugnant that a senator perceives harm merely in giving him a lofty platform from which to air them, then the senator is justified in opposing him for that reason. All beliefs are worthy of expression in our society, but some are not worthy of expression from one of the nine seats on the Supreme Court.

The category of beliefs thus suggested—those so extreme that their mere statement in the opinion of a Supreme Court justice will be harmful—should be strictly bounded.[579] It should include only views that a senator considers beyond the realm of rational political discourse in the nation, not those at the heart of controversey. For example, in the 1980's it should include advocacy of separation of the races, or disbelief in the basic principles of free speech and free religion; it should not include beliefs in or against legalized abortion.

Where a nominee does have views so extreme that they fail under this test, there will be little force in the previously stated reasons for accepting a nomination despite

ideological dissatisfaction. Unless the president himself is so fervent an extemist that he is determined to appoint a justice of similarly extreme views, rejection of such a nomination is unlikely to create a deadlock or shift the appointment power away from the president. Few senators need fear that the standard created by defeating such a nomination would later haunt them; a senator should be well satisfied if the standard is applied equally to extremists of the left and right. Moreover, a nominee so extremist that he is unfit under this standard is unlikely to have an ideological conversion before he does his damage—which he can inflict without assistance from any of his colleagues. Such a nominee should be rejected without fear that the rejection will harm the selection process or the Court itself.

But surely so dismal a nominee is rarely named, and it must be rarer still that a nominee would fail this standard and yet satisfy the Senate with respect to his ability, integrity, and temperament. Those should be the principal criteria that the Senate uses in reviewing virtually all Supreme Court nominations,[560] it should leave questions of ideology aside.

E. *Conclusion*

If the Senate follows this approach, it will, of course, occasionally abandon the opportunity to prevent an unfavorable decision or line of decisions. The Senate must demonstrate the self-restraint borne out of a sense of constitutional courage—recognition that some choices in our government are meant to be the province of other branches;[561] belief that improper judicial decisions can eventually be corrected by the constitutional process; and faith that it is more important to preserve the structural integrity of our government than it is to assure desired judicial results.

The Reconstruction Senate manifested no such self-restraint in considering Supreme Court nominations. Senators perceived the shortrun stakes of consolidating the results for which the Union fought as far more significant than longrun considerations of presidential choice and judicial independence. Whether or not that perception was correct is a difficult question—one depending on a debate that is far broader than the scope of this Article. But two things we can say. We may hope that American society is never again subject to the intense and immediate internal stress that marked the Civil War era. And, at least in the absence of such stress, senators considering Supreme Court nominations should take a longer view than did their Reconstruction predecessors.

FOOTNOTES

[560] See B. Schwartz, supra note 13, at 230 ("baneful effect . . . on the Supreme Court's reputation" of Grant's prolonged attempts to find a successor to Chase); cf. McConnell, supra note 532, at 8 ("To the extent that it has eroded respect for this highest of our legal institutions, the recent controversial period [in which both Haynsworth and Carswell were nominated and rejected] has been unfortunate").

[561] One must pay careful attention to this factor in considering Professor Black's proposition that before a senator votes on a Court nomination he should "ask himself . . . *every* question which heavily bears on the issue whether the nominee's sitting on the Court will be good for the country." Black, supra note 547, at 663 (emphasis in original); see also Rees, supra note 549, at 939 n.80 ("[A]rguments [favoring senatorial] deference must be convincing in order to establish that the legislator should vote against what would otherwise be in his best judgment of what is right for the country."). If that list of questions includes those relating to the impact that the debate and vote will themselves have on the actual and perceived role of the Court, then the proposition appears tautological. Cf. id. at 934 ("what is best for the country depends upon all the circumstances"). And if such institutional questions are not to be asked, then there is a strong probability that the proposition will not lead to results that are "good for the country."

Professor Black indicates in another context that the Senate should place weight on such broad-based institutional considerations. The members of the executive department, he says, are "the President's people"; "they are to work with him." Black, supra note 547, at 660. Accordingly, "there is a clear structural reason for a Senator's letting the President have pretty much anybody he wants, and certainly for letting him have people of any political views that appeal to him," id., presumably including views the senator finds harmful. This structural reason is not present when the Senate reviews a Supreme Court justice: "The judges are *not* the President's people. God forbid!" Id. (emphasis in original). That is true, of course, but with respect to justices another "structural reason," not present in political nominations, demands senatorial restraint—the need to preserve the actual and perceived role of the Court.

[562] Cf. R. Friedman, supra note 529, at 145a (Hughes' assignment practices as Chief Justice were affected by his recollection of the different receptions that liberals accorded his nomination and that of Roberts); cf. McKay, supra note 80, at 131 (it is clearly proper for the Senate to take into account "the general judicial philosophy of the nominee," but "a too-deep probing [into the nominees' views on specific issues] that might be understood as seeking assurance of particular results in individual cases is clearly an improper interference with the judicial function"). It is not clear why there should be less objection to a deep probing that might be seen as seeking assurance of adherence, in case after case, to an approved general philosophical approach.

[563] Even so, one may doubt whether confirmation battles are truly necessary to make the public aware of the importance of ideology in judicial decisionmaking. The storm of vituperation that confronts the Court after a controversial case, such as Roe v. Wade, 410 U.S. 113 (1973), suggests that few Americans any longer believe in what one commentator scornfully calls "slot machine jurisprudence." Beiser, supra note 547, at 269; see Black, supra note 547, at 657-58; supra note 547 and accompanying text.

[564] See Beiser, supra note 547, at 268-69 ("general[ly], the role of the judge as impartial arbiter does not appear to be seriously questioned in America;" impartial arbiter's role contrasted to that of a non-policy making referee).

I certainly do not intend to become involved here in the debate between "interpretivists" and "noninterpretivists," nor in that over the validity of the critical legal studies movement. That judicial independence and impartiality are to be applauded appears to be a proposition accepted across a broad spectrum. See Constitutional Adjudication and Democratic Theory, 56 N.Y.U.L. Rev. 259-584 (1981)(symposium reflecting wide range of interpretivist and noninterpretivist views). The more extreme noninterpretivists, however, appear not to accept the impartial model of judging. See, e.g., Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 784 (1983)("judges no less than legislators [are] political actors, motivated primarily by their own interests and values"); see also A. Miller, Toward Increased Judicial Activism: The Political Role of the Supreme Court 288 (1982)(espousing a thoroughly political role for the Court; Court as "acknowledged de facto third and highest legislative chamber.")

[565] Cf. Beiser, supra note 547, passim (contending that underlying the recent confirmation battles is a conflict over the proper role of the Supreme Court). The thesis presented here is that under a sound but realistic view of the Court's role—a role unlike those of the political branches but connoting far more than Beiser's referee, see supra note 550—extreme senatorial restraint in considering nominees to the Court is appropriate.

[566] See, e.g., 1 W. Swindler, supra note 361, at 68-69; see also R. Jackson, The Struggle for Judicial Supremacy: A Study of the Crisis in American Power Politics 193 (1941) ("The opposition was generally directed to the President's method rather than his objective.").

[567] See Black, supra note 547, at 658.

[568] This factor, among others, distinguishes ideology from other criteria—such as ability, integrity, and temperament—that are more properly part of the Senate's consideration. It is not at all surprising that, after one rejection, a president insists on nominating another justice of his ideological persuasion. See Udall, A Master Stroke, Wash. Post, July 13, 1981, at A13, col. 2 ("My Democratic friends ought to be grateful for [the O'Connor] appointment. It's almost inconceivable to me that they could do any better. Ronald Reagan isn't going to appoint liberal Democrats."). It would be rather extraordinary, however, for a president to become obdurate about his right to select an incompetent or dishonest nominee.

[569] For example, to the extent that the Senate opposed Judges Haynsworth and Carswell on ideological grounds, it abandoned its objective by accepting Judge Blackmun, who was also perceived to be very conservative.

[570] The separation of executive and legislative powers creates other possibilities of deadlock, of course, most notably in the consideration of legislation. That, however, is clearly distinguishable from the Supreme Court confirmation process. When it is difficult to determine the best legislative policy, temporary deadlock—requiring further debate and consideration—may be preferable to hasty adoption of one course or another; that, in any event, is the theory that justifies building into our legislative system the inertia of separated power. Cf. Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764, 2782 (1983) ("President's veto role in the legislative process . . . 'establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body'" (quoting The Federalist No. 73 (A. Hamilton))). It would be difficult to make any corresponding argument in favor of a deadlock that left the Supreme Court understaffed for an extended period. And such an extended deadlock is not unthinkable in the context of nominations to the Court. "If each Senator 'felt institutionally free to insist on a nominee who agreed with [his] view on [a] particular matter, it is doubtful that anyone could be confirmed.'" Rees, supra note 549, at 938 (quoting statement of Stephen Gillers in Nomination of Judge Sandra Day O'Connor: Hearings Before the Senate Comm. on the Judiciary on the Nomination of Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, 97th Cong., 1st Sess. 1, 393-94 (1981).

[571] Of course it may be that the first nominee has views on particular subjects that, while especially distasteful to the Senate, are not important one way or another to the president. In such a case, rejection would allow the president to name a second nominee who he would find no less satisfactory but who would nevertheless meet the Senate's objections. But where the ideological dispute between the Senate and the first nominee is a matter of indifference to the president, it will rarely be of sufficient long-term importance to justify rejection.

[572] The view expressed here seems to be in accord with that stated by Hamilton in The Federalist:

But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or

from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

The Federalist No. 76, at 405 (A. Hamilton) (New American Library ed. 1961); see id. No. 66 (A. Hamilton); J. Grossman, supra note 354, at 172 ("As interpreted by Hamilton, the Senate's function was not to choose judges, but rather to consent to their selection by the President."). With respect to judgeships and other offices situated within a single state, the Senate's power has, of course, become far greater than conceived by Hamilton. But his view that the Constitution gave the Senate a limited role in considering nominations appears to have predominated at the Convention and in the ratification debates, at least among the Constitution's proponents. See J. Harris, supra note 1, at 17-35.

[563] See supra note 117-19 and accompanying text.

[564] Cf. McConnell, supra note 533, at 9 (Senate considered Haynsworth nomination in light of "recent precedent for senatorial questioning" set by the Fortas episode).

[565] It may be responded that this argument could be applied to any political power assessed by Congress against the president (opposition to treaties, veto overrides, and the like); the same power is likely to be used in the future from the opposite side of the fence. But in such political cases there is no doubt about the appropriateness of political opposition. The argument made in this section begins with the premise—based on the argument in the preceding sections—that there are substantial reasons why philosophical opposition to Supreme Court nominations may cause institutional damage. The intent here is not to show the dangers of such opposition, but only to undercut the importance of reasons that might be offered to justify it.

[566] For example, in arguing for confirmation of Thurgood Marshall, Senator Edward Kennedy expressed the vire of many liberals when he declared: I believe it is recognized by most Senators that we are not charged with the responsibility of approving a man to be Associate Justice of the Supreme Court only if his views always coincide with our own. We are not seeking a nominee for the Supreme Court who will express the majority view of the Senate on every given issue, or on a given issue of fundamental importance. We are interested really in knowing whether the nominee has the background, experience, qualification, temperament and integrity to handle this most sensitive, important, responsible job.

Quoted in McConnell, supra note 533, at 15. This statement was quoted with obvious relish by Senator Marlow Cook in defending the nomination of Judge Haynsworth. Id.

[567] In leading the opposition to the nomination of Abe Fortas to be Chief Justice, Senator Robert Griffin took an expansive view of the Senate's role in the confirmation process—a view that Senator Joseph Tyding quoted approvingly in opposing the Carswell nomination. Grossman & Wasby, supra note 528, at 560 & n. 12. During the Fortas hearings, Senator Philip Hart espoused a narrow view of the proper senatorial role in considering Supreme Court nominations. But he "abandoned his position held at the Fortas hearings when the realization hit him and the other liberals that Republican presidents are also allowed Supreme Court appointments." Powe, supra note 549, at 892; see also Rees, supra note 549, at 925 ("broadest view . . . tend) to be taken by the Senators who [are] most hostile to the current nominee" (footnote omitted)).

[568] R. Scigliano, supra note. 4, at 157 ("In addition, other justices have failed to live up to expectations in particular cases."); see supra note 95 and accompanying text, regarding Chief Justice Chase's surprising switch on the legal tender issue—a switch made all the more ironic because Lincoln had chosen Chase in substantial part because he deemed his former Treasury Secretary reliable on that issue. The difficulties of predicting judicial philosophy are also discussed in J. Frank, Marble Palace: The Supreme Court in American Life 44-45 (1958); Halper, supra note 368, 570 (1976); McKay, supra note 80, at 126-27. But cf. Frank, supra note I, at 488-89 (contending that "errors in misjudgment happen seldom, for most Presidents know the men with whom they are dealing").

[569] See supra note 340. Similar reappraisals include Truman's of Justice Tom Clark, see M. Miller, Plain Speaking 255-26 (1973), and Eisenhower's of Chief Justice Warren, see E. Warren. The Memoirs of Earl Warren 5 (1977) (quoting Eisenhower calling Warren's appointment "the biggest damn fool thing I ever did").

[570] James C. McReynolds no doubt benefited from such missunderstanding in 1914, because his vigorous attitude towards antitrust enforcement disguished a fundamentally reactionary nature. I W. Swindler, supra note 361, at 182; Frank, supra note 1, at 461. More often, misunderstanding has plagued nominees, as it did Hughes and Parker in 1930. See, e.g., Thorpe, supra note 532, at 374-75 & n. 18 (Parker's opponents were mistaken about him and would have been better off if he, rather than Roberts, had ben confirmed; he was sympathetic to the causes of both blacks and (labor). Progressives' fear of Hughes, which ignored his long, essentially progressive political and judicial career, led Zechariah Chafee, Jr. to comment that the place to look for intuition as to a nominee's judicial attitudes is "not in his file of clients or in his safe-deposit box but at the books in his private library at home." Z. Chafee, Free Speech in the United States 359 (1941).

Even in modern times, when nominees testify at length before the Senate Judiciary Committee, the Senate often has difficulty assessing their ideological stance. One problem is that many nominees refuse to discuss questions of judicial philosophy or constitutional law at their confirmation hearings. See Rees, supra note 549, at 947-66. Some nominees have expresed fears that such statements will appear improper when they are later called upon to decide controversial cases. Id. at 958-66. Others have asserted that such answers would require recusal in certain cases. Id. 950-58.

[571] For example, senators who opposed the first Justice Harlan because he had been a slaveholder, see supra text accompanying notes 136-40, could not easily predict that he would become the Court's staunchest defender of equal rights. See Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting); see also Halper, supra note 5, at 107 (rejecting a nominee because of prior indications of racism would have kept Harlan, Hugo Black and Earl Warren off the bench). Nor was it generally foreseen in 1925 that Harlan F. Stone, Coolidge's Attorney General, would by the mid-1930's be an anchor of the Court's liberal wing. See J. Harris, supra note 1, at 117-19; Frank, supra note 1, at 489, Mason, "Harlan Fiske Stone," in 3 L. Friedman & F. Israel, supra note 136, at 2223; Murphy, supra note 499, at 187. The influence of Justices Holmes and Brandeis may account in large part for the transformation. See Beard, Preface to S. Konefsky, Chief Justice Stone and the Supreme Court at xx (1945). See generally A. Mason, Harlan Fiske Stone: Pillars of the Law 219-20, 304-07 (1956) (describing Stone's early relationship with Brandeis and later alliance with Brandeis and Holmes).

Ideological shifts may result from the removal of old influences as well as from the introduction of new ones. One may speculate, for example, that Earl Warren would have been a different Chief Justice had he remained subject to the pressures of California politics.

[572] As Alexander M. Bickel once declared, "'You shoot an arrow into a far-distant future . . . when you appoint a justice, and not the man himself can tell you what he will think about some of the problems he will face.'" Quoted in Abraham, "A Bench Happily Filled"; Some Historical Reflections on the Supreme Court Appointment process, 66 Judicature 282, 287 (1983).

[573] For example, Henry Clay, who had bitterly opposed the nomination of Roger B. Taney for Chief Justice, later told him: "I am satisfied now that no man in the United States could have been selected more abundantly able to wear the ermine which Chief Justice Marshall honored." C. Swisher, supra note 28, at 405. Similarly, Senator George Norris came to regret his leading role in the opposition to confirmation of Justice Stone, R. Neuberger & S. Kahn, Integrity: The Life of George W. Norris 343 (1937), and several senators "quietly expressed regret" for their resistance to the nomination of Hughes as chief justice. 2 M. Pusey, supra note 384, at 661.

[574] A dissent or a separate concurrence may, of course, have a substantial, albeit deferred, impact as "an appeal to the brooding spirit of the law, to the intelligence of a future day." C. Hughes, supra note 18, at 68. But again, this will be true only to the extent that it persuades the majority of a latter-day court.

[575] Since the membership of the Court was set at nine in 1869, only presidents Taft (1909-1913) and Franklin Roosevelt (1937 1941) have appointed a majority of the justices during one administration. President Eisenhower also appointed a majority of the Court, but needed two terms in office to do so. See M. Wormser, supra note 2, at 177-79.

[576] Justices Van Devanter, McReynolds, Sutherland and Butler.

[577] See, e.g., Helvering v. Davis, 301 U.S. 619 (1937) (opinion upholding old age benefits provision of Social Security Act, joined by Van Devanter and Sutherland, JJ.)

[578] In several important cases, Justices Roberts and Hughes both voted with the Court's three liberals to defeat the conservative foursome. E.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934; Home Bldg & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). The Court of the late 1920's was probably more solidly and consistently reactionary than the "Nine Old Men" of the 1930's—but it did not have the same opportunities for mischief.

[579] Cf. Black, supra note 547, at 659 (arguing that a senator should not vote to confirm a nominee "whose views on great questions the Senator believes to make him dangerous as a judge"); Rees, supra note 549, at 941 (senators generally settle for the first nominee "not profoundly unacceptable to them," as Hamilton suggested they should). Professor Black is not clear as to what standard a senator should use in making the determination he suggests.

[580] McConnell, supra note 533, at 22, 33, suggests a somewhat different breakdown: (1) competence; (2) achievement; (3) temperament; (4) judicial propriety; and (5) nonjudicial record. See also Grossman & Wasby, supra note 528, at 562 n. 16 (tests adopted by Senators Javits and Proxmire). In occasional cases, other factors may also play a role. For example, it is certainly appropriate for the Senate to consider the advanced age of an otherwise qualified nominee. Cf. A.B.A. Committee on Judiciary, supra note 538, at 5 (age an important factor in assessing nominees for lower federal courts).

[581] Professor Black questions whether it is possible to "conceive of sound 'advise' which is given by an advisor who has deliberately barred himself from considering some of the things that the person he is advising ought to consider, and does consider." Black, supra note 547, at 659. Surely any lawyer who has ever been asked to give legal advice but not to offer an opinion on the merits of a business or personal decision should be able to answer that question affirmatively.

Similarly, Professor Rees contends that arguments for deference to the president's nomination "must be convincing in order to establish that the legislator should vote against what would otherwise be his best judgement of what is right for the country." Rees, supra note 549, at 949-50; see id. at 941. He concludes that "the reponsibility of Senators to choose good Supreme Court Justices is just as great as that of the President." Id. at 966. But deference by one branch to the choice made by another is an integral part of our constitutional system. Like Professor Black, Professor Rees acknowledges that, in the case of a cabinet nomination, a senator acting in the best interest of the country ordinarily *should* defer to the president. Id. at 943. (This conclusion, incidentally, undercuts, or at least renders irrelevant, the argument that the language of art. II, § 2 "suggests no distinction between the criteria the president should use to 'nominate' judges and those the Senate should use in exerising its 'advice and consent' function." Id. at 937; see Black, supra note 547, at 658-59. That language applies equally to cabinet and judicial nominations, and if it is compatible with different presidential and senatorial roles in the one case, it is in the other as well.) My contention is that the Senate ordinarily should defer to the president in both Supreme Court and cabinet nominations, but for different reasons, see supra note 551.

Mr. McCONNELL. Madam President, so where are we? Having thought about this issue quite often for nearly 20 years, it seems to me that a body as political as this one is no longer going to render the kinds of impartial judgments on Supreme Court nominees that it did earlier in this century, based upon the standards that the Senator from Kentucky laid out many years ago—the standards of competence, achievement, temperament, judicial conduct, and personal integrity.

In short, we will no longer limit our inquiry and decisionmaking to an objective, impoliticized standard of judicial excellence.

The Senator from Kentucky doesn't think that is the way it ought to be, but if nothing else I am practical; I have studied this issue and analyzed these nominations for 18 years, and reluctantly have concluded that the standards formulated by a rather idealistic 28-year-old lawyer are not likely to be honored by this body politic of the U.S. Senate.

It occurs to me that the only times we have been inclined to restrain ourselves, and limit our inquiry to objective standards of excellence, are the times we have been sent a noncontroversial nominee. The President, whoever he is, sends up a nomination that is not very controversial and we then have the leisure to preach to each other about how our advice and consent responsibility entails the standards of excellence, and how our objective inquiry has been satisfied. Noncontroversial nominees are easy; they require no senatorial restraint.

But if the President sends up a controversial nomination, and that is what this nomination has turned out to be, then it is no longer likely that we will restrain ourselves; the temptation to go for the political raw meat is just too great, and the demands of senatorial independence and courage too overwhelming.

And so, while I wish it were the way I said it ought to be back in 1970, it is not—and it appears to me that we might as well accept and adopt what the new standard really is.

I say this with no particular bitterness I might add, even though this new standard makes the article that I was proud of writing some 18 years ago dated and irrelevant. Despite all that, I am prepared today to accept the new standard. It is just asking too much of us to ignore the political implications of a nomination to the Supreme Court. We are going to do it from here on out; we'll do it whenever we want, whenever the President—whoever he may be—sends up somebody we do not like. At such times, there will be darn few people in the U.S. Senate who will be able to limit their inquiry to things like competence, achievement, judicial temperament, conduct, and integrity. In fact, no matter what we call it at the time, we simply will be trying to fabricate reasons to oppose any nomination which we really object to on purely philosophical grounds.

So, where is advice and consent in 1987, Madam President? Advice and consent in 1987, a; a result of the imminent defeat of Judge Robert Bork, means this: We in the Senate are going to make our decision on any basis we darn well please, and if we object as a matter of philosophical persuasion to the direction the President is trying to move the Court, whether to the right or to the left, we can just stand up and say that and vote accordingly. No deliberation, no standards of excellence, no standards at all. All of that is out the window for good.

I must say that I reach this conclusion, in some respects, with a sense of relief: because if my party were not to win the Presidency next year, I anticipate a future nominee to the Supreme Court who is of philosophical persuasion that I would oppose. Were I obligated to apply the standards that I penned in 1970 in the Kentucky Law Journal, I would have to make a strictly controlled decision on that nominee, based solely upon his competence, achievements, temperament, conduct, and integrity. I would be forced to ignore that philosophical persuasion which I opposed.

But it occurs to this Senator that if nobody else is applying that kind of strict, temperate standard, then he should not either.

Therefore, and again I say this with no particular bitterness, I believe the Senate should consistently apply this new standard; and as far as my one vote is concerned, I shall henceforth carefully scrutinize the judicial philosophy of every nominee, perhaps even to the point of passing over the nominee's excellent credentials and unimpeachable character.

The Senator from Kentucky will do this with some measure of relief, as I indicated earlier, because it is not easy for us politicians to restrain ourselves, and confine our decisions to something as standardized and simplified as trying to ensure that we have truly outstanding members of the legal profession on the U.S. Supreme Court.

In conclusion, then, let me repeat: where we are in 1987 is that the words "nominate" and "appoint" still allow the President the right to select nominees; but now we interpret "advice" and "consent" much more broadly. If we do not like the philosophical leaning of a nominee, then henceforth the majority of the Senate will simply reject that nominee on a philosophical basis.

The danger of this approach, of course, is that it is a formula for gridlock, as I warned 3 months ago when political opposition to this nomination first arose. It is my prediction, Madam President, that the President will send up another nominee who is a philosophical "soul-mate" of Judge Bork, though perhaps not so widely published, and one about 10 or 15 years younger than Judge Bork; and we may waltz around this Maypole once again. We may be waltzing around the Maypole until next spring, and we may never resolve this gridlock, until the ability of the Supreme Court to function properly is badly impaired.

It will be interesting to see what happens to the next conservative nominee before the U.S. Senate. Is the standard going to be applied the same way? It is a formula for gridlock. But this new standard is, after all, a bit of freedom for each of us to do our thing. We may not be able to pick the nominee, but we can sure shoot him down—we can shoot them all down.

In conclusion, Madam President, let me say that I do have one regret about this point the Senate has reached: Judge Bork, though controversial, was—in my judgment—one of the most outstanding nominations of this century. As a Supreme Court Justice, I am certain that he would have ranked up there with Brandeis, Cardozo, Frankfurter, Harlan, and Hughes—interestingly enough, all Justices whose nominations were violently opposed and nearly defeated.

Further, I suspect the President would have been disappointed in Justice Bork on occasions. I doubt that he would have turned out exactly the way the President might have hoped. And had he been appointed, I suspect that we might have heard at some point in the cloakrooms, if not on the floor, from a number of Senators who had opposed him, saying, "You know, that Justice Bork really did surprise me. He ended up being a lot better and more open-minded than I thought he was going to be. I made a mistake."

We've heard a lot of similar remarks from those who voted against Judge Haynsworth's nomination to the Supreme Court. In fact, I think there are some instructive parallels between the Bork nomination and the failed nomination of Judge Haynsworth in 1969. What did Clement Haynsworth do after he was defeated? Did he resign and go home and sulk? No.

Madam President, Judge Clement Haynsworth spent the rest of his professional carrer on the fourth circuit, proving that his detractors in this body has made a terrible mistake.

And so I say to Judge Bork:

You are an outstanding public servant and jurist. You have distinguished yourself remarkably on the Court of Appeals for the District of Columbia, and I hope you will remain there if not confirmed. It is, after all, the second most important court in the Nation, and the best way to deal with this unfortunate occasion is to prove for the rest of your professional life how wrong the decision of the U.S. Senate was.

Judge Bork, you have fought the good fight and did your best. It was a tough contest, and you happened to be the one for whom the Senate adopted a new standard of review, that will be applied by a majority of the Senate from now on. Unfortunately, this standard was adopted "over your dead body," so to speak, in political terms.

Stay on the court, Judge Bork. Prove your detractors wrong. Continue in your outstanding career of public service and judicial excellence. This new Senate standard may not deserve your work but the Constitution and the people who are governed by it will always need you.

Madam President, I yield the floor.

Mr. MURKOWSKI addressed the Chair.

The PRESIDING OFFICER. The Senator from Alaska.

Mr. MURKOWSKI. Madam President, I rise to speak to the nomination of Robert H. Bork to serve as Associate Justice of the Supreme Court.

I have refrained from publicly announcing my position on this crucial matter until today. I have done so deliberately. I have done so despite repeated requests by the press and others to announce a decision before I believed I had discharged my duty to engage in the kind of thoughtful deliberations that are the hallmark of this great body.

I have done so despite—and in part because of—the spectacle of the rush to judgment which has, in this Senator's opinion, denigrated one of the Senate's most important functions.

In considering my vote, Madam President, I examined four chief areas of concern:

First, the qualifications of the nominee;

Second, the findings and recommendations of the committee charged with reporting to the entire Senate;

Third, the issues surrounding this nomination; and, of course, the views of all Alaskans, whom I am privileged to represent in this Chamber. Thousands of Alaskans have called and written to me on this important matter.

Madam President, I am prepared now to voice my views.

In many ways the hearings on Judge Bork's nomination were extraordinary, to say the least. Never, I believe, in the history of this process has there been such an in-depth discussion of complex constitutional issues. Indeed, one of the committee members remarked that the exchanges with Judge Bork were "like going back to law school." And I am sure it was a very good law school.

I'm not a lawyer, Madam President, and I do not pretend to know the intricacies of constitutional jurisprudence. But I will say this: I understand the Constitution. And that is the way it was intended. Our Constitution was not necessarily written for lawyers. It was written by and for the group identified in its first three words: "We, the people."

I understand that the Constitution establishes a system of government for the people through a series of coequal branches that check and balance each other. I understand that the Constitution stands for fairness in process. I understand that the Constitution instructs us in how the system should work.

The Constitution expects factionalism in the legislative and executive branches. That is what majority rule is all about, and that is certainly fair.

But the Constitution does not expect a political judicial branch—It does not expect a political judicial branch. I repeat that, Madam President, because I think it needs emphasis. Judges must make impartial decisions—decisions based on a body of law without regard to their personal beliefs or party affiliation.

In fact, the Constitution goes to great lengths to insulate that branch from the winds of political change. For example, no matter what party is in the majority, appointments to the Federal bench are for life, so appropriately there is no leverage on the decisions of a Federal judge; no matter who the President is, a Federal judge's salary cannot be reduced. And when the Senate takes a judicial nomination under consideration, I believe we have to take into account the nature of the judicial branch and what the Constitution expects of judges when we determine what's "fair" about our process.

No, Madam President, I am not a lawyer. But I know enough about the Constitution and our system of government to know that we have not been fair in this process. We have not been honest with the process, with ourselves, with Judge Bork or with the American people.

We have allowed this process to become a spectacle of factionalism that just does not belong when the issue is nomination to the Supreme Court.

I do not want to imply that any one group is to blame. There is plenty of blame to go around, not the least of all—this very body. We're all responsible. And I am deeply troubled by these events, Madam President, because I fear we are setting a precedent that could haunt this body long after the final vote on Judge Bork's nomination.

Madam President, this debate did not begin with special interest groups or the media. It began on this floor within hours of the President's nomination of Judge Bork when we heard that women in our land would be forced into back-alley abortions, that blacks would again sit at segregated lunch counters, and local police could break down citizens' doors in midnight raids.

Long before our Judiciary Committee ever heard the testimony of Judge Bork, fires were fueled and fears aroused among black Americans and women. The process in the early stages lost my chance of fairness and objectivity. Perhaps the Washington Post which some of us from out of town do not necessarily agree with all the time, summed it up best when they wrote on October 5, 1987:

> There has been an intellectual vulgarization and personal savagery to elements of the attack, profoundly distorting the record and nature of this man.

The issue here, Madam President is not back-alley abortions, blacks at segregated lunch counters, and police breaking down citizens' doors in midnight raids. It is most unfortunate that the American people have been led to believe that these are the issues at hand.

Nor should the issue be Judge Bork's so-called judicial extremism. His tenure on the D.C. Court of Appeals has demonstrated a respect for precedent. Any fair comparison of his decisions while serving on the court of appeals with his testimony before the Judiciary Committee demonstrates not a confirmation conversion as some have suggested, but rather, a commitment to the protection of individuals rights.

This nomination brings into sharp focus questions about the way our Constitution works and how we think it should work. It is about the very nature of self-government—a representative democracy. "We the people" are the government.

Have we not heard from the people about a perceived expansion by the courts of criminal rights at the expense of victims? As I listen to my colleagues, I reflect how unfortunate it is that Judge Bork is not be here himself to respond to my fellow Senate colleague's interpretation of the judge's hypothetical beliefs on such issues as privacy or abortion; issues which are not necessarily enumerated in the Constitution. What would be the judge's theory of expanded rights granted by the Constitution? Should those expanded rights also extend to criminal rights? If so, how far?

Does the Court have the power to grant criminal rights beyond those provided in the Constitution and rights that we, who the people elect, are in opposition to?

It is my interpretation, Madam President, that Judge Bork believes in judicial restraint. He believes, as did Thomas Jefferson, that enlargements of Federal power properly come from the legislature, not the courts; as Mr. Jefferson said, "Our peculiar security is in the possession of a written Constitution." And Judge Bork believes, as did Justice Harlan, one of our greatest constitutional scholars, that:

> This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally

upon recognition of the limitations on the Court's own functions in the constitutional system.

Madam President, neither of those great men can be challenged on their commitment to individual rights. And I do not think that Judge Bork has any less devotion to individual rights merely because he shares a judicial philosophy with Thomas Jefferson and John Harlan.

No, Madam President, extremism is not the issue. During the past 5 years, not 1 of the more than 400 majority opinions Judge Bork has written or joined with his fellow jurists on the bench has been reversed by the Supreme Court. Not one. Considering this, Madam President, how do Judge Bork's opponents define "the mainstream"? Was it not Judge Bork who years ago praised the major school desegregation decision in Brown versus Board of Education as one of "the Court's most splendid vindications of human freedom"?

Unfortunately, the issue has become Judge Bork's political reliability. The Senate confirmation process in the case of Robert Bork is not about qualifications, independence of judgment, judicial temperament, intellectual honesty or professional integrity; but, unfortunately, it is an attempt to control the specific outcome of future decisions of the Supreme Court by establishing political reliability as a litmus test for confirmation. Do we really want our hardest political decisions made by the unelected branch of our Federal Government? Did the framers of the Constitution contemplate this role for the Court when they established a judiciary that, as Alexander Hamilton once wrote, "had neither force nor will, but merely judgment"? How unfortunate that would be—for the Court and the Nation.

So, Madam President, Robert Bork—lawyer, law professor, Solicitor General of the United States, and Federal Appeals Court judge—has distinguished himself in a lifelong career dedicated to public service and to the education of future generations of lawyers. He has been lauded by past and present Supreme Court Justices, by distinguished lawyers who served Presidents in both Democratic and Republican administrations, by Dean Calabresi of Yale Law School, and by a panel of his peers from the American Bar Association. In sum, he is, by most accounts, a brilliant jurist, a noted scholar and writer, a thinker, a highly respected litigator, and a truly decent human being. I met with Judge Bork just a few days ago, and I was struck by his words:

When he responded to a question with regard to how he felt.

He said:

Senator, my greatest disappointment is not losing the confirmation. It is that black Americans believe the lie that I am a racist. That hurts me, and it hurts me deeply.

I have been thinking about that ever since that meeting, Madam President.

Are we really willing to forsake the services of a man called the most qualified nominee in half a century because some of us think that we will not like the results he might reach in some cases: What does that say about us? What does that say about our attitude toward the Judicial System? Indeed, what does that say about our attitude toward our Constitution?

We demean ourselves, Madam President, by setting this kind of political predictability test for the Supreme Court. Look at where it leads: Unfair and misleading commercials that Judge Bork favors the imposition of literacy tests and poll taxes; inflammatory, baseless charges that Judge Bork would "turn back the clock" and "put women in the back seat." This kind of inflammatory rhetoric against a person of Judge Bork's character and record is shameful and intellectually dishonest.

But, we can expect this kind of response when we permit our standard of review for nomination to our highest Court to be one of common political expediency. I fear we are sending a message, Madam President, not only to future nominees, but to the Court itself, about what we think the Court should be. And that message is this: Forget intellectual rigor; forget judicial integrity; forget connections with a seamless web of jurisprudence that can be traced to times before this Nation was conceived. Forget that. Give us the result we want, and give it to us now.

Not only does that message offend the very basis of our system of Government, it may well augur something far worse: We may, Madam President, get exactly what we ask for.

I shall support our President's nomination of Judge Robert Bork to the Supreme Court.

I yield the floor.

Mr. NICKLES addressed the Chair.

Mr. DECONCINI. I understand we are to alternate between speakers for and against Judge Bork. I will speak in opposition. The Senator from Oklahoma has been here for several hours. He indicates that he has not a short statement, but a statement that will not be more than 10 minutes. I know the Senator from New Hampshire has been here for a long time and would like to get unanimous consent of some sort.

I am prepared to ask for unanimous consent that the distinguished Senator from Oklahoma may proceed for not to exceed 10 minutes and then I will be recognized for my statement on Judge Bork.

The PRESIDING OFFICER. (Mr. ADAMS). Is there objection?

Mr. HUMPHREY. Would the Senator add my name to that request to follow the Senator from Arizona?

Mr. DECONCINI. Under these circumstances, because the Senator from Oklahoma will not speak for a long time, I would have no objection. If the Senator wants to amend my request, I have no objection.

Mr. HUMPHREY. Mr. President, I ask unanimous consent that the Senator from New Hampshire may follow the Senator from Arizona.

The PRESIDING OFFICER. Is there objection?

Mr. METZENBAUM. Reserving the right to object, can the Senator tell us how long he will be?

Mr. HUMPHREY. I cannot say with great accuracy, but I would say about 30 minutes.

The PRESIDING OFFICER. The Senator has said that he thought he would be about 30 minutes. That is what the Chair understood.

Mr. METZENBAUM. Then I would ask that the unanimous consent request be modified so that immediately following the Senator from New Hampshire, the Senator from Ohio will be recognized.

The PRESIDING OFFICER. Is there objection? The Chair hears none. Without objection, it is so ordered.

The Chair will repeat the unanimous consent request: That the Senator from Oklahoma is recognized, I believe that was for 10 minutes; then the Senator form Arizona will be recognized; then the Senator from New Hampshire will be recognized; and then the Senator from Ohio will be recognized. That is the order of the Chair.

The Senator from Oklahoma.

Mr. NICKLES. Mr. President, I thank my good friend and colleague, the Senator from Arizona.

Mr. President, I rise in strong support of Judge Robert H. Bork for the U.S. Supreme Court. Mr. President, I think seldom have we had in history a man more qualified to serve in this position. I think everyone is well aware of his record as a law professor, as Solicitor General, as a judge on the United States Court of Appeals for the District of Columbia.

Judge Bork has done an outstanding job. He was unanimously confirmed by the Senate in 1982 for good reason: He was well qualified for that position. What has happened since 1982 to cause Senators to oppose his nomination? What did he do as a judge on the U.S. Court of Appeals?

He was involved in 416 cases. He voted in the majority 95 percent of the time. In those over 400 cases he has never been overturned by the Supreme Court, never. He dissented in 20 cases, 6 of which were reviewed by the Supreme Court and in all 6 cases the

Supreme Court concurred with Judge Bork's dissent.

That is an incredible record, an incredible record by any estimation whatsoever. Yet we find many of our colleagues, unfortunately the majority of our colleagues, stating their opposition to Judge Bork. Yet he was unanimously confirmed in 1982.

It is hard to understand.

I strongly support Judge Bork because, as I have read many of his statements, he is an advocate of judicial restraint. I will read a couple of his quotes.

The judge's authority derives entirely from the fact that he is applying the law and not his personal values. That is why the American public accepts the decisions of its courts, and accepts even decisions that nullify the laws a majority of the electorate or of their representatives voted for.

No one, including a judge, can be above the law. Only in that way will justice be done and the freedom of Americans assured.

Another quote from Judge Bork, and all these came from the confirmation hearings.

My philosophy in judging, Mr. Chairman, as you pointed out, is neither liberal nor conservative. It is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to the Congress, the President, the legislature and the executives of 50 States, and to the American people.

Mr. President, I could not agree more with that statement.

He also stated:

If a judge abandons intention as his guide, there is no law available to him and he begins to legislate a social agenda for the American people. That goes well beyond his legitimate power.

Again, I concur wholeheartedly. Let us look at the Constitution.

The Constitution in article 1, section 1 says:

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives

Look at the 10th amendment to the United States Constitution. It says:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States repectively, or to the people.

In other words, Judge Bork thinks that not the court should legislate, but the Congress should legislate and if the Congress does not, it should be reserved to the States and to the people. Then if the people do not agree with the legislature, they can change the Members of that body. The people have the checks and balances.

Many of my colleagues, I think, are opposing this nomination because Judge Bork believes in judicial restraint. The Senator from Oregon, my good friend, Senator PACKWOOD, was very forthright when he said he questioned Judge Bork concerning his philosophy on judicial restraint and on the issue of privacy. He was very frank when he said he was concerned about the judge overturning Roe versus Wade.

Roe versus Wade is an excellent example of judicial activism where the Court legislated, where the Supreme Court legalized abortion. Congress did not legalize abortion. The Senator from Oregon said he introduced legislation to do so but it did not pass Congress. It did not have the votes.

If abortion is going to be legal, then Congress should pass it. If we have the votes and courage to do so, let us do so. If the people do not like it, the people can change the Congress. That is the way it should be done. It should not be legalized by nine nonelected Justices of the Supreme Court.

Judicial restraint is important and it is needed.

Mr. President, I very much reject and resent a lot of the tactics that have come about as a result of Judge Bork's nomination.

I ask unanimous consent that an article from the Wall Street Journal on October 15 be inserted in the RECORD. I will just read a couple of comments. It says:

"Dear Friend," said Joanne Woodward's mass mailing, $500,000 is needed immediately. Norman Lear's People for the American Way mailed out 3.8 million anti-Bork solicitations.

And on and on, a very active, a very negative, a very distorted campaign was conducted against an outstanding jurist. I resent that type of activity. I think it is unfortunate. I do not think it speaks well for the Senate. I do not think it speaks well for the nomination and the confirmation process. When we have jurists come before the Senate Judiciary Committee in the future, I think they are not going to be giving frank answers. They are not going to be giving detailed explanations of their judicial philosophy. Unfortunately, they are going to say, "Senator, I am sorry, I can't answer that question because it may come before the courts or may be pending before the courts somewhere in the judicial arena."

I think the next nominee will be stating that time and time again and Senators will be on this floor voting not knowing that particular nominee's philosophy.

Let me make two final comments.

The PRESIDING OFFICER. If the Senator will suspend, did he wish the article placed in the RECORD?

Mr. NICKLES. Yes. I ask unanimous consent that the article from the Wall Street Journal be inserted in the RECORD.

There being no objection, the article was order to be printed in the RECORD, as follows:

[From the Wall Street Journal, Oct. 15, 1987]

BOGEYMAN FUNDRAISING

"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 citizens' doors in midnight raids . . . and the doors of the federal courts would be shut on millions of citizens." These were Senator Teddy Kennedy's first words after the Bork nomination.

While at the same time it seemed mere hyperventilation, this protrayal was in fact central to the apparently successful campaign to discredit Judge Bork. It's not that hyperbole directly persuaded Senators, but that the hyperbole was needed to raise money to persuade Senators. The bogeyman image was absolutely crucial to the needs of the real special interests, the Spitz Channels of the left.

"Dear Friend," said Joanne Woodward's mass mailing on behalf of the National Abortion Rights Action League, "$500,000 is needed immediately. . . . " Norman Lear's People for the American Way mailed out 3.8 million anti-Bork solicitations; its Arthur Kropp boasts, "We wanted to raise $1 million but now it looks like closer to $2 million." Direct-mail consultant Roger Craver, who has five different anti-Bork clients, told the New York Times, "This is the equivalent of Jim Watt wanting to flood the Grand Canyon."

This is bogeyman fund-raising. The livelihood of fund-raisers is raising funds, either through direct contacts or mass mailings. Success lies in getting a batch of first contributions in some heated battle, then returning to a proven list to pay ongoing salaries. Not for nothing did more than 30 special-interest groups submit requests to testify-meaning, appear on national television. At the lowest and most cynical level of American politics, the level at which it has settled the past two months, one might argue that special interest groups are prevailing and being well paid for their efforts. Judge Bork's discomfort is just tough luck; he happened to be handy when the fund-raisers needed a nightmarish caricature.

Of course, both conservatives and liberals have for some time exploited bogeyman fund-raising. Conservative direct mailers wept at Tip O'Neill's retirement. With the creation of the Bork bogeyman, however, something seems to have snapped in Washington politics. Tip O'Neill and Jesse Helms are political figures who have the platform and resources to fight back. A judicial nominee, especially a federal appeals court judge, is severely constrained from defending himself at the level of discourse preferred by, say, the creator of Archie Bunker.

It isn't only Judge Bork's supporters who are concerned that the rest of the country now sees Washington as a stinking swamp of intellectual dishonesty and political reprisal. Lloyd Cutler's support for the nomination is based not on the merits alone but on concern that the tenor of the Bork opposition is poisoning the well for his own party. In the current issue of The New Republic, Andrew Sullivan frets that with the fund-raising hysteria, "The only nominee who in the future will be able to survive the demagoguery will be someone who can respond in kind." Perhaps the president should nominate Don Rickles ("Get off my back, you hockey puck!").

Mr. Sullivan's article should be read by anyone who still doubts this process pro-

foundly distorted the Bork record. While he says a serious case can be made against the nomination, he catalogs "the disingenuousness of the Bork-hate campaign." The lies, such as a claim that Judge Bork testified in favor of a law he in fact opposed. The name-calling of Ralph Nader: "a plague on the next generation." The mailings of one of liberalism's sainted groups, Planned Parenthood, said, "Bork's position on reproductive rights? You don't have any." Mr. Sullivan concluded: "And Senators wonder why the polls show a drift away from the Bork nomination."

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.

Mr. NICKLES. Two final quick comments. From Gerhard Casper, University of Chicago Law School:

It would be ironic if, in this bicentennial year, the Senate were to oppose Judge Bork because he believes, correctly, that judges, like all other Government actors, are bound by the Constitution and should make its meaning the reference point of all interpretations. It would be ironic if in this bicentennial year, the Senate were to seek to legitimate a change in our form of government from one based on rule of law and the Constitution to one based on the rule of judges who have cut their moorings to the basic charter—and who have been chosen by a highly politicized process that obscures the crucial and delicate issues involved.

Mr. President, that could not say it any better. It is incumbent upon this Senate to act responsibly. I believe acting responsibly would be to confirm Judge Bork to the U.S. Supreme Court.

I yield the floor.

The PRESIDING OFFICER. Under the unanimous consent order, the Senator from Arizona is recognized.

Mr. DECONCINI. Mr President, I think it is important for us to look at this confirmation process as, indeed, a process. Part of our duty as U.S. Senators as set out in the Constitution is to advise and consent. That means confirm or deny the confirmation of nominees by the President of the United States.

In doing so, indeed, I heard last night the senior Senator from Colorado urging everybody to keep cool heads. I think he used far better language than that in so articulating and I concur.

Mr. President, I would like to bring to my colleagues' attention some very disturbing reports that I have recently come across. According to the Washington rumor mill, the Heritage Foundation is completely financed and controlled by a foreign government whose objective is to steer American policy in the direction desired by this Government. Reputedly, high officials of the Heritage Foundation meet regularly with the governmental leaders of this foreign country to plot strategy to affect American policy. While these reports cannot be substantiated, I believe that they do lend credence to recent actions taken by the Heritage Foundation in the debate over the nomination of Robert Bork.

Mr. President, I think that all of us would be very disturbed by the allegations that I just made. Many people, hearing them said on the Senate floor, would believe that they must be true. In fact, they are not. I just made them up. I made them up to make a point; a point that I think has to be made. I am sure that all of my colleagues and indeed all Americans would believe that making up stories that have no foundation at all in order to justify a political position is reprehensible. Unfortunately, I have found myself the target of such a malicious practice.

I will read an excerpt from a column written by Gordon Jackson, managing editor of Policy Review, a quarterly publication of the Heritage Foundation. You will recognize the same phrases that I used in my opening remarks. The column said:

DeConcini's role in the confirmation process has been that of a very active partisan. His fence-setting through the hearings was, according to the Washington rumor mill, nothing more than a pose. Reputedly, he huddled with feminist groups two months ago to plot his strategy against Bork. While this cannot be substatiated, DeConcini's aggressive effort to misunderstand Bork's positions, which a transcript of the hearing will make abundantly clear, lends credence to the account.

I believe that I understand Judge Bork's positions on issues very well. I sat through the hearings. I read a number of articles, speeches, and cases. He sees the law as an instrument to protect government from its citizens rather than vice versa and to protect those in power from those who are not in power. But, I think that it is perfectly appropriate for a newspaper columnist to give his opinions on my performance in office. What I find to be so objectionable and irresponsible is the use of rumors that even the writer concedes cannot be substantiated. There is a very good reason why these reports cannot be substantiated. They are not true just as the one I made up at the very beginning is not true. They were made up because they supported the story that some people wanted to tell. They gave in to the temptation that has proven too strong for many of Judge Bork's supporters. Having failed to prove to the American people and the Senate that Judge Bork should be confirmed, they began to attack the Members of the Senate. Having lost the debate on the merits, and now losing it on the floor, they began to attack the process and those involved in it. "Something went wrong," they say. "My gosh, what has happened to us all of a sudden?"

It is obvious how damaging the tactic used by the Heritage Foundation in this instance can be. One cannot prove that something never happened. These allegations are very different from what Judge Bork's supporters claim his opponents did. These allegations are not matters of interpretations of language or legal decisions. What the Heritage Foundation has done is personally attacked the integrity of me. They have a right to do that, I guess, but I am withdrawing my statement about the Foundation because it is not true. They should do the same thing. I wonder too; how many other Members of this body that organization has done likewise, coming up with absolutely no proof and even admitting in their article that it cannot be substantiated.

That is the kind of politicizing we have seen here. I believe that Judge Bork and President Reagan, who appointed him, deserve a fair hearing. I said so from the very beginning. I said I had not made up my mind and I had not. I urge my colleagues here, "do not make up your mind." Give this man a fair hearing. I gave him a fair hearing. Although I think everybody did. Some people may disagree,. But I gave him a fair hearing. My conscience is very clear about that. I listened to Judge Bork. I asked him pointed questions. I read dozens of his opinions, his articles, and his speeches. I was there for all but one day for the hearings, including the days that Judge Bork testified. I attempted to be fair and objective to the extent that that is possible. I excluded considerations as to what it may mean to me politically back home one way or the other.

Judge Bork supporters have decided that something is wrong here because the process did not quite work out; they did not get a vote in favor of the confirmation. We did not hear this when Justice O'Connor was confirmed. They thought the process worked pretty well then, and it did. I was part of that process. In committee there were a few Senators who became exercised and had some objection to Judge O'Connor at the time, but they ended up voting for her. There was some opposition. The National Right-to-Life felt that she was not clear on what her position was on abortion. They testified in opposition. But when it came down to a vote, it was unanimous in committee and unanimous on this

floor. The system worked all right there, did it not? Yes. It worked just fine because it came out right. I think it came out right also.

When Justice Rehnquist was nominated to the Chief Justice of the U.S. Supreme Court, again the system was tested. How was it going to work? In that case there was some real opposition to Justice Rehnquist. There were witnesses from Arizona who came and attacked his credibility. There were people who said he was too far to the right, that he could not really be fair in his interpretation. This Senator made a judgment during the confirmation hearing that he was in the mainstream of conservatism and indeed should be confirmed. I went on the floor. I took part in that process. I argued in his behalf. The system seemed to work all right because he passed. If he did not pass, maybe his supporters would have said, "well, the system broke down." It did not work again. Doggone it, when it does not go my way, it just does not seem to work. Well, Justice Rehnquist was confirmed, as Justice Scalia was.

The supporters of Judge Bork are not here saying the system is working fine because now, it is not going their way. I think it is important to realize that what has happened here is President Reagan made a mistake. That is not terminal. We all make mistakes. He sent someone to the Senate who was not in the mainstream of conservatism and that individual tried the best he can. Those who support him I am sure are conscientious about trying the best they can to demonstrate that this man is a moderate. They have tried to show he is going to be the likes of Rehnquist, O'Connor, or Scalia, when, in fact, a close scrutiny demonstrates that he is not.

On October 8, 1987 the Arizona Republic published an editorial in which they espoused what I believe is a very valuable standard for all of us, including the Heritage Foundation and the Arizona Republic itself, to keep in mind during the debate; probably during any debate. They were making reference to the debate on Judge Bork. That standard is,

> Civility in public discourse, honesty in opposition, restraint in debate, and respect for the goodwill of one's opponents—these are the virtues on which democracy is nourished.

I believe that this standard has been violated by people on both sides of this issue. I regret saying so.

I do not believe either side has a monopoly on a pure approach to Judge Bork. That is unfortunate. That is part of the process. Does that mean it is all bad? No. It is too bad when it defames somebody and it is unfortunate. But it does not mean the process is bad and should be thrown out.

I urge my colleagues, and outside parties interested in the debate, to use civility, honesty, restraint, and respect as we discuss the nomination of Judge Bork to the U.S. Supreme Court. I especially ask the supporters of Judge Bork to respect the sincerity and honest motives of those who may vote or have decided to vote against him. I respect those who are voting for him. I believe Senators who support Judge Bork have concluded that this is the right person at this particular time, and I accept that, even though I disagree with it.

I may point out that it seems very likely Judge Bork is not going to be confirmed. Many who are now attacking the Senate will be supporting the next nominee. I think we need to look to the future as I have urged the President to do. We talk about how unfortunate the politicization of the process is unfortunate, but I guess it is probably something that we cannot avoid.

Let me just read a few quotes of politicians from different groups who have talked about the Supreme Court and even about Judge Bork. Let me just quote Bruce Fein of the Heritage Foundation, in Newsweek in October 1985. He said,

> It became evident after the first term that there was no way to make legislative gains in many areas of social and civil rights. . . . The President has to do it by changing the jurisprudence.

Mr. Fein also was quoted in Human Events on July 6, 1987. This Heritage Foundation official said,

> By packing the Supreme Court, President Reagan would be acting within the mainstream of American traditions to make the federal judiciary partially answerable to contemporary political influences.

Mr. President, on July 2, 1987, Pat McGuigon of the Free Congress Foundation was quoted in U.S.A. Today as saying:

> Bork has a constituency that will be easy to activate. This is very exciting.

There are other quotes. I could go on and on. Here is one from fundraiser Richard Viguerie, who I think is very recognized in our political system as raising substantial money for the far right and for conservative causes. He was quoted in the Washington Post July 2, 1987:

> Conservatives have waited for over 30 years for this day * * *. This is the most exciting news for conservatives since President Reagan's reelection.

It goes on and on. The Moral Majority, through its leader, Jerry Falwell, sent its members a fund-raising letter that said:

> I am issuing the most important "call-to-arms" in the history of the Moral Majority * * * our efforts have always stalled at the door of the U.S. Supreme Court * * *. President Reagan has chosen Judge Robert Bork * * * a pivotal person in getting the Supreme Court back on course * * *. I need your gift of $50 or $25 immediately. Time is short.

This is the person who had critical remarks, as you may recall, about Justice O'Connor. He was not sure that she could meet the litmus test of his judgment. This is the same person that Barry Goldwater, my former colleague, said that he ought to be kicked in the posterior. That is the kind of politicizing that has gone on the Bork issue on one side.

Unfortunately, we have seen politicizing by those who oppose Judge Bork. I regret that. But I do not hold any Senator here responsible for that. I do not see any names of Senators appearing in the ads that we have seen that have resulted, I believe, in the degradation of this process.

So I criticize those activist groups on the right and the left who want to make the process as political as they can with the hopes that, "well, maybe we can win this one." If they do not win it, it means to them that the process has broken down. They believe a mistake has occurred and therefore the process was not legitimate. Well, the process is legitimate. If you want to win you have to have a horse that can win. You have to have a thoroughbred and you have to have someone who can ride that thoroughbred well. You have to have the credentials and you have to be able to explain what you have done in your past as well as you feel about the Supreme Court or whatever the issue may be. If you cannot, you are going to get turned down.

President Reagan says, "Well, just wait, because I am going to send someone else up there you will dislike just as much." I guess that is supposed to put us in fear. "Oh, my goodness, what are we going to do?" I do not know if he can find someone else like Judge Bork, but let us assume that he could and he sends him up here. Are we going to shake? Are 100 Senators saying "That is it, we have to go along this time?" I think it was a good lesson when President Nixon tried to do that. This Senate is not going to buckle under because of political pressure. We are going to make our own judgments and some outside this body are going to disagree with our judgment. But we are going to make it based on what we think is right.

I am going to vote against Judge Bork for a lot of reasons. There is nothing evil about this man. He is indeed a scholar, and I recognize that. He has devoted a great deal of his life to his family, and I respect that immensely; and to his profession, as a teacher, a jurist, a lawyer, and as a public servant. He personal life is not why he is being confirmed as not confirmed—just based on that. He is being turned down for very solid reasons.

I have heard from thousands of people by mail, telophone calls, and personal meetings. What has struck

me most about these people is their sincere belief in their position as to what is best for this country. There are some who are way off the wall, who write threats and make conversations on the telephone that no one can repeat; but they are few, and I do not judge the public at all by those radicals, whether they be for or against Judge Bork.

Those who urge me to support Judge Bork's nomination are convinced that his judicial philosophy will lead America into a new era of prosperity and reduced crime. Those who urge me to oppose the nomination are clearly convinced that his judicial philosophy will lead America back into an era of discrimination, economic monopolies, and Government intrusion into our everyday lives.

Why has this single nomination aroused so much passion and rhetoric? Because, more than any other legal thinker in America I believe that Judge Bork has become a symbol for a return to the days when our legal system protected only the haves and did not care about or did not recognize the have-nots; the time when going to court meant your rights and liberties were being taken away, not being protected; an era when the judge read the Constitution to protect the rights of the powerful and not of the powerless.

Judge Bork is different from Justice O'Connor, Chief Justice Rehnquist, and Justice Scalia. He has spent his career as a legal scholar, criticizing in the harshest terms the Court and its decisions. He has used inflammatory terms to criticize the decisions that most people in this country credit with giving some measure of equality and respect to all of us. Not that I agree with all those decisions, because I do not. But I recognize the Court's right and its independence to make those judgments. That is why I supported Scalia, O'Connor, and Rehnquist with such vigor, because I believe they have what is necessary to make independent judgments on the Supreme Court. They are in the mainstream of conservatism, and I think that is very positive. It is what I like to see on the Supreme Court.

In my judgment, no other potential Supreme Court nominee in history has been as strident in his criticism of the way the Constitution has been used to protect individual liberties as Judge Bork has. That is the difference between the previous nominees and this nominee.

Judge Bork was chosen by President Reagan because of his career and what he has come to symbolize. I believe he should be defeated, and I am confident that he will be. It does not bother me that Judge Bork is a conservative. I consider myself a conservative. However, I do not believe it to be my responsibility to base my decision on nominees to the Supreme Court on their political views.

In the past, I have voted for conservatives, for liberals, and for moderates. I have supported right-to-life candidates. I have supported right-to-work candidates. I have supported strong labor-endorsed candidates. I have supported liberal candidates. I have supported candidates if I felt they have an understanding of what the Constitution is about and if they realize the importance of the Court and what it means to our lives. I have supported them if they would exercise their honest beliefs and if they do not have a long history of tearing down a system that is second to none.

I began my consideration of Judge Bork's nomination with the presumption that the President's nominee to office should be confirmed. During August, I read extensively of Judge Bork's writings, his opinions, his speeches, and many of his law review articles. I talked to hundreds of people in Arizona between August and the time the hearings started and also during the hearings. My preparation left me with a number of questions that I had to ask Judge Bork; and after 12 days of hearings, including 5 days when the judge was before us, all my concerns have not been allayed.

I am no longer concerned about some of the things that bothered me about Judge Bork. To his credit, he was candid and was able to dispel some of my concerns.

One thing that satisfied me was the so-called dismissal of Archibald Cox, the "Saturday Night Massacre." I was satisfied with the judge's explanation. I did not agree with his action, but his explanation certainly was not unsatisfactory enough for me to deny him my vote, based on my disagreeing in that particular instance. He did have a plausible answer to that incident.

I was also concerned as to his judicial activism. After reading some of his opinions, where he expounded philosophically for page after page, I asked the judge, "How can you be a restrained Justice who is not going to be an activist?" I laid out some of the things my reasons for being concerned.

He had a good answer. He said that those points he brought up after he made the ruling in the case were brought up by the appellants in the brief before him. That is legitimate. One of my staff members read those briefs and confirmed to me that indeed those issues were brought up by the parties in the case. So I accept that explanation from Judge Bork.

However, Judge Bork has expressed views on the Constitution that greatly concern me. His views would not protect individual rights of privacy. His position on the right to privacy was clear in the hearings.

The distinguished Senator from Delaware probed his views at great length. I also asked some questions.

Judge Bork criticized the Supreme Court in Griswold versus Connecticut, in which the Court said that a State prohibition against contraceptives violated married persons' constitutional rights of privacy. Not only does Judge Bork say that the Constitution does not protect the right of privacy, but also, he says that he would be unable to find any other provision of the Constitution that would have allowed him to overturn that Connecticut law. Judge Bork says that since the law was not enforced in Connecticut, it did not matter that the "nutty" law was even on the books.

Well, subsequent to that statement, I had several calls from gynecologists and lawyers in Connecticut and some who had moved from Connecticut, and they indicated that not only had the law been enforced but also, contraceptives were generally not available in Connecticut from 1940 until 1965, when the Griswold decision came down from the Supreme Court.

I believe the Constitution does protect the right of privacy. I am disturbed that an individual who is as intelligent and articulate as Judge Bork is unable to find this right and would have the private rights of American citizens at the risk of Government intrusion by the will of a simple majority.

Imagine having a Justice on the Supreme Court who would uphold a State or Federal law which said it was against the law for married couples to use contraceptives. Compare this with Justice Powell's concurring opinion in the 1978 case Zablocki versus Redhail:

> This 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 14th amendment. Our decisions indicate that the guarantee of personal privacy or autonomy secured against unjustifiable government interference by the due process clause has some extension to activities relating to marriage. While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified governmental interference are personal decisions relating to marriage.

In addition, this past year Justice O'Connor wrote an opinion for a unanimous Court, including Rehnquist, Powell, Scalia, and White, finding that prisoners have a constitutionally protected right to marry.

It disturbed me when Judge Bork before the committee stated he could not find a right of privacy within the Constitution. I did not tell him where to look because he knows. He understands what the right of privacy is, what the Court's decisions have been and what is at stake with the Griswold case. He came away saying that a right

of privacy could not be found in the Constitution and that is hard for me to accept.

Although I do believe that there is a right to privacy in the Constitution, I do not believe that it extends to abortion. I do not believe that any provision of the Constitution prohibits a State from regulating or prohibiting abortion. I have consistently and strongly supported pro-life issues throughout my career in the Senate and I will continue to do so. Some of Judge Bork's supporters have attempted to make the nomination into a referendum on Roe versus Wade, the Supreme Court's decision allowing abortion.

That is an important decision, one that I disagreed with and that I sponsored a constitutional amendment to reverse. That is not the issue with Judge Bork and I think people realize that.

I have rejected this reason on Roe versus Wade for three reasons. First, I object to judging any nominee on a single issue. I have no litmus test for judicial or political office. Second, we have no way of knowing how Judge Bork would vote on the Court on the issue of abortion and we should not have any absolute certainty.

Secretary Carla Hills, a Cabinet member under President Ford, testified that she did not believe that Judge Bork would vote to overturn Roe versus Wade.

She worked with Judge Bork. She qualified that statement saying she had no way of knowing, as none of us do. But she did not believe that he would overturn that decision.

So if you are looking for the right-to-life and the abortion issue, you have a very close associate of Judge Bork's who is pro-life and a former Cabinet member who testified under oath that she did not think that Judge Bork would vote to overturn Roe versus Wade. That is an opinion, but to me it certainly indicates that there is no guarantee with Judge Bork, just as there is not with anybody that you put on the Supreme Court.

And third, I have no doubt that if Judge Bork is not confirmed, the next nominee by President Reagan will also be conservative. To the extent that it is possible to determine, I am sure that any subsequent nominee appointed by President Reagan would share Judge Bork's and my own concerns about Roe versus Wade. Of course, we have no absolute assurance how any nominee or sitting Supreme Court Justice would vote even though we can speculate. We must also remember that justices have changed their positions from time to time.

Of course, we have no absolute assurance what anybody will do, as I indicated, and I do not believe that we should be looking for an absolute assurance.

Judge Bork has recently modified his views on the 14th amendment's equal protection clause.

This clause reads, "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws, a very short phrase, one that is so fundamental to all of us".

Although 5 months ago—I think it was June—he reiterated his long-held views that equal protection clause should apply only to racial and ethnic discrimination. He said for the first time during the hearings that the clause should apply to all Americans, including women.

While he did say that he would apply the clause to everyone, he did announce a new standard that he would apply to the equal protection clause of the 14th amendment, a standard that had never been used by the Supreme Court and has only been referred to by Justice Stevens, I believe.

The Court has for the last 15 years used a "heightened scrutiny" standard to review statutes that distinguish between groups based on sex.

Using this standard, the Court has consistently struck down statutes that discriminate against women.

Judge Bork said at the hearings that he would use a standard of deciding whether the statutes were "reasonable."

This is a new standard in the area of equal protection analysis.

Now some may say, boy, you really nit-pick, you prefer one standard of analysis over another standard of analysis, and because of that, you do not think Judge Bork is in the mainstream.

Let me say that Justice Rehnquist and the other Justices that have been appointed by President Reagan do not use the reasonable standard. They may not agree with the decision of the majority of the Court, but they acknowledge three existing standards and the heightened scrutiny standard in the area of sex discrimination, so I think it is indication to me clearly that this nominee is outside this area of mainstream conservatism which I think is absolutely necessary.

I am also concerned about Judge Bork's predictability. My concerns in this area are more difficult to articulate than in the aforementioned areas regarding the 14th amendment, but they are no less troubling to this Senator.

I do not believe it is necessary to be able to predict how a Supreme Court nominee will vote on any specific issue, nor am I suggesting that would be appropriate in any way.

The Senate should not demand this. We do not demand this in the committee nor do we on the floor of the Senate.

However, I do believe that it is important that Americans, particularly litigants before the Court and State legislatures trying to enact constitutional law, have an understanding of what the law is and by what standards their cases will be judged before the Supreme Court on constitutionality.

By his own statements, Judge Bork has been a socialist, a liberterian, and a political conservative. He modified at least two of his longheld views during or just prior to the committee's hearings. While I admire the ability to grow and change one's opinions, I did develop a troubling feeling about the predictability or unpredictability of Judge Bork's views. It is not because he has changed his mind about several important things. Change of mind is part of growth and maturity, and that I am prepared to accept that.

He has expressed a number of views about the role of the Court that add to my concerns in this particular area of predictability. His standard of review of equal protection cases leaves complete discretion to judges to determine what distinctions are reasonable. He told the committee that he would leave it completely up to the Court to determine what pornography is. I do not want judges making this determination, I want these decisions made by local officials. Furthermore, he has written that Congress and the legislatures do not understand the relationship between economics and antitrust laws and should leave it to the Courts to properly apply competitive principles. In his book, "The Antitrust Paradox," on page 412 to be exact Judge Bork said, "Congress as a whole is institutionally incapable of the sustained, rigorous, and consistent thought that the fashioning of a rational antitrust policy requires. No group of that size could accomplish the task." Judge Bork urges the Courts to interpret the antitrust laws using their own judgment as to what is best for consumers and business.

All of these factors have created grave doubts in this Senator's mind whether Judge Bork understands and would indeed be predictable as to what the process is as to who makes the laws in this country and who determines things such as pornography, antitrust laws and the interpretations thereof.

There are a number of other issues that have contributed to my decision to vote against this confirmation. William Coleman, former Secretary of Transportation under President Ford, former Congresswoman Barbara Jordan, and Atlanta Mayor Andrew Young testified quite eloquently about what the nomination of Robert Bork means to the black citizens of this country. Secretary Coleman said that, "So here you have a judge that in every instance on these great issues publicly as a scholar always comes out the wrong way." Secretary Coleman

was talking about Judge Bork's opposition to the Public Accommodations Law, as well as his criticism of decisions overturning poll taxes, literacy tests, and racially restrictive covenants in deeds.

Barbara Jordan told the committee about how she had run for the Texas House of Representatives twice and lost because of malapportionment. Later, after the Supreme Court handed down its series of cases beginning with Baker versus Carr requiring the principle of one man, one vote be followed in state elections, she ran for the state senate and won. Earlier this year, Judge Bork said, "I think this Court stepped beyond its allowable boundaries when it imposed one man, one vote under the equal protection clause. That is not consistent with American political theory, with anything in the history or the structure or the language of the Constitution." Had Judge Bork been writing for the Court, America would have lost one of its most articulate and powerful spokeswomen, As congresswoman Jordan said about Judge Bork's criticism of Baker versus Carr, "If that were the case, I would right now be running my 11th unsuccessful race for the Texas House of Representatives."

This is the problem, Mr. President. We have someone so far out of touch, so far away from the mainstream of constitutional interpretation. I think that what troubles me most about Judge Bork's criticism of one man, one vote is his accompanying deference toward State legislatures. If we did not have the one-man-one-vote proposition today where would we be? Look at the advancement of many, many States in certain particular sections of this country, and what one man one vote has meant for equal representation for everybody who is a citizen, to have an opportunity to participate in that most cherished and most protected right—the right to vote.

I was most impressed by the conclusion of Professor John Hope Franklin of Duke University. Professor Franklin, one of this Nation's most respected and honored historians said:

> Perhaps the greatest concern is that the remarkable and historic strides that this country has made during the past 35 years, and at least mitigating some of the cruder aspects of its problem of race, could become the victim of one who has rarely assumed this judicial restraint in this area. There is no indication in his writings, his teachings or his rulings that this nominee has any deeply held commitment to the eradication of the problem of race or even of its mitigation.

The final area of concern that I will mention is Judge Bork's extremely restrictive view of access to the courts. A group of legal scholars asked by Chairman BIDEN to analyze Judge Bork's judicial record reported to the committee that in 14 split cases involving individuals or public interest groups seeking access to the courts or to administrative agencies, Judge Bork voted against granting access. I am disturbed by the barriers that Judge Bork has, and I must assume would continue, to erect to individuals and groups seeking redress in the courts.

Judge Bork did have some changes before the committee, but he certainly did not explain these away.

There are a great many other things that I could talk about here today, Mr. President, but I know other Senators are waiting to be heard and I could go on for some time, because I feel very strongly about our obligation here. I take it very seriously. Next to having, God forbid, to have to vote one way or the other to declare war, I know of no more important decision that we must make.

I am satisfied that whether we agree or not, that almost all Members and maybe all Members of this body really have made this decision based on what they think is right in their own conscience, what they think is good for this country, for their State, and for the Supreme Court.

I think Judge Bork is an admirable person. As I said, I certainly regret these issues have become so personal between some Members here. Statements have been made that can be interpreted personally. I will not say that Judge Bork should not take the criticism of him personally, because I know that would be impossible.

However, I have attempted to divorce myself from the political rhetoric and come down to an analysis of what is really important to this country.

There are many fine legal jurists sitting today on various courts, some in the Ninth Circuit, that I have already recommended to the President for consideration such as Clifford Wallace and John Noonan, who should be considered, and I believe confirmed. All of us would want to scrutinize and look carefully. I have suggested Paul Laxalt of Nevada, the best friend of the President, supposedly, in the Congress, someone with whom so many of us have served here with for a long time and recognize his legal ability and certainly his position on many issues. John Rhodes, former minority leader in the House of Representatives and Congressman from the State of Arizona, just to mention a few. There is not a shortage of strong conservative people to be considered for the Supreme Court.

I urge the President to move ahead. He has 14 months or so left in his term of office. There are many big problems facing this country. He has an opportunity to enter into a meaningful arms control agreement with the Soviet Union. He has addressed, and I thank him for doing so, a willingness to work with Congress to do something about the trade deficit and the budget deficit. These are important issues. The Supreme Court nominee is important, but it is over. And it is over because the votes are not there. The process is not dead. The process is alive. It just did not happen to work out the way those who support Judge Bork would like to have had it work out.

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

Under the unanimous-consent order previously agreed to, the Senator from New Hampshire, [Senator HUMPHREY] is recognized.

Mr. McCLURE. Mr. President, will the Senator yield for a parliamentary inquiry?

Mr. HUMPHREY. Yes.

The PRESIDING OFFICER. The Senator will state his parliamentary inquiry.

Mr. McCLURE. What is the unanimous-consent agreement under which we are now operating?

The PRESIDING OFFICER. The unanimous-consent agreement was that the Senator from Oklahoma be recognized for 10 minutes, and that has been done; the Senator from Arizona be recognized without time limit, and that has been done; that the Senator from New Hampshire would next be recognized without a time limit. He indicated he intends to speak about 30 minutes, but he is not limited on time. After that, the Senator from Ohio, [Mr. METZENBAUM] is next to be recognized without an agreed time limit.

There is no further statement or order beyond that point, I would state to the Senator from Idaho.

Mr. McCLURE. Will the Senator yield further for a unanimous-consent agreement?

Mr. HUMPHREY. Yes.

Mr. McCLURE. Mr. President, I ask unanimous consent that the Senator from Idaho be recognized following Senator METZENBAUM.

The PRESIDING OFFICER. Is there objection? Is there objection? Hearing no objection, it is so ordered.

The Senator from Idaho will be recognized following the Senator from Ohio [Senator METZENBAUM].

Mr. McCLURE. I thank the Chair and I thank the distinguished Senator from New Hampshire.

The PRESIDING OFFICER. The Senator from New Hampshire.

(Mr. BREAUX assumed the chair.)

Mr. HUMPHREY. Mr. President, the revelation by the New York Times that a witness in support of the Bork nomination was intimidated by Senate staff is very distressing; that an aide to a Senator phoned the witness and suggested that if he appeared as he planned he would be humiliated is profoundly disturbing.

The witness is said to have told his friends: "I just couldn't take the heat."

Indeed, he could not, he canceled his appointment. After flying to Washington, he canceled at the last minute.

Now, we can understand the reaction. It is perfectly human. For those who are not used to the prospect of testifying before a committee of the Congress, especially one which is being telecast live and nationwide, can be very unsettling. On top of that, to receive a call from a Senator who opposes the nomination telling you that "If you come here, you become the issue" has to be chilling.

To be told by the aide that Senators will try to make you look foolish in front of your family and your friends and your associates and your colleagues and the tens of millions, presumably, of Americans who might be watching, must be little short of terrifying.

So we can sympathize with the witness. We can understand when he says he could not take it. We regret that the committee had to do without Professor Baker's testimony because he is a professor of law and a professor of law who is black. His testimony would have been especially valuable. But we are not surprised, at least this Senator is not surprised, to learn of intimidation. After all, much of the public relations campaign against Judge Bork has been based on fear and intimidation.

Nor are we surprised to learn that the aide who intimidated a black law professor is, herself, black. Because, after all, many of the leaders of the black organizations of this country have intimidated their membership into opposing the Bork nomination by resorting to the slander that Robert Bork would return America to the days of segregation, discrimination, and all the ugliness and injustice of the days of Jim Crow.

How ironic it is that black citizens, no longer intimidated, thank goodness, no longer intimidated by the fear tactics of segregationist of an age gone by, should now be subjected, at least on a psychological level, to fear tactics from some of their own leaders. How ironic and how tragic and how unjust.

Parenthetically, I know that I will be tagged as a racist for that statement. One of the unwritten laws of contemporary politics is that you never speak ill of black organizations. And that, too, is unfortunate.

Nonetheless, according to the New York Times report the Senate aide suggested she was just trying to do Professor Baker a personal favor when she persuaded him not to testify. She suggested he was not—she suggested he was not up to the questions on constitutional issues which Senators might pose.

How perfectly preposterous. The professor is a professor of law. He is a former dean of the Howard University Law School. Are we really to believe that the Senate aide considered a law school professor and the former dean, a former dean of the Howard University Law School, a man of her own race, as incompetent to testify? Are we supposed to believe that excuse?

Her explanation is simply implausible. Whatever her intent, whatever the true explanation of this incident—and it is under investigation by the Senate Judiciary Committee and, I understand, by the Justice Department—whatever the intent, the effect was that a witness who was friendly to the nomination, a black law professor who would have been an important witness, after flying to Washington changed his mind at the last moment and decided not to testify.

It is not at all surprising, at least to this Senator, that at this juncture a chapter on scandal should be added to the continuing story of the Bork confirmation. It is not surprising that an unethical act of scandalous proportions should have arisen out of the atmosphere of fear and hysteria, deliberately created for political purposes by the Bork opponents—or I should say by many of them. There have been, of course, many Bork opponents who have been perfectly ethical. I do not mean to lump them all together. But at the same time I stand by the statement that it is not only not surprising, but only logical and fitting that an unethical act of scandalous proportions should arise out of this climate of fear and hysteria, deliberately created by those irresponsible Bork opponents.

The last 3 months within the Senate, and more importantly without—let us face it, this nomination is being decided not within the confines of the Senate or the Judiciary Committee but instead within the confines of the borders of the United States of America.

Some might say that is fine. This is a democracy. I will address that point in just a moment. It is not fine. Not in the least.

The result so far, at least, has been the perpetration of a gross and shameful injustice against the person of a fine citizen. The person of Robert Bork. What is worse, a violent savaging of the once civil and reasonably apolitical process of confirming Supreme Court Justices.

Are the words "irresponsibility" and "villainy" too strong to apply to the conduct of some of the Bork opponents? I think not. I think they perfectly characterize, for instance, the effort of a prominent Bork opponent who, at the outset, deliberately, by his own later admission, set the tone which many of the Bork opponents would follow. This public person claimed that if Robert Bork were confirmed to the Supreme Court, "Women would be forced into back-alley abortions; blacks would sit at segregated lunch counters; rough police could break down citizens' doors in midnight raids; school children could not be taught about evolution."

That was the first uttering of a person of any prominence to follow immediately upon the heels of the announcement by the White House that Robert Bork was the President's nominee.

One of the public persons who was to become a leader in the anti-Bork forces made that demagogic, irresponsible, unfair, unfounded statement which received very wide circulation. It is little wonder in the climate which followed and arose out of that kind of demagoguery, that scandal and intimidation would become a part of this process.

Who can be surprised, then, that a made in Hollywood television ad featuring a famous Hollywood actor played a pivotal part in the smear of Judge Bork? Who can be surprised that in this climate a Senate aide committed, at the least, at the least, a serious impropriety in persuading a black witness to cancel his appearance before the Judiciary Committee? Who can be surprised that another black witness, supporting the nomination, former Deputy Solicitor General Jewel La Fontant, was told of third-party threats to institute a boycott against a cosmetics company on whose board she serves?

To her great credit, Mr. President, Miss LaFontant chose to testify, notwithstanding the threats and the pressure. Even though she said recently she took those threats seriously.

Fortunately there have been notably lofty points in this debate as well.

There have been times when witnesses with no political axes to grind, when witnesses with unimpeachable credibility, broke through the anti-Bork hysteria. One such witness was retired Chief Justice Warren Burger.

Prior to the hearings, at this summer's American Bar Association convention, Justice Burger said, with respect to the Bork nomination:

> I do not think in more than 50 years since I was in law school there has ever been a nomination of a man or woman any better qualified than Judge Bork.

Is Warren Burger the kind of man who would make an unfounded statement of that kind in that magnitude? Surely not.

Is Warren Burger a partisan politician? Surely not.

Is Warren Burger bucking for some higher honor in the legal profession? Surely not. He has gathered all the laurels, won all the honors which any man or woman can gather in the profession of the law. And he said he did not think in the more than 50 years

since he was in law school there has ever been a nomination of a man or woman better qualified than Judge Bork.

I would like to see a Senator rise and explain away this accolade, coming from someone of unimpeachable credibility.

Is Warren Burger an ideologue, a racist, extremist, sexist, any of these nasty things that some of the opponents have thrown at Judge Bork? Of course not.

That is a profound statement. It ought to have profound significance. I hope that before this debate is over, it will.

When he came before the Judiciary Committee, Justice Burger said this of Judge Bork: "He is well, very well, qualified." He did not attach any conditions to that statement. He said, "He is well, very well, qualified."

Regarding the charge that Judge Bork is outside the mainstream of American jurisprudence, Chief Justice Burger told the committee, "If Judge Bork is not in the mainstream, neither am I, and neither have I been."

To this Senator, at least, that kind of testimony, coming from an unimpeachable witness, a witness of unimpeachable credibility, and clearly with no axes to grind, has far more weight than the clamoring of a group of special interest groups with their selfish agenda screaming for Judge Bork's scalp. I suggest to Senators that, likewise, that kind of testimony ought to have great weight.

We had over 100 witnesses. The chairman and members of the committee were diligent and hardworking in accommodating that many witnesses. There is no question about that. Over 100 witnesses.

But only with respect to a small handful could the statement be made that these were witnesses with no axes to grind. Only a few stood out as unimpeachable in their credibility. One of those, of course, was recently retired Chief Justice Warren Burger.

He said, "If Judge Bork is not in the mainstream, then neither am I and neither have I been."

Regarding the charge that Judge Bork is an extremist, Chief Justice Burger said, "It would astonish me to think that he is an extremist any more than I am an extremist."

Replying to the question Robert Bork someone whom black citizens and other minorities need fear, Chief Justice Burger said, "If they need fear him, they should have been fearful of me. I can see nothing in his record that would suggest that or support that."

Regarding the campaign conducted against Judge Bork, Chief Justice Burger said, "I do not think there has ever been one with more hype and more disinformation on a nominee than I have observed in recent days."

The proponents have accused the opponents of disinformation, and vice versa. There has been a lot of disinformation, unfortunately. Even Chief Justice Burger felt compelled to speak out against it. He said:

> I do not think there has ever been one with more hype and more disinformation on a nominee than I have observed in recent days.

Mr. President, compare Chief Justice Burger's words with those of the public person whom I cited a moment ago who claimed that Bork would force blacks to sit at segregated counters and that police would be beating down their doors. If you were jurors, to whose words would you give greater weight, the words of a retired Supreme Court Chief Justice, a man who has no political axes to grind, or the demogoguery of a public person, the man I quoted?

If you were jurists, whose words would have greater weight with you?

The answer is obvious. It is equally obvious that, in fact, we are jurors of a sort. We are jurors of an important sort, of a historical sort.

The question we are to decide is no longer whether Robert Bork should be confirmed. That question was answered by those witnesses whose testimony stands out from the rest because of its self-evident and unimpeachable objectivity.

They are Chief Justice Warren Burger, Carter administration Attorney General Bell, White House adviser Lloyd Cutler, to name a few. Of course Robert Bork is well qualified. Of course he ought to be confirmed.

The real question is, the historical question is, whether the Senate will abide the vicious, dishonest tactics used by many of the opponents of the nomination. The question is whether Senators will abide the raw politicizing of a process which above all others we must protect from politics, even at the expense of our political fortunes, may I say.

That is easier for a Senator from New Hampshire to say. I will get to that point in a moment. But even at the expense of political fortunes of Senators must we protect this process above all others from politics, this process by which we confirm or do not confirm a Supreme Court Justice.

The real question is, the historic question is, whether the Senate will stand up to the political pressures brought to bear by those who have politicized this nomination.

Mr. President, I am going to wade even deeper into more controversial waters because some things need to be said.

Mr. President, there are groups in this country who think they own Senators. Let me illustrate the point.

I note that shortly after the nomination was made, an official of the NAACP in a large Northeastern State had the gall to assert that she had one of that State's U.S. Senators in her pocket. A column by Mark Shields printed in July related that this NAACP official introduced the Senator to an NAACP convention as someone who would certainly vote against the nomination of Judge Bork.

When later she learned, to her evident annoyance, that the Senator would not say at that point how he might vote, this NAACP official responded, "I have the votes to defeat him. When I get together with his staff I will get what I want. It is strictly politics."

Mr. President, we can certainly understand the anger of the Senator, the displeasure of the Senator, the mortification of the Senator, when he later heard about that statement. But the fact remains, many of these groups—and I am not talking only about black groups—many of these groups expect Senators to knuckle under or else.

The question is, the historic question facing us, whether the Senate will bow to that kind of pressure and knuckle under.

By the testimony of the most credible witnesses, the witnesses of the most unimpeachable objectivity, Robert Bork has passed his test. The question is, will the Senate pass its test?

On this point, the senior Senator from Oregon recently made a landmark speech in this Chamber, a speech of historic importance. To this Senator, it is one of the best speeches in the whole debate within the Senate and without. I hope that Senators who were not able to hear the speech will read it in the CONGRESSIONAL RECORD of October 7, beginning on page 26877. Those who read it I guarantee will be very impressed.

I do not agree with all of the opinions expressed in that speech, but it was an extraordinary clear speech. It was incisive, it was powerfully analytical and, above all else, it was intellectually honest.

That is certainly not surprising to anyone because Senator HATFIELD is richly blessed with intellectual honesty and courage. So we are not surprised in the least what valuable commodities are those in this debate, intellectual honesty and courage.

Given the political pressures which Senators are under, the Senator from Oregon terms himself a liberal. As a conservative I would certainly acknowledge the accuracy of that self-designated label. He is a liberal. He says he is a liberal. I am disposed to believe it.

That makes his support of Judge Bork that much more credible.

About the nature of the campaign waged against Judge Bork these 3 months, he said,

But never before have we seen the type of political viciousness which is unique to the television age threaten the independence and integrity of the judiciary. It has transformed a good man into an evil symbol.

The words of Senator HATFIELD.

Speaking of Bork's opponents, the Senator said:

If you listen to the logic of his detractors, he must have been a danger to the Republic in 1982.

Where were they then? We had the same documents, the same opinions—the same writings. There is no escape from the change: This Senate was either asleep at the wheel and therefore derelict in its duty or there is something very wrong with what is occurring right now. Something very, very wrong.

And he is in that passage of course referring to the fact that in 1982 this body by unanimous vote confirmed Robert Bork to the D.C. Circuit Court of Appeals, the second most important court in this country. And indeed he is right, or almost right. We had almost all of the same writings available in 1982 as are available now. We had almost all of the same speeches. And if those documents and speeches constitute an indictment against this man, they constituted an indictment in 1982.

Then listen to these next words. They are both wise and powerful. The Senator from Oregon said:

This nomination debate has been described as a lynching. That imagery should serve as a reminder to all of us. For it is at moments such as this when we should remember that the independence and integrity of this Nation's judiciary is sometimes all we have to protect us from popular hysteria and the tyranny it feeds when there are no cool heads left.

Listen to this especially because it so fits the situation:

When we politicians cower in fear of an arrogant majority or a potent minority, we had better hope that there are people seated on the bench who are willing to accept the accusation that they are "narrowly legalistic"—as Judge Bork has been accused.

And then Senator HATFIELD concluded:

If I thought for a moment that this man was capable or likely or disposed to turn back the clock on civil rights, on antidiscrimination laws, on privacy—on any form of civil liberty—I would be leading the opposition on this floor today. But that is not the case and I think most of us know that is not the case. With all of the legitimate concerns one may have—and there have been many voices of reason opposing Judge Bork struggling to be heard above the catcalls—there is no question in my mind we will live to regret the powers which this body seems intent on pursuing.

"When we politicians cower in fear of an arrogant majority or a potent minority, we had better hope that there are people seated on the bench who are willing to accept the accusation that they are narrowly legalistic." And that, I suggest—my words—is precisely the situation in which we find ourselves, politicians facing in this case potent minorities and in some cases politicians cowering in fear of that situation.

Mr. President, is there another Senator in this body more highly regarded for this sense of fairness and his intellectual honesty than Senator HATFIELD? He is in many ways the conscience of the Senate. He is sometimes a troubling conscience, sometimes a real pain, when his principled positions reproach us, but we can always depend upon Senator HATFIELD for fairness, intellectual honesty, and courage. That is why I believe that his words carry so much weight in this debate. That is why I sought his permission to quote extensively these passages. His words bear repeating and rereading in this debate.

Mr. President, the partisan tactics employed by many of the Bork opponents ought to frighten every American. The damage wrought against the once civil and objective confirmation process is incalculable. The viciousness of the anti-Bork campaign will have a chilling effect on talented young men and women who are the potential Supreme Court nominees of the future. We may be sure that they will be extraordinarily circumspect in their writings and their speeches henceforth. They will speculate publicly about Court decisions with the greatest care, if indeed they speculate publicly at all. What is worse, the best of them may be 20 or 30 years down the road, unwilling at all to be considered for nomination, not wanting to subject themselves and their families to the kind of lynch-mob tactics employed by many of the Bork opponents.

With so much at stake before we vote, with the greatest respect, and for the most part affection in the long run, the affection I have for Senators, though like all Senators I sometimes grow impatient with certain of my colleagues, but nonetheless with the greatest respect I urge Senators to review once again not just the committee report, which, frankly, I have to grant is propaganda—it is really a hatchet job—not only the committee report but the transcript, the unedited transcript.

I cited earlier the unimpeachable remarks of Chief Justice Warren Burger in support of Robert Bork. Surely Senators will find the testimony of Lloyd Cutler of unquestioned credibility. Lloyd Cutler has had a long struggle to advance the civil rights movement. Mr. Cutler served as While House counsel to President Carter, and by his own description, he is a liberal Democrat. Surely he is not a man who would beat the drum for Republican initiatives or Republican candidates or nominees and yet he testified in support of confirmation.

He said:

Based on my reading of this written record—

And here he was referring to Judge Bork's record as Solicitor General and appeals court judge——

Based on my reading of this written record, and on 20 years of personal knowledge of Judge Bork, I have appraised him as a highly qualified judge, a conservative jurist who is closer to the moderate center than the extreme right.

Lloyd Cutler, a liberal Democrat, a man long active in advancing civil rights, President Carter's White House counsel, says Judge Bork is highly qualified. He says Judge Bork is closer to the moderate center.

He said:

I would be prepared to bet that if Judge Bork is confirmed the journalists and the academics of 1992, 5 years from now, who follow the Court will rank his opinions as nearer the center than the extreme right, nearer to the center than some of the other sitting judges on the Court whom you have confirmed, and fairly close to those of the very distinguished Justice whose seat he would fill.

Mr. President, compare that testimony of unimpeachable, unchallengeable credibility, of Lloyd Cutler, with the claptrap about the rogue police beating down our doors in the middle of the night. Compare that with the effort to incite fear, successful, I am sorry to say, among black citizens, a red-hot rhetoric about blacks having to sit at segregated luncheon counters if Robert Bork is confirmed.

Does anyone believe that Lloyd Cutler would support a man who is a threat to the rights of citizens? Of course not. Are Senators going to dismiss his testimony in favor of pressure groups with their own agendas? In favor of the academic community which nowadays is so reduced in intellectual diversity that a book, "The Closing of The American Mind," which is critical of the narrow-mindedness of academia, has become a best-seller?

Much has been made, and 40 percent of the teaching law professors signed a letter in opposition to Judge Bork. That in this day and age could be read as a commendation. There is no breed, no practitioners of a profession who are more political than lawyers. If there is a class who are even more political than lawyers, it is law professors. Those who are familiar with the working of Roth and Lichter 2 or 3 years ago know that academia today is almost monolithically political and that applies to the law schools perhaps even more than academia in general.

So why should we be surprised that so many law professors opposed Judge Bork? I take it as a commendation.

Does anyone question the commitment to civil rights and equality of former attorney Gen. Griffin Bell? Certainly not. Does anyone suspect

Griffin Bell of harboring support of the Republican agenda? Certainly not, he served in President Carter's Cabinet and is a Democrat. He is, as far as I know, a life-long Democrat. He is certainly a confirmed Democrat. Does anyone believe Griffin Bell is careless about the quality of American jurisprudence, as a man who has devoted his lifetime to the profession of the law? Surely not. Surely he cannot be accused of that.

Here is what Attorney General Griffin Bell said about Robert Bork:

I think he is a conservative, but he is principled, he is rational, and I think that he would not wear anyone's collar. I doubt President Reagan knows what he would do, and I like that. I like to see a man on the Court who is going to be his own judge, be his own man, and I think that is the way it is going to turn out * * * so I think that he is in the mainstream myself—

Said Griffin Bell—

on the conservative side. If I thought he was going to turn back the clock—

And here this is the famous phrase which has incited so much fear in the black citizens, amongst black citizens—

I would not support it.

Mr. President, does anyone think that Griffin Bell would support an ideolog? Certainly not. Are Senators going to dismiss Griffin Bell's testimony in favor of pressure groups and the academic community nowadays dominated so heavily by the far left?

I am glad to say, Mr. President, that while most black organizations oppose Judge Bork unreasonably and unfortunately, nonetheless the committee heard testimony from Roy Innis, a distinguished black American who is chairman of the Congress on Racial Equality. Mr. Innis had this to say:

I support the nomination of Robert Bork * * * because I believe that he will apply the law in a fair and evenhanded way. His record as Solicitor General and as a Federal appellate judge attest that Justice Bork would vigorously enforce the civil rights laws on our statutes, books, and the Constitution. I also believe—

Roy Innis said—

Judge Bork's presence on the Supreme Court can contribute mightily to the efforts to confront and mitigate one of the most pressing problems facing black America and today—urban crime.

Mr. President, does anyone question Roy Innis' devotion to the cause of civil rights? Of course not. Does anyone suggest that Roy Innis is a racist? Of course not. An extremist, outside the mainstream, a sexist, any of these other nasty labels that have been thrown at Robert Bork? Of course not.

Then why did Mr. Innis appear as a witness for Robert Bork? Here is what he said. He said:

I believe quite frankly he—

Bork—

has become the victim of a rigid and selectively unforgiving civil rights movement orthodoxy to whom the results desired have become more important than the fair and impartial application of the law.

There you have it, Mr. President, from one of America's most distinguished black citizens. He put his finger right on it, I believe, with respect to the almost monolithic opposition of groups which purport to speak for black citizens when he said with regard to Bork that—

I believe quite frankly he has become the victim of a rigid and selectively unforgiving civil rights movement orthodoxy to whom the results desired have become more important than the fair and impartial application of the law.

In other words, he is saying that Bork has become the victim of an unforgiving movement to whom results are more important than the process. That really goes to the heart of the debate.

Those who like activist judges, subjective judges, are more concerned about results than they are about preserving the process, the integrity, and the independence of the judiciary, and the legitimate powers of the legislature, may I say.

I would like to hear a Senator stand and rebut, effectively rebut, the testimony of Warren Burger, Lloyd Cutler, Griffin Bell, Roy Innis, four of the most credible witnesses, in the opinion of this Senator, among the 100-plus who appeared before the committee.

Mr. President, I will say it again: Robert Bork has passed his test. He passed it during the 4 years he served as Solicitor General of the United States during which time he argued for extending the application of civil rights laws in 17 out of the 19 cases of that kind he argued before the Supreme Court; 17 out of 19. His opponents cavalierly and truly cruelly dismiss Robert Bork's record as Solicitor General, and appellate court judge, dismiss it; say it is irrelevant, with one exception. Of course, they are perfectly willing to have another long and hard look at the Cox affair, the dismissal of Archibald Cox. That is relevant, that one element, plucked from 5 years' service or 4 years' service as Solicitor General. That is relevant. That is fair game. But the rest is all irrelevant, they tell us. Do not consider it.

They falsely claim that the Solicitor General simply follows instructions from his superiors and that an appellate court judge simply follows the precedents of the Supreme Court. If that were so, we would not need circuit court judges. We could do it with computers. All they would have to do, the clerk could type in the facts of the case and the computer would consult Supreme Court precedents, and the result would be spit out. Think how much money we could save and how much time. But of course that is not true. Cases on appeal to the appellate courts do not fit nicely into preexisting Supreme Court pigeonholes called precedents, not at all.

You can tell a great deal, and indeed you can forecast pretty accurately the future conduct of a Supreme Court Justice based on his record in this case, extensive record, as an appellate court judge on the second most important appeals court in this country.

Bork's opponents tell us to dismiss the most comprehensive, the most concrete, the most revealing possible evidence available of how Robert Bork would approach his responsibilities on the Supreme Court.

How is that for cynicism? The Bork opponents want us to throw out the most objective evidence by which Judge Bork's conduct as a Justice might be estimated. It just shows again how completely unprincipled is much of the opposition to this nomination.

In 1982, the Senate unanimously confirmed Robert Bork as a judge of the D.C. Circuit Court of Appeals. In the ensuing years, Robert Bork has served with truly remarkable distinction. His decisions were in the mainstream on that court, and that says a great deal when you consider that some very liberal judges sit on that bench.

Judge Bork voted with Judge Wright in 75 percent of the cases in which they both participated. He voted with Judge Wald, a liberal judge, in 76 percent of the cases. He voted with Judge Edwards in 80 percent of the cases. Judge Bork voted with Abner Mikva, the liberal's liberal, in 82 percent of the cases in which they both participated. Judge Bork voted with Judge Ginsburg in 91 percent of the cases.

Does that sound like the record of an ideolog, a man who is outside the mainstream? It certainly does not.

In the 10 cases in which Judge Bork sat which involved substantive civil rights claims, he sided with the minority person or woman or older citizen 7 of the 10 times. In the three cases where he ruled against the plaintiff, Judge Bork was upheld by the Supreme Court in two of those cases.

Overall, Judge Bork has joined in over 400 opinions, of which he wrote 125, and not 1, as is now well known, was ever overturned—not 1. Never overturned by the Supreme Court. Does that sound like the record of an extremist, the record of an ideolog, the record of a man outside the judicial mainstream and whose conduct cannot be trusted?

Let me rebut the charge which the opponents always raise at this point. They say, yes, he is industrious and has participated in a lot of opinions. Yes, none of his opinions in which he has joined has ever been overruled, so far, with one exception, one case pending on appeal, not yet decided. The op-

ponents say, yes, he has never been overturned in any of the decisions he has joined, but none of the decisions which he wrote has ever been taken under appeal by the Supreme Court, with the one exception that has not been decided.

Two points with regard to this fallacious discounting of the important fact that Judge Bork has never been overturned by the Supreme Court, notwithstanding the prolific number of opinions.

First, if Bork were the ideolog painted by his opponents, the Supreme Court, believe me, would have found plenty of cases among the more than 125 that he, himself, wrote that were worthy of review. But it did not find among those 125 any that were worthy of review, except 1, and that is pending.

The paucity of losing parties who felt a Bork decision worth appealing and the refusal of the Supreme Court to review Bork's opinions, save the one pending, it an impressive commentary on the soundness of Judge Bork's reasoning.

The second point: In fact, the Court has reviewed three opinions which Bork clearly wrote himself. These were opinions in which he formed the minority opinion by himself. These were three-judge panels. A majority was two and a minority was one, and obviously he wrote the dissenting opinion. The Court has reviewed three of those dissenting opinions, those minor opinions which he wrote, unquestionably. How did the Supreme Court rule in those three dissenting cases? It concurred in Bork's decision in all three.

So there are three that he wrote—uphill opinions, if you will, in that they stood against the majority—and the Court upheld him three out of three. That is pretty impressive.

Mr. President, clearly, the Senate was right in confirming Robert Bork to the second most important court in the land. So, why the change in opinion 5 years later by Senators who were here in 1982 and who voted for Judge Bork?

Clearly, all of Bork's writings and speeches were available to us, as I pointed out in my opening remarks before the Judiciary Committee hearings. The same material which Senators now say constitutes evidence of unfitness was available to us in 1982. Were Senators irresponsible in 1982? Did they confirm an ideologue to a court which is the second in importance only to the Supreme Court? Did they confirm a racist, a sexist, an enemy of civil rights? Of course not.

Then, why the change in opinion? We know the reason: pressure group politics. Some Senators are prepared to repudiate not only Robert Bork; some Senators are prepared to repudiate their vote in 1982. Indeed, some Senators are prepared to repudiate themselves, so worried are they about politics.

Senators were impressed by Robert Bork in 1982. They should be more impressed by Robert Bork in 1987, because his record is now even more impressive than it was 5 years ago. Any fair examination of his record as Solicitor General and as appeals court has to impress.

Unfortunately, the leaders of outside groups demanding that we string up Robert Bork are not prepared to be impressed, because they are not prepared to be fair. They have one object, and that is an activist Supreme Court with subjective judges who will do their bidding, just as they would have us do their bidding—or else.

Most black organizations want an activist Supreme Court with subjective judges, as do most women's organizations. I want to make clear that I do not believe these self-appointed black organizations represent all blacks, that these self-appointed women's organizations represent all women, or that these self-appointed homosexual rights organizations represent all homosexuals. I am not suggesting that these are monolithic blocks of citizens, not at all. But the ones that make the noise want an activist Supreme Court with subjective judges.

The question is, Will the Senate knuckle under and give them what they want? It is ironic, because citizens most threatened by subjective judges, judges who read into their opinions their own values and their own prejudices, are the greatest threat to minority citizens. Does anyone need proof? Just look at some of the most discredited Supreme Court decisions down through history.

The Supreme Court, despite its lofty reputation—because it is made up of human beings, as is the Senate—has made some supremely bad, unspeakably bad, decisions on those occasions when Justices chose to play the role of legislator and policymaker instead of judge.

The most famous example, of course, and the most unfortunate and tragic of all, is the Dred Scott decision of 1857. In Dred Scott versus Sanford, the Court rules that laws passed by Congress regulating and outlawing slavery in the Western Territories were unconstitutional. The Supreme Court took away from Congress the authority to regulate or to abolish human slavery in the territories.

Even worse, if that is possible—and it is possible; they outdid themselves—the majority claimed that black human beings are an inferior race, and even if free, can never become citizens of the United States. If ever there was a racist Court decision, that was it. If ever there was a subjective decision, that was it. If ever there was a decision not grounded in the Constitution, that was it.

If ever there was a decision that arose out of the personal values and prejudices of judges that was it.

Dred Scott perpetuated human slavery for another 10 years and certified the racist notion that blacks were legitimately objects of property and not worthy or entitled to citizenship. It took a Civil War and an amendment to the Constitution to undo the injustice before this body. Any fair examination of his record as Solicitor General and appeals court judge has to impress. Unfortunately, the leaders of the outside groups demanding we string up Robert Bork are not prepared to be impressed, because they are not prepared to be fair. They have one object, and that is an activist Supreme Court with subjective judges. Most black organizations want an activist Supreme Court with subjective judges. Most womens' organizations want an activist Supreme Court with subjective judges. Most homosexual groups want an activist Supreme Court with subjective judges. The question is, Will the Senate knuckle under and give them what they want?

It's ironic, because the citizens most threatened by subjective judges, judges who insert their own values—and prejudices—into their court opinions are minority citizens. Does anyone need proof? Just look at some of the most discredited Supreme Court decisions wrought by the Supreme Court in the Dred Scott decision. It took a bloody Civil War, in which hundreds of thousands died and many thousands more suffered, with decades more of suffering by black and white citizens alike, to undo Dred Scott.

On what basis did the majority reach their decision in Dred Scott? Justice Curtis, one of the dissenters, bless his soul, in his lengthy dissent, essentially accused the majority of making up their ruling out of thin air. The majority opinion was a subjective judgment. The majority wanted a particular result, given their own set of values, or prejudices, and they sacrificed the process and a lot more to get it. To result-oriented judges, judging is simply an extension of legislating. But where legislators can be held accountable, and that is what Senators are worried about, many of them, in this Bork matter, being unfairly held accountable, where legislators can be held accountable for their sins, judges appointed for life cannot. That is the danger of judges who cannot restrain themselves to leave out of their opinions their own values and prejudices.

Blacks and other minorities would be wise today to remember the bitter tragedies they have suffered at the hands of subjective judges.

Take another, one more case. Take Lochner, for another example of Jus-

tices acting as legislators. In the 1905, Lochner versus New York decision, the Supreme Court overturned a New York law designed to correct some of the worst abuses perpetrated against working men and women. The law limited the workday to 10 hours. We could do well with a law of that kind around here, I might say. Ten hours would be a pleasant relief from the 12- and 14- and 16-hour days we have.

But to get back to history, this law which was struck down by Lochner limited the workday to 10 hours and the workweek to 60 hours. For its reasoning, the Court invented a new doctrine, that of substantive due process, which was used not only to strike down Lochner but ultimately over the next 30 years, a host of State and Federal laws that protected workers from sweatshops, eliminated child labor, and reduced workplace hazards. In other words the Court got itself wholesale into the making of policy, usurping the role of the legislatures. President Franklin Roosevelt criticized the Court severely. He said, "The Court has been acting not as a judicial body, but as a policymaking body." Continuing, he said:

> The court * * * has improperly set itself up as a third house of Congress—a superlegislature, as one of the Justices has called it—reading into the Constitution words and implications which are not there and which were never intended to be there.

Should not blacks and others who have a special reverence for President Franklin Roosevelt share his concern about judges who read into the Constitution words and implications which are not there? I think they should. Should not minority citizens be concerned about judges who cannot restrain themselves from interjecting their own values—including prejudices—into their court decisions? The answer is obvious. Should not minority citizens support a judge who embraces, indeed practices, judicial restraint? Of course, they really should. Judges who cannot practice judicial restraint are a danger to citizens and especially minority citizens, as we have learned at such great cost whenever the Supreme Court has gone beyond interpreting the law to making the law.

If subjective judges playing legislator have been a danger to minority citizens down through the years, what kind of Justices should we seek? We should seek Justices who practice the time-honored doctrine of judicial restraint. That means that the Justices should base their decision, first of all, on the clear, plain meaning of the Constitution and then upon the most objective possible reading of the intent of the framers and the amenders and the ratifiers of the provisions of the Constitution. Justices should apply the Constitution to contemporary cases which they could never have envisioned, of course, by applying the clear meaning and intent and by applying inferences reasonably drawn from the intent. But where there is doubt about the intent and the meaning, matters should be left to the democratically elected legislatures. That is what judicial restrain is about. That is what the separation of powers is about. That is what accountability to the people is about. It is the difference between subjective judges and objective judges. It is the difference between the rule of law—the protection of the law—and the rule of princes wrapped in judicial robes. Princes can indulge themselves and their fancies. Judges must not. If you like the indulgences of judicial princes today, you might not like them tomorrow. Indeed, they may well be at your expense. Historians know too well the damage wrought when judges indulge themselves, but minority citizens unfortunately seem to have forgotten. They want subjective judges. The question is, will the Senate knuckle under to the acknowledged political power of minorities and the pressure politics they have engaged in with respect to this nomination?

I have wondered how to change some minds. We need only a few changes of mind to change history. We need only a few to turn the Senate from commiting a grave injustice. We need only a few to prevent fearmongering and distortion, and the political pressure they engender, from becoming the norm in the debate over Supreme Court nominations. We need only a few as the Marine Corps slogan says, a few good men and women, to make this come out honorably instead of dishonorably.

Respected persons of unquestioned credibility, such as Chief Justice Burger and Lloyd Cutler and Griffin Bell, and Roy Ennis, of the Congress on Racial Equality have laid out the facts. We need a few more Senators who will act on the facts. We need a few more who will stand up to pressure groups and pressure tactics.

We all know Senators are under pressure, some more than others.

I wish I could take on part of the burden that some Senators face given the demographics of their States. Senators from States with large numbers of black citizens are under enormous pressure and that is because in terms of numbers of citizens who are disposed to be influenced in future elections by Senators' votes on Robert Bork. I really think it is fair to say that the greatest number of such citizens are black citizens and that is a pity because I think that black citizens have been badly served in this debate by the national groups which purport to speak for them but the fact is that such groups have frightened many black citizens, not all of course, but many with the propaganda about turning back the clock on civil rights.

We also know by recent revelation that this tactic of scaring blacks was chosen after conducting some political polling and consulting the results. Some cynic said, "Ah, look at those numbers. The best way to succeed in beating Robert Bork is to scare the daylights out of the black citizens." And they did. They told black America that Robert Bork is a racist and that he will turn back the clock on civil rights.

We know, nonetheless, that eminent Americans, black and white alike, respected Americans, Americans who have long fought for civil rights, such Americans have dismissed that propaganda as a smear, a smear that it is. But the fact is that so many black citizens have been frightened, the fear tactics worked. The poll was right. And Senators are worried about the black vote.

It goes without saying that there is more at stake here than transient public opinion polls. There is more at stake than the political fortunes of Senators. And it is easy for the Senator from New Hampshire to say that, I recognize it. But there is more at stake than our political fortunes. What is at stake is principle. What is at stake is justice. What is at stake is the integrity and the honesty of the process by which we confirm for life Justices to the Supreme Court.

The Constitution does not intend that Supreme Corut Justices incorporate the latest opinion polls into their Court decisions. Heaven forbid it should ever get that bad. And Senators know that the Constitution does not intend for Senators in their confirmation of Supreme Court Justices to substitute the latest public opinion poll for their judgments. To do so would undermine the confidence not only in this body—if there is any confidence left—but more importantly would undermine the confidence in American justice by making the Supreme Court just another political prize to the hauled off into the camp of whichever faction has succeeded in intimidating the most Senators.

That is what is going on. Not only intimidation of the witness, and perhaps witnesses, but wholesale intimidation of Senators. That is what is going on.

As the official of the NAACP to whom I referred earlier in my remarks said, "It is just policies. Don't worry. These Senators will do what we want."

Well, friends, shall we consent to be intimidated now and certainly in future nominations on an increasing frequent scale? Shall we consent to be reduced to mere electors? Shall the confirmation of Supreme Court Justices be reduced to a mere electoral college, taking instructions for the latest public opinion poll? George Will, the eminent columnist, in a

recent piece expressed that concern well. And it is a concern well taken. Will wrote that some are "pioneering a new wrinkle the framers neglected to provide—popular elections of Supreme Court Justices."

It might be well for each of us to refresh our minds as to why Senators have 6-year terms instead of 2-year terms like Members of the House. I want to read a couple quick passages from the Federalist Papers Nos. 62 and 63, which were written by Madison or Hamilton, depending upon which expert you consult, with respect to the terms and the purpose of the relatively long terms which Senators enjoy.

Federalist No. 62:

The necessity of a Senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders.

We have heard from factious leaders, have we not? Are we going to be seduced by them?—

and to be seduced by factious leaders into intemperate and pernicious resolutions.

Or confirmation of Justices—

All that need be remarked is that a body which is to correct this infirmity

That is the propensity to yield to the impulse of sudden and violent passions—

which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It

Being the Senate—

ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.

That is why we have 6-year terms, to give us some isolation in the scheme of things from popular sentiment, from sudden and violent passions, as Madison put it.

And then from Federalist No. 63. This is even better because this really describes what is going on in 1987, although this is 200 years old.

So there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens,

That is supposed to be us—

in order to check the misguided career and to suspend the blow medicated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?

That is why we have 6-year terms. Shall we be mere electors. Shall we be reduced by our own fear to mere electors? Shall this campaign of intimidation against Senators by organized groups succeed in reducing Senators to mere electors and this body to a mere electoral college responding to the latest public passion and the latest public opinion poll? That is the question before this body.

Mr. President, I say with the greatest possible sincerity and affection toward my colleagues that we who support this nomination wish that we could take some of the burden from those of our brethren who are under such great pressure. We sympathize with them. We understand their situation. But we cannot take the burden from them. We can only pray—we can only pray—that they might have the peace and the courage to resist the pressure; that they might resist the pressure to commit an injustice against a fine man; that they might resist the pressure to sacrifice the confirmation process to political expediency.

Earlier, I alluded to the speech by Senator HATFIELD. It contained a quote from the columnist David Broder about the kind of inappropriate tactics that have been used in the Bork debate and the importance of insulating the judiciary from politics. And that quote by David Broder bears repeating. He said, "I have seen enough politics in my life to have lost my squeamishness." It is true we lose our squeamishness and our innocence and idealism. That is unfortunate.

I have seen enough politics in my life to have lost my squeamishness. But watching these tactics applied to judges is scary. It should send shivers down the spine of anyone who understands the role of the judiciary in our society.

Mr. President, I will say this finally. Senators have it in their power to do right. They have it in their power to resist political tactics inappropriate to the confirmation of Supreme Court Justices. They have it in their power to prevent the Supreme Court from becoming just another political spoils to fight over. They have it in their power to rescue a fine man from a cruel injustice. For Senators to exercise that power would be the finest and most long-lasting celebration of the 200th anniversary of our Constitution.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. ROCKEFELLER). The majority leader.

Mr. BYRD. Mr. President, the Senate will continue in session, at least until 10 o'clock this evening and I will be around. If Senators wish to speak longer, I can sit in the chair or I can stay on the floor.

I would suggest that those Senators who want to speak in opposition or in support of, be prepared to stay in that late or later.

I also should say that I hoped the Senate would vote today on the nomination but I have been unable to find anyone to discuss that with the final hour for voting. I can only assume that we will be still on the nomination tomorrow but I have alerted all Senators on this side to be here tomorrow, be prepared to vote tomorrow. I would suggest that those who are supporting the nominaton prepare to provide the speakers beginning at 8 o'clock tomorrow morning. Also, I will have a live quorum call, and see who is here.

So, I am saying now I will not have the live rollcall on getting the Sergeant at Arms to request the attendance of absent Senators at 8 o'clock tomorrow morning if those who support the nomination are prepared to speak at that hour. I hope that the leadership on the other side and I can talk and have some understanding as to what time on tomorrow the Senate can vote on this nomination. I do not see the necessity of going beyond tomorrow to vote.

Several Senators have spoken. I think there have been good debates. I believe that as of this moment those in support of the nomination have been about 13 in number or some such, and have utilized as of this moment something like 559 minutes. Those opposed have been 9 in number and as of this moment they have used 404 minutes.

So we have not had any quorum calls and both sides have produced speakers so there has not been any spinning of wheels with respect to lost time on quorums. But I think there does come a time when we need to have some knowledge as to when this debate is going to run its course and when the Senate will be able to vote on this nomination and then go on to other business. The other business, the first item of other business will be catastrophic illness.

I ask unanimous consent that following Mr. McCLURE, Senators KENNEDY and NUNN be recognized.

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

Mr. BYRD. Mr. President, I thank the Chair and I thank all Senators.

### JUDGE BORK

The PRESIDING OFFICER. Under the previous order, the Senator from Ohio is recognized.

Mr. METZENBAUM. Mr. President, I would like to ask the Senator from New Hampshire just one question. I intend to respond to his remarks.

When you opened your remarks you indicated, if I picked up your language, about Professor Baker receiving a call from the Senator. Was that your intent?

Mr. HUMPHREY. I hope, truly, I did not say that. Certainly it was not my intent. I never even thought it. I believe I said an aide from the Senator.

Mr. METZENBAUM. I know that you were talking about the aide to the Senator, and I will respond on that subject, but I want to make the record unequivocally clear the Senator called no prospective witness.

Mr. HUMPHREY. I do not believe I said it. If I did it was the worst slip of the tongue perhaps ever to come from this mouth. If I did say it I want to clear up the record. I do not think I did say it but just to err on the conservative side, if you will, I certainly did not mean to say it if I did, nor did I even think it. It was an aide to the Senator.

Mr. METZENBAUM. No problem. I thank the Senator from New Hampshire.

Mr. President, we have just heard a very lengthy presentation by the Senator from New Hampshire, and I think it was the 24th presentation made by a Member of this body in connection with the Bork nomination. I believe that I am the 25th to take the floor.

I must say that the comments of the Senator from New Hampshire were, indeed, sort of sad. They were distressing. They were disheartening. They were acrimonious.

I believe that they injected into the debate an element that has not been in the debate for the first 23 Members who have taken the floor and I am sorry that the Senator from New Hampshire saw fit to take that tack because I believe that Judge Bork's confirmation deserves more than that kind of invective.

I was sitting, listening to the Senator from New Hampshire and I heard such words as: "intimidation," "slander," "fear tactics," "scandalous and unethical conduct" "hysteria," "gross and shameful injustice," "vile savaging," "villainy," "demagogic," "smear," and "serious impropriety" and "viciously dishonest tactics." Then I heard him talk about groups who think that they own Senators and he went on to mention the NAACP. I do not think that that is what this debate is all about and I intend to discuss the substance of the issue with reference to the matter of whether or not Judge Bork should or should not be confirmed. But by reason of the presentation of the Senator from New Hampshire, I think it falls upon me to discuss the very lengthy presentation made by the Senator from New Hampshire about a member of my staff, Linda Greene.

Linda Greene is an able woman. She is very intelligent. She has integrity. She is a committed human being. She is a former professor of constitutional law at Oregon, Temple, Harvard, and Georgetown. Some have seen fit to accuse her of unbelievable acts: intimidation and even illegal, perhaps even criminal, conduct.

Come now, let us be realistic. Let us stay with the facts.

As a matter of fact, her accusers did not consult with her before they made false accusation. They did not consult with me. They did not consult with the alleged victim of the intimidation.

The distinguished Senator from New Hampshire has truly distinguished himself—in a way—by claiming that Ku Klux Klan tactics were used in connection with this matter. And he made this allegation in reference to this telephone call that was made as an act of love between two good friends.

Ku Klux Klan tactics? Ask black Americans about Ku Klux Klan tactics. Yes, ask Linda Greene. Ask Professor Baker, who supposedly was intimidated.

We will find that the comparison is so ugly and so pathetic that I am truly sorry it was made.

As a matter of fact, when it was made there was a banner story: "Ku Klux Klan tactics alleged in connection with Bork hearing." To equate this type of evil with the events that actually occurred is beneath the dignity of the Senate.

Let me read you what Coretta Scott King said when she heard about it. Said she:

> A month ago the Senate Judiciary Committee held an exhaustive and eminently fair inquiry into the nomination of Judge Robert Bork to the U.S. Supreme Court. During the course of that hearing both Judge Bork and his supporters on the committee agreed that the hearings were conducted in an equitable and balanced manner. The Senate's decision to reject Judge Bork represents a ringing endorsement of the achievements of the Supreme Court, and a repudiation of the extremist views advanced by the nominee.
>
> In an effort to obscure the basis on which Judge Bork has properly been rejected, proponents of Judge Bork have begun to complain that he was defeated solely because of improper tactics of his opponents. These arguments demean the integrity and competence of the Members of the Senate whose considered judgment is being attacked. This criticism of the Senate has now taken a shrill tone of which all Americans should disapprove, and which is particularly offensive to black Americans.
>
> The President has described the Senate Judiciary Committee that disapproved this nomination as a "lynch mob." More recently, Senator Humphrey has described as "Ku Klux Klan" tactics statements made by a member of the Senate staff to a potential pro-Bork witness.
>
> The cavalier use of this sort of language trivializes one of the darkest chapters in American history. Over the course of the last century gangs of hate-filled bigots summarily executed several thousand Americans, most of them black. Within the last decade a black man was lynched in the State of Alabama. It is an insult to the memory of these victims to suggest that the depraved crime inflicted on them is in any way analogous to the political dispute about the Bork nomination.
>
> The criticism of the conversation involving the committee staffer is unwarranted, since the participants were friends of longstanding, and the witness himself has said, "I bear complete responsibility for my decision. I would resent any attempt to attribute my position on Judge Bork or my ultimate decision not to testify to the influence of any other person." The suggestion that this exchange was equivalent to the tactics of the Ku Klux Klan is more than just factually inaccurate; it implies that the Klan's century long campaign of threats, beatings, bombings and killings was no more egregious and no more coercive than a benign admonition to a witness that his statements would be subject to cross examination. No one disputes the right of Judge Bork's supporters to use extravagant political rhetoric on this or any othe subject, but I, like many Americans, find deeply offensive an ill-considered analogy whose implications minimize the enormity of the racially motivated violence for which the Ku Klux Klan was responsible.

Now let us talk about the facts. Linda Greene, a longtime friend of Professor Baker, gave him moral support during a considerable period of time in his life which was particularly difficult. They were longtime friends. She cared about him. She was worried that he would be embarrassed if he was unprepared to answer difficult constitutional questions and she knew that constitutional law was not his field.

So Linda Greene called Professor Baker. She did not tell me she was calling him. She did not tell any of my staff. She did not tell any person involved with the nomination and no person asked her to make the call. She told no one of the call before making it. She discussed the issue of Professor Baker testifying with only one other person. That other person was a mutual friend of Professor Baker's and hers. He was also a black professor. She asked him, "Do you know why John is testifying?" And the other person said he did not know. That was the end of that conversation.

Now, it is easy for us to stand here and say, why did she call him? Why not let him alone? But they were close friends. They were colleagues. There are not thousands and thousands of black law professors in this country. Unfortunately, they are quite limited in number. She has helped him and knew intimately the problems he had experienced when he had been here at Howard University. As a matter of fact, she had been offered a professorship at Howard University when he was a dean there.

You have to understand the whole content to understand what occurred and why. You have to understand how a black professor might do this. You have to understand how a colleague would worry about a close friend and how would he do. Would he look unprepared? Would he maintain his academic reputation?

So she said to Professor Baker, "Be prepared for tough questions. It is your decision completely. But be prepared."

She said she told him, "I am calling you out of love," and he responded, "I know that."

The professor's own explanation has been that he was not intimidated and not threatened. He sent us a letter in

which he said explicitly that, "I have not been intimidated." The letter reads:

DEAR SENATOR METZENBAUM: Mr. Eddie Corrcia of your staff has requested an explanation for my decision not to testify as scheduled in favor of Judge Bork's nomination to the United States Supreme Court.

I bear complete responsibility for my decision. I would resent any attempt to attribute my position on Judge Bork or my ultimate decision not to testify to the influence of any other person. People supporting and opposing the nomination of Judge Bork offered me their insights concerning both the risks and benefits of testifying. I appreciated those insights because I am not the type of person who can make difficult decisions without regard to the personal consequences. By the same token, I am not the type of person whose judgment on the merits is overwhelmed by concerns relating to my personal interests.

Thank you for giving me an opportunity to clarify my views on this matter.

I ask unanimous consent that the letter be included in the RECORD.

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

INDIANA UNIVERSITY,
SCHOOL OF LAW,
*Bloomington, IN, October 15, 1987.*

Senator HOWARD METZENBAUM,
*Russell Senate Office Building, Washington, DC.*

Attention: Eddie Corrcia.

DEAR SENATOR METZENBAUM: Mr. Eddie Corrcia of your staff has requested an explanation for my decision not to testify as scheduled in favor of Judge Bork's nomination to the United States Supreme Court.

I bear complete responsibility for my decision. I would resent any attempt to attribute my position on Judge Bork or my ultimate decision not to testify to the influence of any other person. People supporting and opposing the nomination of Judge Bork offered me their insights concerning both the risks and benefits of testifying. I appreciated those insights because I am not the type of person who can make difficult decisions without regard to the personal consequences. By the same token, I am not the type of person whose judgment on the merits is overwhelmed by concerns relating to my personal interests.

Thank you for giving me an opportunity to clarify my views on this matter.

Sincerely yours,

JOHN T. BAKER,
*Professor of Law.*

Mr. METZENBAUM. On October 21, which was yesterday, the Associated Press carried a story from Professor Baker, and the headline on the story was "Bork Friend Denies He Was Harassed."

I will not read the entire article, but I will read part of it.

A black law professor who was asked by Supreme Court nominee Robert Bork to testify on his behalf says he wasn't initimidated to cancel the appearance before the Senate Judiciary Committee.

John T. Baker, a friend of Bork who taught at Yale at the same time as the judge and now is a professor at Indiana University, said he received a call from a committee aide telling him that he, rather than his testimony, would be the focus of questioning.

"After about 10 hours of considering my testimony, I concluded it didn't make sense to appear unless I was prepared to deal with that kind of questioning," Baker told The Indianapolis News on Monday.

The article goes on to say:

Baker said he and Greene have been friends for several years and that accusations that she influenced him into canceling his appearance do not merit any kind of investigation.

"When you are the black professor, people call you. I have said explicitly that Linda never tried to intimidate me. If I was influenced by Linda, I was also influenced by the pro-Bork people," Baker said.

He said he was told by Bork, a U.S. Court of Appeals judge, that it would be helpful if he would appear before the committee.

I ask unanimous consent the entire article be included in the RECORD.

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

BORK FRIEND DENIES HE WAS HARASSED

BLOOMINGTON, IN.—A black law professor who was asked by Supreme Court nominee Robert Bork to testify on his behalf says he wasn't intimidated to cancel the appearance before the Senate Judiciary Committee.

John T. Baker, a friend of Bork who taught at Yale at the same time as the judge and now is a professor at Indiana University, said he received a call from a committee aide telling him that he, rather than his testimony would be the focus of questioning.

"After about 10 hours of considering my testimony, I concluded it didn't make sense to appear unless I was prepared to deal with that kind of questioning" Baker told the Indianapolis News on Monday.

Baker, the only black law professor who was to testify for Bork, was to have appeared Sept. 28. He phoned the White House and declined to appear before the panel after a call from committee aide Linda Greene the day before his scheduled appearance.

Baker said he and Greene have been friends for several years and that accusations that she influenced him into canceling his appearance do not merit any kind of investigation.

"When you are the black professor, people call you. I have said explicitly that Linda never tried to intimidate me. If I was influenced by Linda, I was also influenced by the pro-Bork people" Baker said.

He said he was told by Bork, a U.S. Court of Appeals judge, that it would be helpful if he would appear before the committee.

"He helped me with my scholarly writing" Baker said about Bork. "He appeared as a guest lecturer in my classes. We lunched together frequently and discussed some serious and not so serious matters. We were friends.

"I think he is a thoroughly decent man of true integrity. To say I would testify was a painful decision because so many of my friends whom I respect are opposed to him."

Fifty-four of Senate's 100 members have declared themselves against Bork as of yesterday. A vote on the nomination has not been set.

Mr. METZENBAUM. Now, one Member of this body has seen fit to call for a Judiciary Committee investigation. I have also asked the Judiciary Committee to investigate the facts. I might also say that I have received a letter from Linda Greene in which she says:

I understand that a request has been made to the chairman and ranking minority member of the committee to investigate the facts of this matter. I would welcome such an investigation.

I ask unanimous consent that that letter be included in the RECORD.

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

COMMITTEE ON THE JUDICIARY,
*Washington, DC, October 19, 1987.*

Hon. HOWARD M. METZENBAUM,
*Chairman, Subcommittee on Antitrust, Monopolies and Business Rights, Washington, DC.*

DEAR SENATOR METZENBAUM: As you know, On Sunday, October 18, 1987 and Monday, October 19, 1987, The New York Times and The Washington Post, respectively, carried stories about a telephone conservation I had with Indiana University Law Professor John Baker on September 27, 1987. I had called Professor Baker to ask if he was fully prepared to respond to all the issues likely to be raised by his testimony. At the time of our conversation, Professor Baker was scheduled to testify before the Judiciary Committee in support of Judge Robert Bork's nomination to the Supreme Court of the United States. Professor Baker subsequently withdrew as a witness.

I understand that a request has been made to the chairman and ranking minority member of the Committee to investigate the facts of this matter. I would welcome such an investigation.

Professor Baker and I are personal friends and professional colleagues. We have served together in professional associations and have known each other for several years. My phone call to Professor Baker was entirely personal. I did not act under instructions or encouragement from anybody; nor did I discuss the phone call with anyone prior to making it.

I did not contact Professor Baker to persuade him not to testify. Professor Baker said it best when he told The New York Times: "I was not intimidated by Linda Greene or anyone else. It is ironical that in this hard-fought confirmation process, a conversation between two black professionals who have known each other for several years should be thought of as newsworthy."

I also note that in The New York Times article, Dean Maurice Holland of the University of Oregon Law School is quoted as saying that Professor Baker told him that I had warned, " 'Our strategy will be to focus on you, to make you look silly and foolish.' " I never made any such statement and never said anything that could have been interpreted as such a statement. Nothing in my conversation with Professor Baker could be fairly interpreted as an attempt to intimidate him or influence his testimony before the Committee.

I regret that this matter has arisen. I am confident that a complete investigation will demonstrate that nothing improper occurred.

Sincerely,

LINDA GREENE.

Mr. METZENBAUM. Now, let us clear the air. Let us get the facts out. In a supercharged atmosphere the

more hardened of us might have said, "Stay away from Professor Baker, leave him alone." I am frank to say if Linda Greene had asked me, I would have said, "Forget about calling your friend. Do not call him. I am not sure that you should do that because of some possible misperception of it." But there is certainly no impropriety, certainly nothing illegal, certainly an understandable call from one friend to another.

Is there anybody who really believes that Linda Greene could have conceivably thought that his testimony, one professor's, would make a difference in the confirmation hearing? Two thousand professors have signed a letter in opposition to Judge Bork's confirmation. Would one judge, black or white, appearing before the committee have made a difference? Of course not.

Was she trying to discourage an important witness from testifying? Absolutely not. The most which can be said is that she may not have used good judgment in calling the witness, even though she was a good friend and concerned about him. But it is simply a judgment question. That is not news and that is not headlines.

It is sad that some of the language that has been used in connection with that call is untrue and unfair. Most of all to this Senator it is sad because a dedicated, caring, competent human being has been held up to much criticism which this Senator believes is unwarranted and unfair.

I feel confident that when the Judiciary Committee concludes its investigation it will state publicly the very same thing that I have just said on the floor of the Senate.

I am, indeed, sorry that I found it necessary to comment on Linda Greene, but having heard the very lengthy discourse of the Senator from New Hampshire, I felt that I had no alternative in fairness to Linda Greene, whom I consider to be a very able, competent aide on my staff.

Proponents say let us debate the record of Judge Bork, and I could not agree more, but the debate lately, including today, has been about everything else. The issue is the record. It is not the advertising. It is not Gregory Peck. It is not the lobbying. It is not the process. From the beginning, there has been an attempt to divert attention away from the record. But let us face it. Judge Bork was picked because of his extreme positions. There is no secret about that. Everybody knew that Judge Bork would be controversial because he had written so extensively, and some of his writings were so far off the beaten path. But the far right was pushing for the selection of someone like Judge Bork.

Jerry Falwell commented prior to the Bork nomination:

> President Reagan has the opportunity of the century. Through his selection of a new conservative Supreme Court Justice, he can set the tone of the Court for many years to come—perhaps into the next century.

And after the President made the nomination, Jerry Falwell said:

> We are standing at the edge of history. Our efforts have always stalled at the door of the U.S. Supreme Court. Bork's nomination may be our last chance to influence this most important body.

The President argued: Do not consider the man's views, only his qualifications. The Senate should confirm him, the President said, simply because of his "outstanding intellect," his "unrivaled scholarly credentials."

Frankly, that was a reasoned approach. Judge Bork is intellectual. He is an able scholar. But there is more to it than that. And the administration could not sell Judge Bork just using that strategy.

Then they made an attempt to repackage Bork as a moderate. President Reagan portrayed Judge Bork as a moderate and reasonable jurist in the mold of Justice Powell.

Now, you have to consider this repackaging effort in the context of the far right's push for Judge Bork's nomination because he was so far to the right, because he was much more than a conservative. It is undeniable that this Senate has confirmed unanimously two very strong conservatives, Justice Scalia and Justice Sandra Day O'Connor—100 percent, not one vote against them. But when the White House found themselves with not just a conservative but one who was maybe a little bit off the beaten path as a conservative, then they came out with a new approach. The White House briefing book, some 72 pages long, claimed that:

> Judge Bork's legal philosophy follows directly in the mainstream tradition exemplified by jurists such as Frankfurter, Harlan, and Black.

Those were the great conservatives of the Court. In order to recast himself in that tradition, Judge Bork himself was willing to modify certain positions. At one point, he even said, "I don't consider myself to be a conservative."

At that point, Pennsylvania Avenue was acting very much like Madison Avenue. Then the White House became upset when the opponents of Judge Bork allegedly used some of their own methods.

But, frankly, there is another aspect of this confirmation proceeding about which we ought to be talking. That is Judge Bork's changing of positions as he came before the Senate to be confirmed as Solicitor General, when he changed his position with respect to the public accommodations law and its legality and with respect to his views about freedom of speech, when he was up for confirmation to be a circuit court of appeals judge. Then in the more recent hearings we find he took still different positions for the first time. For example, for the first time at the hearings, he said that the equal protection clause protects women. He had never said that before. And that was a very critical issue as far as the members of the Judiciary Committee were concerned. He went on to say that the first amendment protected nonpolitical speech. He had never said that in those terms before.

But even after the confirmation conversions, even after these changes made during the hearing, his positions, frankly, are unacceptable.

Now the President wants to blame somebody else for the fact that the American people and the U.S. Senate are not prepared to accept Judge Bork on the Supreme Court. He wants to blame the process. He wants to blame the advertising. He did not mind the advertising when it was supporting Judge Bork and there was certainly a tremendous amount of that. That was OK. But when there were ads against him, that was not OK. He wants to blame special interests whom he says are guilty, in his words, of "distortion," "disinformation," and "unfair and unfounded attacks."

There has been a constant litany about alleged character assassination, and intentional misrepresentations in connection with this confirmation—strong words, and the attacks have become the sideshows. They ignore the record which just will not go away.

The latest argument by the President is a very interesting one—very. The President said that Judge Bork is tough on crime. But frankly, Mr. President, that was not an issue in the hearings. I was there almost all of the time, and I never heard that issue brought up although I do know that Judge Bork testified to the following effect: "I have written nothing about criminal law. It's just never been one of my specialties."

I guess I would say to the President, How do you know that he is tough on crime? What makes you so certain of that? Judge Bork did not indicate that in the hearings. He has never written a word on the subject according to his own testimony.

Now let us look at the record, and let us debate that rather than extraneous issues.

Judge Bork's views on civil rights and constitutional protections of equality are very, very disturbing. They are troubling to those very persons who look to the Constitution for protection. Nobody claims that Judge Bork is a racist. Nobody claims that Judge Bork is sexist. Nobody claims that Judge Bork has any personal bias, and nobody claims that he is anything less than that which he is, and that is a distinguished scholar.

I do not doubt he now favors laws which prohibit discrimination. But the

record shows his consistent opposition to leading Supreme Court decisions which provide such protection. In Judge Bork's legal world, he stands by on the sidelines regretting the result saying it is too bad but believing that the courts can do nothing about it.

The problem is not that he personally favors bad laws but that his constitutional interpretations would allow bad, unfair, discriminatory laws to stay on the books. Judge Bork said as recently as this summer that the equal protection clause should have been interpreted by the courts to apply only to race and ethnicity. That would mean no protection for women, no protection for the poor, no protection for aliens, no protection for illegitimate children, nor for other groups that the Supreme Court has found deserve protection.

As I said earlier, for the first time he announced at the hearings that he believed the equal protection clause did apply to women, but then he went on to say that the extent of protection is based on a "reasonable basis" test. Under this test Judge Bork believes that the Constitution would allow a State to provide for different drinking ages for men and women. In fact, he said that the Supreme Court decision which struck down this discriminatory law was a "trivialization of the Constitution." He would find that statistical differences about men and women drinking would justify that distinction.

But this is just the kind of discrimination that the Supreme Court has time and time again rejected. Yes, it is just the kind of discrimination that has plagued women.

On the issue of one man, one vote, he rejects the constitutional requirement of equal representation—the requirement that makes every person in this country equal in their right to vote. That principle prevents any voters from being disproportionately more important than others. It has revolutionized the political policy of America.

Go down South. Talk to the Congresspersons who appeared before our committee such as Barbara Jordan, who said without the principle of one man, one vote she never would have gotten to the U.S. Congress. And so many other Congresspersons and so many other public officials in the South, particularly black persons would not presently be holding their positions except for the one-man-one-vote decision that Judge Bork rejects on a constitutional basis. Yet Judge Bork says there is "no reputable theory" for the one-man-one-vote constitutional requirement.

Judge Bork also says that the poll tax decisions were wrongly decided. There is no claim that he personally favors the poll tax. There is no claim that he would vote for one if he were in the legislature. But the reality is that he criticized the Supreme Court decision that struck poll taxes down. He claimed that he would reach a different result if there was proof of racial discrimination in connection with the use of the poll tax.

But leaving the racial discrimination issue aside, one has to be concerned about economic discrimination when talking about the poll tax.

When the Supreme Court heard the Harper case the poll tax at that time was $1.50. Using normal inflation, that today would be about $5. Frankly, Mr. President, there are many in the South and in the North as well who never have had poll taxes who would not pay $1.50 20 years ago and certainly not $5 today in order to have the privilege of voting. Judge Bork's view would roll the clock back with respect to that issue.

He criticized the decision striking down racially restrictive covenants in the sale of housing. There is no claim that he personally favors such racially restrictive covenants. But under his views the Constitution would allow them. Racially restrictive covenants say only certain people may live in an area—discriminatory restrictions against blacks, Jews, and sometimes Catholics, members of the Indian race, and yellow races. He would not find a constitutional basis to strike down those laws.

He criticized the Supreme Court decision upholding the congressional authority to ban literacy tests. There is no claim again that he favors literacy tests as a qualification for voting. But the fact is he would not find a constitutional basis to strike down and ban literacy tests. The reality is that he does not believe that the Congress has the authority to ban them.

When we examine his views on the subject of privacy, we find he has consistently opposed privacy decisions in the harshest terms.

He compared the ban on married couples using birth control to an ordinance banning smoke pollution. He said that the two issues were identical. He wrote there was no "principled way to decide that one man's gratifications are more deserving of respect than another's * * * why is sexual gratification nobler than economic gratification?"

The proponents say he has changed. But in 1982, he said the result in the Griswold decision could not have been reached by a proper interpretation of the Constitution.

It will be recalled, Mr. President, that in Griswold the Supreme Court declared unconstitutional a Connecticut law making it illegal to prescribe or use birth control devices. Judge Bork found no basis to declare that law unconstitutional.

So that the record may be clear, we are talking about the fact that under the Connecticut law, the banned birth control devices was even applicable to a married couple's conduct in the privacy of their own bedroom.

He wrote in a 1984 court of appeals opinion that the privacy cases lacked an explanatory principle.

This summer, when asked by Time magazine if he found a right of privacy anywhere in the Constitution, he replied, "I do not."

At the hearings, he was asked, "Do you find that the Constitution recognizes a marital right to privacy?" He answered, "I do not know. It may well * * * But I have never worked on a constitutional argument in this area."

That is a subject he has been writing about for 20 years. If he has not found a constitutional right in 20 years, it is hard to believe that he is going to in the next 20, if he is confirmed and sitting on the Supreme Court of the United States.

He never said in the hearings, though given the opportunity many times, that he considers the privacy cases to be among the settled law he would not disturb on the Court.

Only one reasonable inference can be drawn from his unwillingness to take that position. He would vote to limit the principle of privacy established by the Supreme Court, and that is a frightening thought.

Judge Bork has little respect for precedent. He has repeatedly said that many of the Supreme Court's decisions should be overruled.

In January 1987, he said: "An originalist judge would have no problem whatever in overruling a nonoriginalist precedent because that precedent has no legitimacy."

He stated prior to the hearings that precedent is not all that important. At the Judiciary Committee hearings he said he had a newfound respect for precedent. But we cannot ignore the statements he has made and talked about and written about over a period of years and then accept his newfound respect for precedent at the time of the Senate Judiciary Committee hearings.

I cannot conclude that Judge Bork believes in expansive freedom of the individual. I cannot conclude that he accepts the tradition of substantive liberty. I cannot conclude that he accepts the constitutional principle of unenumerated rights.

We are left with a man with a narrow, long-rejected view of the Constitution, one which requires looking for freedoms in the fine print, a view that, however honestly held, is not one that belongs on the Supreme Court.

So I say to my colleagues that the President does not like the fact that the Senate is required to advise and consent to his appointments. But the reason why the framers required Senate approval was that they recog-

nized the wisdom of the separation of powers.

Nobody objects to the President of the United States choosing a conservative. We have confirmed over 300 judicial nominees, conservatives. In this case, the President overreached. He tried to push the Court in one direction, and the American people said, "No; you have gone too far."

Never before in history of the Nation have the American people had such an opportunity to observe a hearing, day in and day out, while a Supreme Court nomination was being considered by the Judiciary Committee. The American people were brought into the process, and now we find that a strange notion is being argued, and that is that the people of the country should not be listened to in the confirmation process.

The proponents say it is improper that those opposed to Judge Bork attempted to convince the public to agree with them. The proponents say it is improper that Senators listen to the public in making up our minds.

My phones rang off the hook, people indicating support for Judge Bork, many indicating opposition to Judge Bork. But what a wonderful demonstration of the people of this country being involved in the process!

Whether it has to do with the confirmation of the judicial nomination or with the passage of a law, I can only say that I could not welcome more the people of this country participating in the political process here in the Congress of the United States.

I think the argument that the people should not be involved is one of the most ludicrous arguments imaginable. Since when are the American people to be shut out of the confirmation process?

Were Judge Bork's supporters paying no attention to the public when they made speech after speech in the hearing, when they ran ads, when they telephoned and orchestrated their telephone calls? Of course not. Did the framers of the Constitution contemplate that Senators would not listen to their constituents in giving advice and consent? Of course not.

This confirmation debate is like all others: Senators defer to the President unless there is an extraordinary case. Judge Bork's nomination is extraordinary.

It is a fact that Senators have listened to the American people; they have considered their views—on both sides. But more importantly Senators have listened to Judge Bork, and the American people have listened to Judge Bork. The ads did not defeat him. The telephone calls did not defeat him. The mail did not defeat him. Judge Bork will not be confirmed by the U.S. Senate because Judge Bork's own record and testimony did not rise to the standards that the Senate feels are imperative and important for a member of the Supreme Court of the United States.

I feel that we have been part of a magnificent process, and that process has made it possible for the people to be involved, for Senators in this instance to spend more time reading a nominee's writings than probably any time before in history.

On the basis of his article his speeches and his opinion, on the basis of the record that Judge Bork made before the committee, on the basis of the witnesses we heard before our committee, the Senate Judiciary Committee recommended that Judge Bork not be confirmed. I expect and hope that the entire Senate will agree with the Judiciary Committee's conclusion. I believe that a strong enough case has not been made for the confirmation of Judge Bork.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who seeks recognition?

Under the previous order, the Senator from Idaho is to be recognized.

Mr. McCLURE. I thank the Chair.

Mr. President, I ask unanimous consent that the Senator from Wyoming [Mr. SIMPSON] be recognized to speak following the speech by the Senator from Georgia [Mr. NUNN].

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

Mr. McCLURE. Mr. President, I come before the Senate today with a plea to uphold the Constitution of the United States. I ask only that Members of this body uphold their oath to protect and defend that Constitution against the political forces and expediencies to which they bend and yield.

Two hundred years ago, this Nation adopted a Constitution of separate and limited powers. Today, the Senate stands on the brink of rejecting the most qualified jurist to be nominated to the Supreme Court in the last 50 years precisely because he believes in the system of government outlined in that Constitution.

The nomination of Judge Robert Bork raises the question of how to interpret our Constitution. Judge Bork says that when the Court reads new rights into the Constitution, they go beyond their power. I totally agree.

I ask that you look again at the record of Judge Robert Bork and to consider anew whether this man should indeed be elevated to the Supreme Court of the United States.

I believe he should. And I believe anyone who is willing to hear him over the clamor of his critics will agree with me.

The fact is, Robert Bork is the most deserving person in this Nation for the high post to which he has been nominated. He is a man of personal integrity, professional ability and judicial temperament. Thomas Jefferson said:

> The Judges, therefore, should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness and attention; Their minds should not be distracted with jarring interests; They should not be dependent upon any man or body of men.

Mr. President, Robert Bork is such a man.

Throughout this process, Judge Bork has been defamed, his jurisprudence distorted, and his judicial record misrepresented. Accusation that he would allow the sterilization of his fellow human beings, that we would deny women the equal protection of the laws, and that he would violate the sanctity of the marital chamber are not only gross and misleading. They are lies.

On the basis of this campaign many of my distinguished colleagues have made early judgments on Judge Bork's fitness for our highest Court. To those who have so decided, I must ask only this: Are you willing to stand firm in a decision wrongly made on the basis of false impressions? If you are not, if you are willing to revisit this all important issue, the time to do so is now. History will not forgive us so rash a rush to judgment.

The body in which we are honored to serve has long been celebrated as the greatest deliberative body in the world. The essence of that greatness has been our commitment to decide the great issues of every age here on this floor of the Senate. Our solemn duty, our political responsibility, our constitutional obligation is to reach our decisions here, amongst ourselves, as little disturbed as we can be by the boisterous forces outside.

Make no mistake about it. This Senate is a representative body; but it is also more than that. Part of the Constitution's great design is that we must do more than merely represent or reflect the opinions, passions, and interests of the people, as Madison put it. We are here, as he said, to "refine and enlarge" those opinions and passions. This we are to do through deliberation—open, candid and above all, honest discussion. We must vote in a way we think most likely to conduce to the long-term interests of the people. Passion steeped in ignorance should never be our guide.

But passion steeped in ignorance is precisely what has come to characterize this nomination. Sensational rhetoric bereft of facts has skewed Judge Bork's record and has besmirched his good name. This we cannot allow to go unchallenged. Reason must reassert itself. Let us—the U.S. Senate—take a stand for justice, for decency, and for fairness. Let us see this man, Robert Bork, for what he really is—a great jurist.

Many of Judge Bork's critics have insisted that he would turn this Nation back to the political dark ages

of our constitutional past. Judge Bork would, they allege, force us to reopen old wounds and to re-fight old battles. That one man could not do this is usually overlooked; that Robert Bork would not do this is always overlooked.

The fact is that Judge Bork has always been an ardent defender of the right of individuals. In a little read passage in his now-famous 1971 Indiana Law Journal article, Judge Bork put it simply. "There are some areas of life," Bork argued, "the majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom and coercion by the majority in these aspects of life is tryanny."

This is not the language of a man hostile to liberty. No, this is the language of a decent and liberal man who knows well the ever-present threat majority government poses to individual liberty.

The same man who has written of his strong commitment to individual liberty is also the same man who has been painted as some sort of mad extremist who, single-handedly, will change or reverse 200 years of judicial history. I've never heard such nonsense. To presume that Judge Bork is that extreme or that powerful is ludicrous. To believe that you have to believe that there are four other members of the Supreme Court who are also this extreme and that 51 Members of the U.S. Senate, having been elected by the people, are also that extreme. Robert Bork is a man who believes that the people should decide and that the Constitution should be interpreted, not rewritten, by judges. Does this body have less faith in the very people who elected us to office?

The real objection to Judge Bork lies in his view of judicial power under our written Constitution of limited and enumerated powers. His critics suggest that rights are best left to a textually unmoored judiciary to do what it thinks is right. Judge Bork knows better. He knows that any power unchained to the text and intention of the Constitution is a dangerous power.

Our Constitution is not a blank check for judicial activism. The framers of our Constitution did not send up blank pages to be filled out later by the courts. They wrote down words, and those words have meaning. The Constitution which governs the executive and legislature also governs the courts. No one in this country is above the law, and that includes Justices on the Supreme Court.

Unfortunately, the notion that the legislatures pass laws and the courts interpret them has fallen by the wayside. It seems to me that the Senate would want judges who are not going to be quick to make laws—that's our job. Why then do so many Senators applaud activist judges and oppose a nominee who embodies judicial restraint? There can only be one answer: They want courts to accomplish by judicial fiat what they could never accomplish in this body. They want courts to pass their agenda into law; they want courts to make the tough decisions; they want to be reelected and if they enacted the types of laws the courts are enacting the people would kick them out of office.

The bedrock principle of Judge Bork's jurisprudence is that of the great Chief Justice John Marshall. In the most famous of all Supreme Court opinions, *Marbury* v. *Madison* (1803) Marshall said that "a written constitution is the greatest improvement on political institutions * * * and must be understood as a rule for the government of courts as well as for legislatures." This was the same principle that led Thomas Jefferson to refer to a written Constitution as "our peculiar security."

Robert Bork, like John Marshall and Thomas Jefferson, knows the danger in trusting the good intentions of those who govern us. Like Marshall and Jefferson, Judge Bork stands committed to the rule of law over the inherently arbitrary and capricious rule of men, beset as they are by their own passions and opinions, by their own politics and predilections. This cautious view extends to judges not less than any other official.

By arguing, as Judge Bork always has, that the Court must be tied to the Constitution is to argue for judicial power, not against it. It is to bolster the force of the Court by keeping its work legitimate. For only if the Court is seen as giving force only to the will of the people, as expressed in their written Constitution, can the awesome power of judicial review ever be reconciled with our democratic society. We made our American judiciary independent for a very good reason. Our judges are to stand against the tides and trends of the moment and defend the rights and power of the Constitution.

In their heart of hearts, Judge Bork's critics know he poses no threat to the civil rights all Americans have gained over the past 30 years or so. They know, deep down inside, what the issue really is. And that issue is that judges like Robert Bork know what they are up to: making "an end-run around popular government," as Chief Justice Rehnquist once observed.

The critics' concern is that a court that starts acting like a court and not like a legislature may not be as likely to transform their policy preferences into constitutional decrees. They may find it far more difficult to have the Court give them the items on their social and political agenda. We did not create an independent judiciary so that judges are free to place their own values and standards on the Constitution. As Judge Bork said in his testimony:

> The judge's authority derives entirely from the fact that he is applying the law and not his personal values. This is why the American public accepts the decisions of its courts, accepts even decisions that nullify the laws a majority of the electorate or of their representatives voted for. The judge, to deserve that trust and that authority, must be every bit as governed by law as is the Congress, the President, the State governors and legislatures, and the American people. Only in that way will justice be done and the freedom of Americans assured.

What Robert Bork threatens is not the civil rights of yesterday and today gained through law, but the liberal social agenda sought for tomorrow through judicial decree. Perhaps we all hold specific views and values that we think are desirable and would steer a course other than that defined under law. But we are a government of laws, not of men, and we must resist those temptations which would destroy the liberty granted us by the written law.

It seems to me that it is a pretty sad day when we wantonly rush to keep a man off the Court because he does not think he should use that position to transform society. It is a strange day, indeed, when we deny our consent to a nominee because he thinks a judge should be a judge—and not a legislator or a policy planner.

At the deepest level, that is what this is all about. It is not over Robert Bork the man; it is over the great judicial tradition he represents. To vote no on Judge Robert Bork is to vote no on that judicial tradition, the tradition of John Marshall Harlan; of Oliver Wendell Holmes and Louis Brandeis; of Felix Frankfurter and yes, of Lewis Powell.

Alexander Hamilton understood the limited role the judiciary should assume, and the dangers of the mingling of judicial and legislative powers. In Federalist 78, he wrote:

> It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers.

Time has proven Hamilton true. The most oppressive rulings have come from courts which usurped power from other branches—the Dred Scott case, Plessy versus Ferguson, and Roe versus Wade are examples of such rulings. The evil fruit of those rulings are blotches on the honorable record of our Nation. Hamilton rightly said that "Liberty can have nothing to fear from the judiciary alone, but would

have everything to fear from its union with either of the other departments."

We stand on the edge of a great shadow of shame. Benjamin Franklin urged his fellow delegates to the Constitutional Convention of 1787 to doubt their own infallibility. We should doubt a little of our own infallibility on this great issue. We should always remember the mainstream of American jurisprudence has two banks; if Robert Bork stands on the one rather than the other is not to say he is unfit. Our constitutional tradition not only is sturdy enough to handle, but greatly needs, the presence of a Bork as much as a Brennan.

We who sit in this body took an oath to uphold the Constitution. It is an oath we all consider sacred. How can any of us be true to that oath, and to the people who entrusted us to sit here, if we reject a nominee whose judicial philosophy is premised upon being true to the Constitution?

The time has come to secure liberty in America, because liberty is not secure when it rests merely upon the ability to persuade five members of the Supreme Court. Our liberty does not proceed from the courts, but from a higher authority. It is given to us by God, and protected by our Constitution. That is why I support a judge who believes that the Constitution has a meaning beyond what special interest happens to be trendy. That is why Judge Robert Bork should be confirmed by the Senate.

The PRESIDING OFFICER (Mr. GRAHAM). Does the Senator from Idaho yield the floor?

Mr. McCLURE. I yield the floor.

Mr. BIDEN. 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. McCLURE. 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. McCLURE. Mr. President, I ask unanimous consent that Senators HATCH and DOMENICI be recognized following Senator SIMPSON.

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

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

The PRESIDING OFFICER. The absence of a quorum having been suggested, 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 PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD. Mr. President, I have checked this out on the other side of the aisle, and it is agreeable, I understand. I ask unanimous consent that immediately following Mr. HATCH and prior to the recognition of Mr. DOMENICI, Mr. HEFLIN be recognized.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. BYRD. I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from Massachusetts is to be recognized at this time.

Mr. KENNEDY. Given the high stakes on this nomination and the inevitability of the outcome, it is understandable—but not justifiable—that the disgruntled supporters of Judge Bork are attempting to divert the focus of this debate to the question, "Who beat Bork?" The answer to that question is clear. I did not beat Bork. Senator BIDEN did not beat Bork. Senator METZENBAUM did not beat Bork. Gregory Peck did not beat Bork—Bork beat Bork.

At the Senate Judiciary Committee hearings, Judge Bork was his own worst witness. In large part, Judge Bork's reactionary views on civil rights and civil liberties are the major reason why he was nominated for the Supreme Court by President Reagan—and the major reason why he is being rejected by the Senate.

The statement I made on July 1 about Robert Bork's America was accurate then—and it is accurate today. It stated some of the most important reasons why many Senators and millions of Americans opposed Judge Bork's nomination from the beginning.

Nothing Judge Bork said in the hearings and none of his notorious confirmation conversions changed the fundamental point—that Robert Bork is wrong on civil rights, wrong on equal rights for women, wrong on the right to privacy, wrong on justice in America—and it would be wrong for the Senate to seat him on the Supreme Court of the United States.

The American people have sent a very important message in their rejection of this nomination: They are proud of the role of the Supreme Court in the last 40 years in advancing our most fundamental civil rights. They do not want a Supreme Court nominee who has opposed and harshly criticized the Court's proudest accomplishments in this area.

Robert Bork has rejected too much of what is great and good about this Nation's constitutional legacy. Before his nomination, and in the hearings, he expressed a cold, mathematical approach to civil rights. He believes that the Constitution is essentially a zero-sum game, in which granting rights to some diminishes the freedom of everyone else.

That strange view was demonstrated by an exchange with Judge Bork in the confirmation hearings. Senator SIMON asked Judge Bork whether he believed that when a court adds to one person's rights, it subtracts from the rights of others. Judge Bork responded, and I quote, "Yes, Senator, I think it is a matter of plain arithmetic."

Later, Senator SIMON said he thought it was fundamental in our society that "when you expand the liberty of any of us, you expand the liberty of all of us." Judge Bork responded, and again I quote, "I think, Senator, that is not correct."

Judge Bork is wrong as a matter of logic, and he is wrong as a matter of justice. His calculating view of civil rights makes us wonder whether Judge Bork has genuinely repudiated the unacceptable theory that led him to refer to the principle underlying the public accommodations provision of the Civil Rights Act of 1964 as "a principle of unsurpassed ugliness."

The view that Judge Bork expressed—that the rights of the majority would be unfairly limited if racial discrimination is abolished—is absolutely repugnant to this country's sense of justice.

It is worth reflecting on the context in which Judge Bork wrote his two notorious articles opposing the Civil Rights Act of 1964. When he wrote those anti-civil right tracts, Judge Bork was an associate professor at Yale Law School, and he did not mumble his views at a faculty tea. He trumpeted his opposition to civil rights in national publications at key moments in the national debate, when the outcome was hanging in the balance. And while Judge Bork was at Yale, working out his intellectual rationalization for opposing civil rights legislation, men and women of courage and judgment in all parts of the country—Republicans and Democrats, conservatives and liberals, blacks and whites—understood that the time had come to end race discrimination in America.

Judge Bork did not publicly recant these troubling views until his 1973 confirmation hearings, when he had been nominated to be Solicitor General. It is clear, however, from writing and speeches throughout his professional career, and from his testimony at the hearings, that Judge Bork continues to hold a narrow view of civil rights, inconsistent with the fundamental role of the Constitution and the courts in protecting equal justice under law.

He wrote in the Indiana Law Journal article that the Supreme Court's unanimous decision in Shelley versus Kraemer, barring court enforcement of racially restrictive covenants in real property agreements, was impossible to justify through application of neutral constitutional principles. During the hearings, Judge Bork did not back away from this position; instead, he

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suggested—falsely—that Shelley was a dead letter, ignoring the fact that the Supreme Court applied Shelley in the Barrows decision, when it ruled that the Constitution also forbids recovery of damages for breach of a racially restrictive covenant.

The American people know better.

They understand that it is wrong for courts to enforce a contract that prohibits the sale of a home to a family because their skin is a different color.

In Robert Bork's America, that may not be a denial of equal protection of the laws, but in our America, it is. And the Senate should reject a nominee who rejects that principle of simple justice.

At his confirmation hearings, Judge Bork added yet another major decision on civil rights to the hit list of Supreme Court rulings that he opposes.

In Bolling versus Sharpe in 1954, the Court unanimously held that public school segregation in the District of Columbia violated the fifth amendment guarantee of due process of law.

At the hearings, Judge Bork called that decision, and I quote, "constitutionally * * * a troublesome case," and one for which he had not, in his words, "thought of a rationale."

Judge Bork taught constitutional law at Yale Law School for more than 10 years. Yet he never thought of a rationale to support the Supreme Court's decision banning school segregation in the District of Columbia. Thirty-three years have elapsed since the Bolling decision; those same 33 years comprise Judge Bork's career in the law. If Judge Bork has not thought of a constitutional rationale for ending school segregation in the Nation's capital for 33 years, he never will.

The American people know better. We cannot take the risk that a Justice Bork will be unable to think of a rationale to protect civil rights in the next case to come along in the Supreme Court, or in the next decade he would be serving on the Court. That is a major reason why the Senate will reject this nomination.

During his confirmation hearings, Judge Bork also persisted in his view that the Supreme Court's decision in the Harper case was wrong, and that poll taxes are constitutional, unless there is evidence of race discrimination. Think about that for a moment. In 1987, Judge Bork still believes that the Constitution permits a poll tax, even though such a tax would keep poor citizens from voting.

The American people know better. Judge Bork's view that the Constitution permits a poll tax, even though some Americans would be too poor to vote, is completely repugnant to our sense of justice.

During the hearings, Judge Bork also persisted in his rejection of Supreme Court decisions recognizing the fundamental principle of "one man, one vote."

Even today, Judge Bork thinks that unequal voting districts are not unconstitutional, so long as a majority of the voters can elect a majority of the legislators.

The American people know better. They understand that every person's vote ought to count the same. Otherwise, minority constituents would be powerless to overcome the tyranny of a fixed and intransigent majority.

Without one-man one-vote, democracy would be diminished and the political process would lose its legitimacy.

Judge Bork has also persisted in his view that the Supreme Court was wrong to uphold a key provision in the Voting Rights Act banning literacy tests for voting. He called the decision "very bad, indeed pernicious, constitutional law."

The Supreme Court had ruled that section 5 of the 14th amendment gave Congress authority to prohibit literacy tests, because they deprive voters of the equal protection of the laws. Judge Bork thinks that Congress should have no such power, even though the power is plainly stated in the Constitution.

The American people know better. They understand that the framers of the 14th amendment intended to give the Congress broad power to enforce the guarantee of equal protection of the law. And they do not want a nominee on the Supreme Court who would drastically cut back the power of Congress to protect the most important civil right of all—the right to vote. In perhaps the single most revealing question and answer at the hearings, Judge Bork was asked why he wanted to be a Justice on the Nation's highest court. It would be "an intellectual feast," he said. To Robert Bork, service on the Supreme Court might be an intellectual feast, but in Robert Bork's America, millions of our fellow citizens would be starving for their rights.

After reviewing Judge Bork's persistent criticism of landmark Supreme Court decisions on civil rights, Mr. William T. Coleman, Jr., Secretary of Transportation under Republican President Gerald Ford and one of the most distinguished lawyers in the country, summarized the nominee's views as follows:

> At almost every critical turning point in the civil rights movement, as exemplified in these cases, Judge Bork has, as a public speaker and scholar, turned the wrong way.

That statement captures the essence of our pervasive concern about Judge Bork's attitude toward civil rights. At every critical juncture, Judge Bork has "turned the wrong way" on civil rights. In a lifetime in the law, he has heaped nothing but criticism on the Supreme Court's landmark civil rights decisions. In all his writings, he has never published an article or given a speech suggesting that the law should be construed to advance civil rights.

America is a better and fairer nation than Robert Bork thinks. The American people have turned away from Judge Bork's views on civil rights, and the Senate should turn down his nomination.

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. NUNN. 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. NUNN. Mr. President, while the Senator from South Carolina is on the floor and the Senator from Delaware is on the floor, I agree with Senator THURMOND when he said, "Senator BIDEN has conducted this hearing in a fair, reasonable, and just manner."

I do want to add, however, that those of us in the Senate who are charged with the constitutional responsibility of advice and consent should be concerned about the environment surrounding the hearings and the Bork nomination. We call our body "the most deliberative legislative body in the world," and yet there has been tremendous pressure on Senators to take a position on the Bork nomination prior to the committee meetings, prior to the testimony being given, prior to the committee vote and prior to any Senate debate. While these groups have every right to make their views known at any time, Senators have a broader responsibility.

These pressures are, of course, not confined to the Bork nominations. There is an increasing tendency for outside groups, both from the right and the left, both liberal and conservative, to mount all-out campaigns on a subject long before the Senate process has started, let alone been completed. We must recognize that premature decisions threaten the Senate committee process and in the long run jeopardize the effectiveness of the Senate as an institution of thorough debate and careful deliberation.

It has been said that a conservative is someone who is opposed to doing anything for the first time. I hope that my conservatism does not go that far, but I do pose a few questions for the Senate's consideration. What is wrong with the old-fashioned way? What is wrong with telling our constituents, who express fervent support or opposition on a judicial nominee, or any other matter, that we will wait for the appropriate committee to have hearings before we make our decision? What is wrong with talking to the members of the relevant committee who spend hundreds of hours on a

subject before deciding to vote "yes" or "no"? What is wrong with reading the committee report, including individual and minority views, before deciding? What is wrong with listening to Senate debate before deciding how to vote? Are we going to substitute 30-second TV ads for the Senate process and for the committee process?

Mr. President, I fully recognize the right of any individual or group to petition a Senator for a quick decision—but as for me, I have no apologies to make for doing things the old-fashioned way.

Mr. President, I regret that I did not have an opportunity to hear the testimony of Judge Bork before the Senate Judiciary Committee.

I know that those hearings were very educational. In fact, when I was in law school years ago, constitutional law, I think, was my favorite subject. I think the hearings have been an education to the country on the very important constitutional issues we face in the future and the ones we faced in the past.

While the committee hearings were being held, Senator WARNER and I spent 3 weeks on the floor of the Senate managing the Defense authorization bill.

I know the majority leader spent a number of hours on that one himself.

Since that bill was completed, I have spent a number of hours reading the transcript of Judge Bork's testimony as well as portions of the testimony of those who testified on his behalf and against him. I have also met with Judge Bork personally.

I have decided to vote "no" on the Bork nomination. I will not, however, cast this vote with 100 or 90 percent certainty that I am correct. After my own study of the record, I agree with the conclusion of the senior Senator from Alabama [Mr. HEFLIN] who stated:

> A lifetime position on the Supreme Court is too important to risk to a peron who has continued to exhibit—and may still possess—a proclivity for extremism in spite of confirmation protestation.

I do not pretend to be an expert on Judge Bork.

I wish I had had many more hours to spend studying his views and the views of those who spoke on his behalf and against him. I do, however, have a few observations I will share with my colleagues.

First, I am concerned that Judge Bork seems to have the belief that, 200 years ago, the Constitution was locked in concrete and that its interpretation is limited only to its exact and explicit words. I have always believed in judicial restraint, and I still believe in judicial restraint. I believe that the original intent of the authors of the Constitution should be the foundation of constitutional interpretation. However, I do not believe that interpretation can or should be limited to the explicit provisions of the Constitution. If this was the case, the Supreme Court would have very little to do today. Beginning with Marbury versus Madison, the court found that it was the final interpreter of the Constitution.

Such a responsibility was not explicitly set forth in the Constitution itself, but rather was implied by history and by common sense. I emphasize the words "common sense." Judicial restraint is not the equivalent of judicial rigidity. I believe, Mr. President, that our Founding Fathers intended to set forth general principles which would remain the foundation of our Nation and that they viewed the Constitution as a living document to be interpreted with common sense in light of changing conditions and circumstances.

Second, I am concerned about the conflicts between Judge Bork's testimony before the Judiciary Committee and his past articles and speeches, including some of recent vintage. For example:

In June 1987, prior to his appearance at the Judiciary Committee hearings, Judge Bork stated that the Equal Protection Clause of the Fourteenth Amendment prohibited discrimination only on the basis of race and ethnicity. This is contrary to several well-settled Supreme Court cases and would have the effect of denying meaningful protection to women. At his confirmation hearings, Judge Bork changed his position and said he would apply the Equal Protection Clause of the Fourteenth Amendment to everyone, including women, pursuant to a "reasonable basis" standard.

In 1971 Judge Bork stated his view that the First Amendment ". . . does not cover scientific, educational, commercial or literary expression as such." As late as June 1987, Judge Bork was still suggesting that speech, in order to be protected, had to have some connection to the political processes, but he was still hedging on whether it covered other speech. Yet at his confirmation hearings, although he questioned whether the First Amendment protected nonpolitical speech, he finally accepted the proposition that speech should be protected regardless of its relationship to the political process.

In strongly worded articles in 1963 and 1964, Judge Bork opposed the Civil Rights Act of 1964 which banned discrimination in public accommodations and employment. He called the principle underlying the proposed ban on discrimination in public accommodations "unsurpassed ugliness." It was not until his 1973 confirmation as Solicitor General that he publicly modified his views about the Civil Rights Act.

Although I am in favor of thoughtful change, the renunciation of long-held beliefs during confirmation hearings gives me some cause for concern. Which views would Judge Bork apply on the Supreme Court—his confirmation views or his previous views? Mr. President, I am not confident of the answer. America simply cannot afford to refight the civil rights battles of the 1950's, 1960's, and 1970's. America cannot afford to march backward on the quest for blacks and women to be accorded equal treatment in our society.

Contrary to his previous extreme positions, Judge Bork's recent confirmation testimony, as I viewed it and as I read it, reflected the views of a mainstream judicial conservative, with one troubling exception: His continued failure to recognize the unwritten rights reserved to the people under the Constitution. Judge Bork's view is outside the mainstream of such judicial conservatives as Justices Harlan and Frankfurter as well as such recent conservatives as Justices Stewart, Powell, and O'Connor and Chief Justice Burger. Each of these members of the Court accepted and applied, in one form or another, a concept of liberty and unwritten rights.

The framers intended, as I read the constitutional history, perhaps above all else, that the Constitution protect the ultimate right of the people to be sovereign. That principal permeates the very fabric of the Constitution—giving the Federal Government only specifically identified powers, preserving those accepted and traditional powers of State government and reserving all other rights and powers to the people.

I am puzzeld by Judge Bork's refusal to recognize among those reserved rights the people's right to privacy—some call it liberty, some call it privacy—the very basic right of the people to be left alone. In my view, the right to privacy encompasess those inherent rights which all Americans, regardless of race, sex, economic class, or political leanings, cherish and respect; among these are the right to marry, the right to bear and bring up children, and the right to live and work where we choose. The right to privacy ensures us the right to make those very personal decisions which determine how we live our lives. This right will become even more important in a technological age of supercomputers which can handle massive amounts of information and advanced biotechnology which can make possible genetic engineering and surrogate motherhood. Certainly, the right of privacy is not unlimited and lines must be drawn. Just as with any other constitutionally recognized right, it is a question of balancing the interest of the State against the right of the individual in each case. This is the func-

tion, a very important function, of our courts and our legislatures.

Finally, I am concerned by the history which Senator HEFLIN pointed out in his individual view:

> 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.

Mr. President, Judge Bork has had, and I believe he will continue to have, a distinguished legal career. I admire him in many ways. He has a solid background as a private practitioner, an eminent professor at Yale University and a distinguished Solicitor General of the United States. He has been on the cutting edge of legal theory in this country, particularly in his days as a professor, his days as a writer, and also his days as a Solicitor General and a judge.

In reviewing Judge Bork's record, however, it is obvious that he has endeavored throughout his career to apply the technical precision of a mathematical formula to jurisprudence. But law is not mathematics and the social and human issues which it governs are not easily reduced to the figures and formulas of a science. Law cannot be looked at in a vacuum; it cannot be divorced from the reality of how it affects the people it governs. Just as I do not support sociological jurisprudence, neither do I support mathematical jurisprudence. Law cannot, by its nature, be a product of technically rigid formulas; it must instead reflect, to a large degree, a commonsense search for justice.

Unfortunately, Judge Bork's formula approach to legal analysis has not been anchored over the years by a search for common sense.

Mr. President, Judge Bork's confirmation testimony presents some evidence that his legal thinking is evolving away from rigidity. Looking at his entire record, however, I have considerable doubt as to where he would evolve as a Supreme Court judge. I believe that there is a considerable risk that Judge Bork's intellectual adventure might leave human values and commonsense justice outside the door of the Supreme Court.

Mr. President, because of these doubts and concerns, I will vote no on the Bork nomination.

Mr. President, I yield the floor.

Mr. SIMPSON addressed the Chair.

The PRESIDING OFFICER. The Senator from Wyoming is recognized.

Mr. SIMPSON. Mr. President, I will go forward for a few minutes, and I would share with the majority leader, who is present on the floor, that we are moving our people to seek the floor and speak. Obviously, those speaking on both sides are doing so with great personal intensity and that shows we can have a debate of this nature on a very serious issue which is our advice and consent function.

The majority leader has been very gracious and we will proceed. This evening the majority leader will present a proposed unanimous-consent agreement to go foward with a time certain to conclude this debate tomorrow. That is our hope.

I have visited with Judge Bork this afternoon about an hour or so ago. He has no desire to protract and prolong this. It is painful enough as we might all imagine for him and for his family. And we will go forward and work toward that with a vote certain tomorrow. But in the visit with Judge Bork he wanted to express that indeed he hoped we could conclude, that he has no desire to take it into next week or 2 weeks. Surely if there were some great revelation to be shared it would be known to us. One or two have popped up and they have been well portrayed, and they have been explained also on both sides.

So in sorting the debate, though, I think—this is difficult to do, and I do not speak on behalf of Judge Bork. I would not attempt to do that. Let me say, too, that I entered the fray here not at any direction from the White House. I entered the fray as a lawyer who had practiced law for 18 years, and though that this was kind of turning into a disappointing thing. I am not laying any particular blame, but it seemed to be very tough and demeaning kind of spectacle as to what happened the very day that Judge Bork was presented to the Senate by the President.

I do not think anyone was prepared for the intensity of that onslaught and obviously not prepared because it took hold out in America, and the American people were frightened by it all. And we were never able to steer them from that course. But there are a couple of things I would share on behalf of Judge Bork, after our visit, that there have been several things said that might bring it into better perspective.

One was the comments of our distinguished colleague from Oregon, Senator PACKWOOD, who spoke with great intensity. We all know that remarkable gentleman—about his feelings about the issue of privacy. I just want to share that Judge Bork wanted to put that in a little better perspective, and the true perspective, as Bob did also from his standpoint, is that their entire conversation was about abortion, and the right to privacy.

So as to the discussion of privacy, as expressed by the Senator from Oregon, Judge Bork wanted me to express that that entire conversation as he recalls it was about abortion; nothing more. We did not get expansive into the rights of privacy, although it is public information that Judge Bork has said that the finding of rights of privacy in the Constitution are different than Senator PACKWOOD's. That is the certainty of it. But it was limited to abortion.

Also, Judge Bork expressed that he had seen some of the ads that have been placed by those in support of him, particular targeted ads in the States of Senators who have been opposed to him. And he wanted to express that is very disturbing to him. He deplores that type of advertising campaign, just as he deplored the campaign that was addressed against him. I think that is kind of the measure of the man.

He wants to be sure that the Senate is aware that he disassociates himself completely with the advertising campaign which, as I say, has been targeted to some of our colleagues who have opposed or indicated they would vote against Judge Bork. He said, "That is not the kind of debate that I wanted, and I will not be any part of it. And I am appalled by it."

Therefore, I think that is important to spread on the record—the celerity across the entire spectrum with regard to advertising, and it should be disappointing to both the proponents and the opponents as to how far it went. It is just unfortunate—perhaps we did not have a better mixup at the earlier front end of it if we were going to have it. But such is the case. And Robert Bork said, "That is not the way I have ever done business," and those of us who have looked at his public record know that is exactly the case.

He loves to stir it up. He loves to create interest and excitement with his students and provocative comments in his Law Review articles. For that he paid a dear price. I hope it does not deter other thoughtful law professors in the years to come or the kind that bring real spirit to a classroom, and excite young people, and write provocative things. I hope we do not end up with a long series of milk soup nominees to the U.S. Supreme Court who shrivel from controversy. I can think of some on both sides of the aisle who are pretty spirited, on both sides of the spectrum who are pretty spirited, in what they have written as law professors.

Then, finally, I would want to express there was a discussion either today or yesterday in debate about

Judge Bork's antitrust record, and I would enter into the RECORD the letter from the 17 former chairmen of the antitrust section of the American Bar Association about Judge Bork and what an extraordinary authority he is in the United States on antitrust. It goes back almost through the entire spectrum of 20 years of the American Bar Association. That letter I will ask unanimous consent be entered into the RECORD.

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

SHEARMAN & STERLING
*New York, NY, August 7, 1987.*

Mr. BENJAMIN C. BRADLEE,
*Executive Editor, The Washington Post, Washington, DC.*

DEAR SIR: I am Immediate Past Chairman of the Section of Antitrust Law of the American Bar Association. I write this letter on behalf of myself and the previous Chairmen of the Section listed below.[1] We write to take issue with Colman McCarthy's criticisms in his article of July 12, 1987 stating that Judge Robert Bork's views on antitrust law are "over the edge" and anticonsumer.

To the contrary, Judge Bork's writings in this area have been among the most influential scholarship ever produced. While not all of us would subscribe to its every conclusion, we strongly believe that *The Antitrust Paradox,* which he published in 1978, is among the most important works written in this field in the past 25 years.

It is indicative of the value of Judge Bork's contributions that *The Antitrust Paradox* has been referred to by the United States Supreme Court and by the U.S. Circuit Courts of Appeals in 75 decisions since its publication. Perhaps the clearest evidence of its influence is that it has been cited approvingly by no fewer than six majority opinions written by Justices commonly viewed as having widely varied judicial philosophies: by Justice Brennan in *Cargill v. Monfort of Colorado, Inc.,* 107 S.Ct. 484, 495 n. 17 (1986); by Justice Powell in *Matsushita Electrical Industries v. Zenith Radio Co.,* 106 S.Ct. 1348, 1357 (1986); by Justice Stevens in *Aspen v. Aspen Highlands Skiing Corp.,* 105 S.Ct. 2847, 2858 and n. 29, 31, 2860-61 n. 39 (1985) and *NCAA v. Board of Regents,* 468 U.S. 85, 101 (1984); and by former Chief Justice Burger in *Reiter v. Sonotone Corp.,* 442 U.S. 330, 343 (1978) and *United States v. United States Gypsum Co.,* 438 U.S. 422, 442 (1978). Justice O'Connor also relied on *The Antitrust Paradox* in her concurring opinion in *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 36 (1984), as did Justice Blackman in his dissent in *National Society of Professional Engineers v. United States,* 435 U.S. 679, 700 n.* (1978). It should also be noted that every member of the present Supreme Court joined one or another of these opinions.

In light of the fact that six of the nine present Justices have cited Judge Bork's book and that all of them have joined opinions citing it, Mr. McCarthy's claim that Judge Bork's antitrust views are "so far on the fringes of irrelevant extremism that [Bork] disqualifies himself from the debate" demonstrates more clearly than anything we could say that Mr. McCarthy does not know what he is talking about.

Mr. McCarthy is also quite wrong in his suggestion that Judge Bork's antitrust writings are anticonsumer. To the contrary, the central thesis of Judge Bork's book, as summarized in chapter 2, is that:

(1) The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore,

(2) "Competition, for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree. R. Bork, *The Antitrust Paradox,* 51 (1978).

It is true that Judge Bork has also stressed that protection of consumer welfare is sometimes inconsistent with protection of some businesses from legitimate competition. The key point, here, however, is that Judge Bork advocates pro-competitive policies which promote the very efficiency that makes the enhancement of consumer welfare possible.

Thus, we fear that it is Mr. McCarthy, and not Judge Bork, who is out of touch with the center of legitimate judicial and economic thought about the proper direction of antitrust analysis. Fortunately, the mainstream view, which no one has helped promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare rather than unnecessary government intervention to protect politically favored competitors.

Sincerely,

James T. Halverson, Shearman & Sterling, New York, New York, Immediate Past Chairman, Section of Antitrust Law, American Bar Association.

On behalf of himself and:

Richard A. Whiting, Steptoe & Johnson, Washington, D.C., Section Chairman, 1984-85.

Richard W. Pogue, Jones, Day, Reavis & Pogue, Cleveland, Ohio, Section Chairman, 1983-84.

Carla A. Hills, Weil, Gotshal & Manges, Washington, D.C., Section Chairman, 1982-83.

E. William Barnett, Baker & Botts, Houston, Texas, Section Chairman, 1981-82.

Harvey M. Applebaum, Covington & Burling, Washington, D.C., Section Chairman, 1980-81.

Earl E. Pollack, Sonnenschein, Carlin, Nath & Rosenthal, Chicago, Illinois, Section Chairman, 1979-80.

Allen C. Holmes, Cleveland, Ohio, Section Chairman, 1978-79.

Ira M. Millstein, Weil, Gotshal & Manges, New York, New York, Section Chairman, 1977-78.

Edwin S. Rockefeller, Schiff Hardin & Waite, Washington, D.C., Section Chairman, 1976-77.

John Izard, King & Spaulding, Atlanta, Georgia, Section Chairman, 1974-75.

Julian O. von Kalinowski, Gibson, Dunn & Crutcher, Los Angeles, California, Section Chairman, 1972-73.

Richard K. Decker, Of Counsel, Lord, Bissel & Brook, Chicago, Illinois, Section Chairman, 1971-72.

Frederick M. Rowe, Kirkland & Ellis, Washington, D.C., Section Chairman, 1969-70.

Miles W. Kirkpatrick, Morgan, Lewis & Bockius, Washington, D.C., Section Chairman, 1968-69.

[1] The opinions expressed herein are those of the individuals listed below and are not intended to represent those of the Section of Antitrust Law or the American Bar Association.

Mr. SIMPSON. I thank the Chair.

These are from people who have known Judge Bork. They have worked with him. He presented his seminal work on antitrust and interestingly enough, the Supreme Court has often cited Judge Bork's work on antitrust in their opinions. I can cite those, and they will be entered in the RECORD at a later time.

But I think it is very important to note that the Supreme Court came around to almost all of the views of Judge Bork on antitrust legislation, which is a very proconsumer type of theory of antitrust, and an antiregulation restriction type of philosophy, which is very clear. The book he wrote, of course, we quoted from in the hearings and he is known as one of the great authorities on that area of law in the United States.

So, then, as for myself, I have shared with you the reasons I entered into the fray. As a lawyer practicing law for 18 years I felt that my reputation was all that I had—nothing more. That is the currency of this place, is our integrity and our reputations. And in the course of this long trial—and it has been a trial—almost as we used to think of it in the law business, what was particularly important to me was the attitude of his family. It may not mean anything to others. It does mean something to me. And they went through the process. It was a very painful experience for them, as it was for the judge.

When we came to this point here, where we are doing our statutory or our constitutional function of advise and consent, it is very obvious that here are people who had seen their husband and father portrayed in a way in which he was almost unrecognizable. So they expressed as a family unit, we think we ought to press forward and have that debate on the floor of the U.S. Senate, let the record be prepared and presented for people to read, throughout time, of a man whose entire personna was twisted and presented in a most grotesque way.

So they said go forward. That is not our husband and father that has been portrayed to the United States of America, and to the people—presented actually almost an evil caricature of a man, a gargoyle of a man.

I knew that something was up when I went home this summer in August, and I was besieged by people who I have known for many years, Democrats, Republicans, independents, but thoughtful people, good Wyoming people and they would come up to me and say, "Al, don't vote for Judge Bork. Promise me you won't do that."

I said, "Why?"

They said: "Why? I can't possibly even believe you would ask. I'm telling you why. Because what I have read and what I have seen on television and what I have read in the New Yorker or

the Atlantic or heard by radio. Now what I'm surprised about is how could you support a man who would be one who favors sterilization of his fellow men and women; who is so consumed with big business and union busting that he has lost all sense of balance; who would go back to segregated lunch counters; who does not believe in equal protection for women; who would 'turn back the clock' on civil rights; who is insensitive to religious minorities; who would overturn all established precedents; who does not object to sexual harassment of women at work; who would impose poll taxes to prohibit blacks from voting and literacy tests to prohibit minorities from voting; who was the central figure in the firing of Archibald Cox; who would bring cameras and intrusions into the marital bedroom; who would assure that there would never be a right of privacy of any human being in the United States; who would enforce and believe the work of the executive branch over the legislative branch, if ever the choice came, always siding with the executive branch; who would personally overturn the Civil Rights Act of 1964; who favored racially restrictive covenants in deeds; who believes in freedom of speech only in the political sense and not in the sense of writings and art and letters and usual intercourse?"

Well, if I had heard that when I was just home practicing law in Cody, WY, and raising three babies, like I was in the 1960's, and doing Little League coaching and going to Rotary and the chamber of commerce, and I heard those things about a man, I would have been frightened to pieces. And they were. Maybe some still are. But, let me tell you, it surely was disappointing and saddening and galling to watch. And it worked.

They could have added, I guess, that he was in favor of euthanasia, child pornography. They did miss some things. I think it is important next time around that they try to gather those up and get them in, because there was not much they missed about the man and the "evilness" of him, and that is what they presented to the American people.

I do not know how it could have been much more lurid; but knowing some of the participants, I know it can get more lurid. It was almost a scorched-earth policy. If you will read the wire from the ACLU which went out to their members on August 31, you will get a better flavor of what I am speaking about. I ask unanimous consent that it be printed at this point.

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

ACLU FOUNDATION,
*New York, NY, August 31, 1987.*

Late yesterday ACLU board voted to oppose nomination of Judge Robert Bork to U.S. Supreme Court.

Are moving at once to put in motion nationwide mobilization plan to block his appointment.

Detailed research reveals Bork far more dangerous than previously believed. His stated views clearly place him outside any range of judicial philosophy acceptable in recent decades. If his views were to prevail we risk nothing short of wrecking entire bill of rights and Federal courts in protecting individual liberty.

ACLU's decision not premised on single issue like abortion—racial equality—sex discrimination—privacy—religious liberty—or artistic freedom—even though all these would be in grave danger. Our decision to oppose is far more basic: his confirmation would threaten our system of government.

He does not believe in Supreme Court's role as defender of liberty against government abuse. In his mind Constitution protects power of majority to impose its moral values on all citizens. Record shows he believes that Supreme Court must defer to the will of local majorities—State and local legislatures.

This is basis for destroying protective function of Federal courts and overthrowing American tradition of tolerance for minority beliefs. Church/state issue good example. Bork says "government is inevitably entangled with religion." He believes ". . . exclusion (of religion in public schools) is an affront to democratic majority."

I am preparing detailed memo for you. Time is short. Urgently need your immediate financial help to launch this mobilization. Only tough, targeted campaign will work. Press releases, single issue pleas, shouting from rooftops simply not enough.

ACLU in unique position to make difference because Senate knows we have special credibility where entire bill of rights and Federal courts concerned.

Senate vote likely to be decided by slimmest of margins. ACLU most effective civil liberties voice in Washington. Highly respected by Senate. Can make the critical difference.

Early this morning began mobilization to focus on key Senate votes—reveal startling results of our research to Senators and editorial boards—and marshall support of opinion leaders in key States.

Requires extra staff, sophisticated materials, best legal talent available, activating our network of State affiliates. Enormously expensive.

Your special help critical. Time is short. Hearings start soon. Urge you to rush emergency contribution at once.

IRA GLASSER,
*Executive Director.*

Mr. SIMPSON. I think that one of the most important comments, as we summarize this very unfortunate experience, was by a man I think all of us deeply respect in the political world, I think the finest political commentator and journalist, David S. Broder. To paraphrase the old adage, "When David speaks, everybody listens."

David Broder is a man of rare balance and extraordinary ability to communicate, a reasoned man, and a delightful man of great good humor and spirit, who does not become obsessed with politics, who has found the leavening of existence that all of us seek as we participate in this sometimes barbaric experience—and it is in some cases that.

He said this in his column—and I will insert it in the RECORD—of the day of the vote on Judge Bork in the subcommittee:

I have seen enough politics in my life to have lost my squeamishness but watching these tactics applied to judges is scary. It should send shivers down the spine of anyone who understands the role of the judiciary in this society.

Then he goes on to say:

Candidates for elective office now routinely face battering by public emotions created by mass-media opinion manipulators. To subject judges and judicial appointees to the same propaganda torture test whether from the right or the left does terrible damage to the underlying values of this democracy and the safeguards of our freedom. No one wins in such a game.

Mr. President, I ask unanimous consent to have printed in the RECORD the article to which I have referred, by a man I greatly respect.

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

WHEN JUDGES ARE LYNCHED TO APPEASE THE PUBLIC

(By David S. Broder)

The victory that liberals now boast they will achieve in blocking Judge Robert H. Bork's elevation to the Supreme Court could be an expensive one. The game of judge-bashing, which they learned from their opponents on the political right, ultimately profits no one. It inevitably damages and could destroy one of the major safeguards of freedom in this society: the independence of the judiciary.

If Bork goes down, as seems likely, he would be the second prominent and principled jurist in a year's time to be victimized by a campaign of mass propaganda. The first was Rose Elizabeth Bird, the chief justice of the California supreme court. She was removed from the bench last November in a confirmation election that also terminated the tenure of two other "liberal" justices.

The parallels make activists of the left and right squirm, but they are unmistakable. The Senate confirmation process—like the California confirmation election—has been around for a long time. But neither has been used this way before. It is one thing for responsible senators to conclude, on their own reading of his record, that Bork does not belong on the Supreme Court, or for reputable legal scholars to oppose Bird's continued service on the California supreme court, as some did. It is something else when judges are lynched to appease the public.

Bird lost because of the multimillion-dollar, mass-media and direct-mail campaign mounted by her opponents, and if Bork goes down, it will be for the same reason. Once that gun is drawn, every judge and judicial appointee can be held hostage to the engineered popular passions of the moment. Something precious and vital to our democracy will be gone.

There's an obvious irony in the fact that the battle against Bird was organized by the

right-wing supporters of the same Ronald Reagan who is decrying the assault on Bork. And to complete the paradox, liberals like Norman Lear, who were fervent in their defense of Bird, are uninhibited in their slugging of Bork.

Both the left and right are ready to use all the tools of today's high-tech political communications industry on judges, as if it were a campaign for governor or senator or president. The radio-TV spots and the computer letters employ the same systematic exaggeration and repetition. Bird was beaten on the false allegation that she was "soft on crime" because she had voted "wrong" on case after case applying the death penalty. Bork is succumbing to the false charge that he is "insensitive to personal rights" because he has been "wrong" on cases of importance to women and minorities

With both, political opponents overlooked the judges' claims that they were applying the law as it came to them. In both cases, the opponents conveniently ignored the fact that if the judges truly were "extremists," as charged, their views could not easily prevail on their presumably "mainstream" colleagues on the bench.

In both cases, the opponents were emboldened by the fact that the elected executives who appointed the judges no longer enjoyed great public confidence and the judges themselves were out-of-the-ordinary individuals. Bird, the first woman to serve on the California supreme court, was appointed by Gov. Edmund G. (Jerry) Brown Jr. By the time she faced the voters for confirmation, Brown was out of office and out of favor. Bork, a scholar and teacher whose writings offer endless fodder for intellectual debate, was named by Reagan in the twilight of his presidency, when other politicians no longer feared his power.

Hard-boiled political analysts can look at the two cases and say, "Tough luck, Bird and Bork. Your names came up at the wrong time, and your opponents were smarter, meaner, better-financed and more aggressive than your supporters. That's the way it goes."

I have seen enough politics in my life to have lost my squeamishness. But watching these tactics applied to judges is scary. It should send shivers down the spine of anyone who understands the role of the judiciary in this society.

Our history—like that of every other nation—has been marred by moments when a fever or passion seized the people and goads them to demand extreme action. Genuine conservatives, from Madison to Taft, and genuine liberals, from Jefferson to Douglas, have understood that in such moments, the majority of the country will howl that the offending person's or group's property be seized or their liberties suspended.

It is precisely at such moments—when economic or political freedom is threatened by a massive and angry majority, when a president wants to seize the steel industry or conduct mass arrests of demonstrators—that the independence and integrity of the judiciary is the nation's most precious resource.

Candidates for elective office now routinely face battering by public emotions created by mass-media opinion manipulators. To subject judges and judicial appointees to the same propaganda torture tests whether from the right or the left does terrible damage to the underlying values of this democracy and the safeguards of our freedom. No one wins in such a game.

Mr. SIMPSON. So, Mr. President, that was the case that was presented to the American people.

I left out one: Discrimination against women based upon their gender. How about that one? Evil. Yet, there are probably about half the Members of this body who voted on that one and must believe the same thing. This is the way the distortion comes. Anyone in this Chamber who voted to exempt women from the draft voted to discriminate against women based solely on their gender.

It sounds a little different that way, does it not? Six members of the Judiciary Committee, three Republicans and three Democrats, have already gone on record as discriminating against women based solely on their gender, because that is the vote when you cast it on exempting women from the draft.

I think I have covered them all. As I say, it worked, and that is troubling me enough.

So, I thought, too, as David Broder, that in 18 years of practice of law I had seen it all. I have seen a cowboy chew a guy's ear off and get charged with affray. You want to try one of those cases. I have seen the heirs begin to fight over the body before it even cooled, to get into the probate game.

I have done 1,500 divorces. I could write a book on that. That was not my principal interest in practice, but it was a small-town area. Of course, Wyoming was the second easiest State in those days to obtain a divorce. Nevada was 6 weeks and Wyoming was 60 days, so we had a lot of interesting practice, and I thought I had seen it all. I have tried cases—from reorganizing railroads to replevin of a one-eyed mule, but I had never seen anything like this.

With respect to the ad of Gregory Peck and the text of it—and that has been entered into the RECORD before—I have a hunch that Gregory Peck has no idea who Judge Bork is or what he really is as a human being or as a person. Even though it is imagery and fantasy, I shall never forget Gregory Peck's role in "To Kill a Mockingbird." If I recall, it was about fairness, it was about justice, it was about defanging prejudice and bigotry. I remember that part of it.

How ironic. Somebody got to Gregory Peck and said "Here you go. Here is some stuff about a person, but we will not tell you the whole story, but we will tell you the hideous parts of it and then if you will do this for us," and he did, and I think if I envision the man as I think I would like to, he is probably a bit troubled as he looks back upon what he has done and how the record has actually been presented here in a little bit different way.

So we have heard the debate or soon will tonight and tomorrow morning, and we are pressing for this vote at 2 o'clock and hope we can get that. I hope all of us want to get to that point. It has been fascinating. I tried to watch as much as I could.

There has been the presentation of the opponents and the proponents, the evidence presented by the proponents of what they perceive as distortion and, yes, lies, the presentation of evidence by the opponents as to this twisted record, a record that I know is frightening to them and something they would not want to see on the Supreme Court bench.

So, as I say it, I will present some of that into the RECORD.

I was interested in another interesting article from the Legal Times, and I commend the ACLU. I have had my scraps with the ACLU, won a few and lost a few, mostly lost them, and I was a member once of the ACLU. Do not say anything. No accolades. I was a young lawyer, and I was very fascinated with the things they were doing with right of privacy, things that happened, and then along came Skokie, IL, and I jumped ship. I said, "If you allow the Nazis to march in Skokie, IL, you lost the cowboy from Wyoming." They said, "We did not only lose the cowboy from Wyoming, we lost 200,000 members on that one," which they did.

Then, of course, I have worked with them and I enjoy their membership, their people who handle their Washington experiences here, Morton, Jerry, Wade Henderson, all of them. And we have had some good knock-down, drag out scraps especially in the immigration area.

But I think as I say I have entered into the RECORD their wire to their troops on August 31 which is a little bit, just a slight bit heavy.

Then in the Legal Times with this curious article, it says:

While some Supreme Court watchers are bemoaning the near-certain prospect of an eight-member Court for at least the first few weeks of its fall term, others are viewing it as a blessing in disguise.

This is the Legal Times of August 3, 1987, in their Courtside column.

Take, for example, the American Civil Liberties Union, which is a direct participant in six cases the Court has already agreed to hear this fall—an unusually high number including two that will be argued the first week of the term.

In all but one of the six cases, the ACLU won in the court below, and the other side appealed to the high court.

That't where the benefit of an eight-member Court could come in; if those five cases are heard by only eight justices, and if they produce four-to-four ties, then of course the lower-court ruling stands, and the ACLU prevails. It's a scenario that has not escaped the imagination of ACLU lawyers.

"The balance of voting power is unpredictable," says the ACLU's associate legal director, Helen Hirshkoff, who adds that "one

could certainly wager" that at least some of the cases could come out four-to-four.

And then it cites the ACLU's busy docket.

I ask unanimous consent to print that in the RECORD as an interesting sidelight, I think.

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

EIGHT IS ENOUGH

While some Supreme Court watchers are bemoaning the near-certain prospect of an eight-member Court for at least the first few weeks of its fall term, others are viewing it as a blessing in disguise.

Take, for example, the American Civil Liberties Union, which is a direct participant in six cases, the Court has already agreed to hear this fall—an unusually high number including two that will be argued the first week of the term.

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"The balance of voting power is unpredictable," says the ACLU's associate legal director, Helen Hirshoff, who adds that "one could certainly wager" that at least some of the cases could come out four-to-four.

The ACLU's busy docket:

*Reagan v. Abourezk*, No. 86-656, on the denial of U.S. visas for foreign communists.

*Karcher v. May*, No. 85-1551, testing New Jersey's public school moment-of-silence law.

*Webster v. Doe*, No. 86-1294, whether the CIA dismissal of a gay employee is reviewable.

*Hartigan v. Zbaraz*, No. 85-673, on Illinois' abortion law.

*Russoniello v. Olagues*, No. 86-1217, involving a voter-fraud investigation that challenged only foreign-born voters who requested bilingual ballots.

*McKelvey v. Turnage*, No. 86-737 challenging the Veterans Administration refusal of educational benefits because of alcoholism.

Mr. SIMPSON. Then I think that I just want to comnent upon a really curious twist as we saw this thing develop. There was a discussion of what Robert Bork would do to the Supreme Court of the United States, that he would not be like Lewis Powell—the steadying, calm, swing vote—that he would be really bad news. But to be really bad news he has to go convince four of these sitting eight Justices to go with him.

I had not heard anything about how he would use his awesome powers to do that, just get appointed to the Court I guess and wrestle four of the eight to the ground and say we are going to overturn this and that and, of course, that is absurd.

Yet we were told that that would be the result.

What we saw happen in the Judiciary Committee hearings was a kind of a court packing. Do not miss the import of what you saw. I am gathering together, and it will just go in the record at some future time, I think there were at least 16 particular doctrines or themes that Robert Bork was asked about as to what would he do if—16 of them.

And the questions were pretty clear, "What would you do if the case of so and so like that came before you?", and he answered in ways that no other nominees will ever answer, at least I feel sure of that, because we will not have to do a book for the next Supreme Court nominee. All of us at the table, the Judiciary Committee, Democrats and Republicans alike, will say, "I want to know how you feel about this," and that person being adroit and having watched this, will say something like this: "Thank you very much, Senator SIMPSON. I appreciate your question. I want you to know that I feel quite certain that that issue will come before me, if I am confirmed to the Court, and therefore I do not believe that in good conscience or ethically I can comment on that and I will refuse to respond."

And that is it. The Judiciary Committee members will gnaw down through the table tops likely and they will be unsated and unsatisfied, both sides of the aisle.

But if you go back and look at the testimony at the hearings, go back and look at the testimony of Justice Rehnquist, Justice O'Connor, and Justice Scalia, you will find that that exactly is what they were saying. In fact, Justice O'Connor was the sharpest one in that game. She put it right in her opening statement right on the first page, and Justice Rehnquist then threw out his and he took a brutal pounding as we all saw and did that with great good humor and great equanimity and Justice Scalia in many occasions just quoted something like I have just shared with you.

That is the way it will be, at least I think it will in the future.

But Robert Bork opened himself to that because he said when he started, "I obviously have become so controversial that I am going to answer questions. Perhaps, I should not or I need not, "or by historical perspective would not." But, anyway, that happened.

That is what will happen, in my mind, in the future with the next Supreme Court nominee.

It is a form actually, as I say, of Court packing. If you ask a person who is there as the nominee, "Before I vote for you I insist on controlling the decision of the Court and if you are not going to support what I have just asked you I will not vote for you." That is I think a form of Court packing. I do not know what else you call that. I have another name for it, but I mean that would work for a Court packing.

A doctrinal test, that is, "You will not be on the Supreme Court, according to me, unless you meet the test of me and my philosophy and, therefore, if you do not you will not go on the Court. If you do, we will pack you on the Court."

I think that is Court packing. It would meet that definition.

But what will be the saddest part of the exercise other than pain for Judge Bork and his family—you know, somewhere under all the rubble and the glee. I understand now they are having a seminar soon in a couple of weeks on how it worked. And I guess you toady up a few bucks and they will teach you how to do this in your particular next thing before the Congress. It is a remarkable faculty. I know some of the people involved. I am sure they will have a high old time of it over there and make a few bucks on the side perhaps and teach people how to do this. Symbolism is terribly important—emotion, fear, guilt, racism. That is not the first time I have used those phrases, but it will not be the last when we get to Supreme Court judges.

And so what has happened or will happen is that we will deprive the U.S. Supreme Court of yeast and zest and spirit. That is what we will do in this process.

I had a hunch or a fantasy that 6 months from now, if we had Robert Bork on the Supreme Court, 6 months of him in his remarkable way with his brilliance—and not one person in America has questioned his brilliance or his intelligence. Not one. Not one, he would have had some of the most spirited conversations with Bill Brennan, who is a lovely friend, a respected friend of mine. Stimulating. I could see those conversations taking place. Or conversations with Thurgood Marshall, who I have come to know but not to the degree of Justice Brennan. Or our old friend—and he will not like it—Wizzer White who we remember in the West was a great All-American football player at Colorado.

I could just see what they would have done with each other and would have had a tremendous, tremendous spirit like all lawyers have, where you always learn more from the guy on the other side and learn more from what the adversary is doing than you do about your own case. And that Court has been deprived of that yeast, that stimulation.

I had this further fantasy that as they did that and they got to know each other better and saw how their mental processes worked and their prejudices which everyone brings to the table—and that is not prejudice in the racist sense. That is prejudice in the dictionary sense. Because a person

without prejudices in the dictionary sense is a pretty bland person. I do not like being around too many people who do not have ego or prejudice, and I leave out the aura of racism when I speak of that, I assure you.

I had that hunch that in about 6 months that Robert Bork and Bill Brennan would go off somewhere and have a glass of grape pop and realize the respect that they would have for each other, because they would form that. There is not a question in my mind that they would not form that.

And that yeast and spirit and zest has been or will be deprived from the Court perhaps for a long while. I will tell you it is tough to lose a man of that caliber. America will be rethinking this one for a long time. Because they do not give him a chance. He had his chance. He was at the hearings. Yes, he testified. Yes, he went further than anyone. But there was no way to override what happened out in the real world.

And often in the time that I have been involved in this, someone would run up to me and maybe ram a microphone under my snoot and say, "Well, Simpson, if we have a Democratic President and a Democratic appointee, you would be doing the same thing as us. Don't give us that stuff." And I said, "No, I wouldn't, because I never have."

There is a lady who now sits as the chief judge of the District of Columbia Court of Appeals. Her name is Pat Wald. She is superb. As far as I know, in her other life she was a, quote, "liberal Democrat." And she was assailed when she came here, writing an article about the rights of a parent and children. And they were children of 12 or 13 years old. What are the rights of children of that age with their parents? And they told her to write a very provocative article. Well, she really did. And they used it on her and they took this one article. And Bork has written hundreds of provocative articles. So for her it was only one.

They said, "You do not deserve to be on that court because you have written something here which is antifamily. Whoever heard of giving a 12-year-old the right to do what is suggested here, the rights of arguing with the parent, saying, 'I'm going to do that.'" I said, "Well, I will read the article." And I did, and I thought it was delightful. It was not written to be delightful, but it showed a creativity.

And so I said to her, "I would work very hard to see that you are on the bench and I am a, quote, 'conservative Republican.' But you look like you have a tremendous mind. You love the law. You have been living with the same chap for all these years and have five delightful children and they are trying to palm that stuff off on you. They won't palm it off on me."

So she sits as the chief judge of the court on which Robert Bork sits and will continue to sit, I might add, if all goes awry here. I hope he will. And in the course of their time together on the bench, some 5½ years, they have voted together, I think, 76 percent of the time. That all got lost in the shuffle.

Ab Mikva, who was a, quote, "liberal Democrat" from Chicago, I was very anxious to help him get on the bench when President Carter appointed him. And then it surfaced that he had voted for some form of gun control at one time. I went to him. I said, "Wait, pal, judge to be, my friend, Ab, I can't support you any more. And it is on totally ideological grounds or whatever you want to call it. But in my part of the country, gun control is simply how steady you hold your rifle."

And I said, "I can't help you at all. But," I said, "I think you will be a great judge. That one part about gun control is something that, just being raised in the West, it is part of our ethic."

And gun control is not a popular subject in any way among those people of the West. These are not dull people who kill. These are thoughtful people, articulate and responsible people. That is another issue. But that is so overriding an issue. I told him, "I can't support you because of that. Wish I could, but can't."

And he now has served on that court with Judge Robert Bork and he and Robert Bork have voted the same way 82 percent of the time. That all got lost in the shuffle because of fear and the "frightening" aspect of this man.

Then here is one that really got lost in the shuffle—and I am very disappointed. I paid my dues to the American Bar Association for many a year. I was embarrassed when they came and presented their case on Robert Bork and they leaked the information as to what the scorecard was. It was 10, 4, and 1. And somebody leaked that from that group. I thought how weird—and that is the best word,—how weird that the American Bar Association gave Judge Bork just 6 years ago the recommendation of "exceptionally well qualified" by a unanimous vote. And then, of course, the U.S. Senate twice before, as Solicitor General under the Democratic Party and as he was seeking the court of appeals judgeship under the control of the Republican Party in here, received a unanimous vote. Unanimous.

And then, to come to this point in his life where they disregarded his entire record from that point and spent the entire time on the record prior to his time on the bench and not on the time and when he was Solicitor General and Federal Circuit Court of Appeals judge; and then the American Bar comes out and their literature and their bylaws and their stuff is full of things about high-blown phrases like, "We do never become involved in ideological issues, political issues," and so on.

Yet, four members of that committee are still hiding out somewhere. We do not know who they are, the four that rejected Robert Bork. Ten voted for him, gave him the highest rating they could give for a Supreme Court judge, and four voted against him and one not opposed. We do not know who they are. I think, hopefully, in the future we should smoke people like that out. I think the American public is entitled to that.

Furthermore, we understand that they interviewed judges all across the United States, including five sitting Supreme Court Justices. I understand that five of the members of the eight-member Court that are left, were interviewed. My hunch is that the ABA probably received a pretty good positive flavor from those people, but we will not know because they will not share with us what that was. I understand confidentiality, as a practicing lawyer, but I also understand, you know, kind of covering yourself up, too.

So, in my mind, I was embarrassed, as a member of the American Bar for many years, and as a member of the profession: One, that they had their little session; two, that they prattled on about ideology and politics and that that did not affect their decision, and yet 5½ years ago they gave him the supreme compliment, unanimously. What happened in that time?

He never had a case overturned. He never had an appeal that went to the Supreme Court that overturned his decision. Justice Powell voted with him 9 out of 10 times. In six dissents, the Supreme Court embraced his dissent.

He wrote six dissents on that court that went to the U.S. Supreme Court and they embraced his dissents, wrote the majority opinion on Robert Bork's dissent.

One hundred and seventeen opinions that he wrote. Well, I will tell you, I think America will look back with embarrassment, absolutely embarrassment if they reject this man. You have heard others speak. I will not belabor it and I will wind down here.

You have heard others speak about the American Cyanamide case, which was a real potent thing to talk about: Sterilization. Then you find that Judge Bork was not even on the bench; he was not even sitting at the time that these five women on a terribly unfortunate situation voluntarily chose to be sterilized. He was not even on the bench.

Boy, he got the whole load on that one. That was heavy, heavy stuff. That kept coming back. The American Cyanamide case.

In the record there is a letter from one of the women's attorneys who voluntarily sought the lady out and she sent a wire to the Judiciary Committee. It was pretty heavy. It said that Bob Bork gets glee out of this, or takes some kind of pleasure out of our terrible anxiety.

I could not let that one go. I said I thought that was offensive for a lawyer to go to a client she had in a previous case who had not wanted to testify. They had asked her before if she would say anything and she said no, as I gather it. Then the lawyer went to the lady and said: Send a wire; which she did.

Then they found out that she had not done that voluntarily. She had been urged to do that by her, I guess, former attorney. I think that is a very important part. I do not think it was her present attorney. It is not the issue whether she was paid or pro bono. The issue is the attorney sought her out.

So it appeared, then, that Judge Bork somehow had some judicial satisfaction out of this decision which is very cruel, in my mind. It was a terrible decision for these women because the lead level at the plant was not—the company said: "We cannot do any more about that." They said: "Well, if you cannot, we are going to have to close the plant or we are going to have to lay people off, or if you are going to work in that area and you are of child-bearing age, you may choose to be sterilized."

Five women voluntarily made that decision. Then the suit arose, the union came into the case.

The OSHA review board was unanimous. The Court was unanimous. Do not miss the essence of that: It was a three-judge court. I think it was Judge Williams, Judge Scalia, and Judge Bork, unanimous. The full court of appeals chose not to hear it. It felt that it was a correct decision, and the Supreme Court did not choose to do anything with it whatsoever.

But that is what happened to Robert Bork on sterilization.

Then you remember that ad that Senator HATCH showed you? I cannot remember exactly how that was said, that Robert Bork was the man who caused your utility rates to go up. Well, that was the most minor charge of the whole last few weeks, but, you know, that gets people pretty keyed up. "So this is the fellow that made my light bill go up." That is pretty potent stuff.

Here it is. Yes. You see this is the ad and everyone in America has seen it. It ran all over the United States. Here is the first headline. It says: "Sterilizing Workers."

I just told you about the American Cyanamide case where he was not even on the bench when it happened. "Billing Consumers for Power They Never Got."

"Thanks to Judge Bork, Consumers Got a Bill for $400 Million."

Well, thanks to distortion, Judge Bork got worse than that and I am going to place in the RECORD the letter to the editor of the Washington Post by the counsel in the case. I know nobody wants to pay much attention to that, but I just thought I would throw it in: Leonard W. Belter.

He said he saw the ad full page, "Billing Consumers for Power They Never Got," and then he says:

> I represented Jersey Central in that case which was an appeal from an order of the Federal Energy Regulatory Commission. The facts are * * * it has long been an established principle at FERC that consumers must pay for prudent investments in power plants that are not completed. Thus, there was never any issue before Judge Bork over whether consumers had to pay for the investment in the plant. There was, and is, debate over whether consumers should pay a "return" on this investment during the time that the consumers pay for it. The precise issue before Judge Bork was a procedural one.

Get this; this is the attorney in the case.

> Jersey Central had alleged it needed the rate level requested in order to maintain its financial integrity. FERC denied Jersey Central's rate level request without a hearing. Judge Bork ordered FERC to afford Jersey Central a hearing on its allegations and that is all that Judge Bork's decision required FERC to do

Please hear this:

> The hearing that was ordered has not yet been held. Hence, consumers have not yet been billed one nickle because of Judge Bork's decision, much less $400 million.
>
> Let us hope that the debate on Judge Bork can be resolved on accurate facts, not the type of distortion evidenced by this example.

Well, unfortunately that did not happen, about the debate going forward on accurate facts, because I do not know what could be more accurate than that. But it does not fit the bill of an ad because it is not thoroughly larded with symbolism and this stuff here.

Then, "no privacy." You have all seen the ad. It went all over the United States. It hit every tabletop and every family in America and they were frightened when they saw it.

"Big business is always right." Those are little subheadings. The full text of that in larger form has been presented to you.

Then, of course, to find out that the Griswold case which was talked about so often was really a law school professor's exercise. They had had on the books in Connecticut, a law which said that it was illegal to use contraceptives if you were a married couple. That was the essence of it.

Nobody has ever brought a prosecution under that because it was very difficult to find the prosecutor who would do the investigating, apparently. But certainly nobody with any sense would have done anything with it. So nothing was done with it. Judge Bork called it a "nutty" law.

But he said legislatures have a way of passing, sometimes, nutty laws and there is a way to correct that. You do that through the people's elected representatives.

So when he described it as a law school professor's exercise, it was quite interesting to all of us.

They finally found a doctor who was selling contraceptive devices and they brought the issue up based on that. Thus, we find Robert Bork in his expressions of the right to privacy of a married couple is no more than the right of a polluter to pollute. I believe that is the way they garbled that baby up. If you look at the full text of it, you could see what Judge Bork was saying. He was saying just what Judge Hugo Black was saying, who dissented in that case.

We do not ever get to equate that very clearly.

Well, enough.

It is interesting to me to ask the American people, and I think they would want to ask this in the future, "How did this happen?" There will be a textbook written on it, I am sure. I hope not with pleasure, and I hope the seminars do not get too gleeful as they talk about destruction of something that probably means more to us in politics—no, just as much to us in politics—as it does to every human being, and that is their reputation—their reputation and their integrity as human beings. I thought of the irony of the whole thing. We talked about the rights of everybody on Earth in this hearing, the rights of minorities, the rights of this or that person, the rights of women, the rights of men, the rights of blacks, the rights of Jews, the rights of whites, and nobody ever talked about the rights of Judge Robert Heron Bork.

I tell you, somebody ought to be paying attention to that on the next go-round.

I appreciate the majority leader giving us the time to do this. Maybe we will find out later how did this happen; what did he really do; how did we warp his record and savage this man?

Maybe this record, this small attempt in the last 2 or 3 days, will help to heal the pain and present the man, the man himself, because the American people have seen him. But they did not know his feelings, how deep this has been for him. All I can tell you is that for me as a busy American citizen just watching, just reading, I would have been frightened to death by this man, and I would have been confused, too.

So it happened.

It must be puzzling to the Nation to know that this body has twice, by unanimous vote, found Robert Bork highly qualified to serve this country as Solicitor General and as judge of the circuit court of appeals—and then see a majority of the Senators publicly express their opposition to him, before the debate had even begun.

It must be perplexing—no, really unheard of—to know that a Chief Justice of the Supreme Court of the United States has testified that no nominee to the Supreme Court in 50 years has been better qualified than Robert Bork, yet the participants in this debate come to the floor with minds closed to arguments on the merits.

I believe this paradox can be explained by two phenomena which had distinguished this nomination:

First. The extraordinary and unprecedented efforts and influence of outside special interests.

Second. A nomination process dominated by partisanship. The senior Senator from Colorado spoke eloquently to these issues yesterday.

And I believe it is a national tragedy that we are permitting this to happen. I fear for the integrity of the nomination process; but even more I truly believe the President did indeed nominate the very best candidate available for the Supreme Court.

Robert Bork's intellectual brillance, his integrity, and his unusually qualifying legal and judicial experience are not questioned—even by his most strident opponents. No, it is Robert Bork's judicial philosophy which so violently upsets the opponents of this nomination.

Let's look at Judge Robert Bork's judicial philosophy:

Mr. President, some of the current opponents of the nomination of Judge Robert H. Bork view the role of the Supreme Court and the function of the judicial branch in a manner that I think poses a serious threat to the democratic rights of the American people. Perhaps the American people have tired of self-government; perhaps they want guardians appointed by others to make the tough policy decisions that will determine the quality of their lives and the lives of their children. But I do not believe this for a moment.

No, I think that there is another reason why the people have not deluged this body with demands that this wise, compassionate, learned, and able man be added to the Supreme Court. I think that the people have not fought harder for Judge Bork because they have been ill-served by those whose duty it is to keep them informed. Their elected leaders and the media have failed to help the people focus on the fundamental issues amidst all the legal technicalities, and to help them see through a vicious and dishonest campaign waged by ideologues who seem to distrust the democratic process.

Mr. President, at this time I want to review a fundamental issue that my colleagues and the American people might not be aware of.

One of the confusing elements of the debate so far is that the terms "liberal" and "conservative" are used to refer to two very different categories of a Justice's beliefs: political ideology and judicial philosophy. Furthermore, these labels are sometimes used to describe not a Justice's beliefs, but whether the results he tends to support are favored by political liberals or political conservatives. Thus, a dissenting vote in the abortion case is often called conservative without regard to whether it was grounded on political ideology or judicial philosphy—even though the two grounds have entirely different implications for how the Justice will decide other cases.

Mr. President, a Justice's political ideology—his personal opinions about what law and Government policy ought to be—determines how he votes as a private citizen and how he would vote if he were a legislator. Whether or not it significantly affects the Justice's votes on the Supreme Court depends on the Justice's judicial philosophy. If this philosophy is reasonable, then political ideology is of little importance.

Three aspects of a Justice's judicial philosophy are essential to the distinction that is made between liberal and conservative Justices. These concern: First, the proper way to interpret the Constitution; Second, the level of restraint the Court should show in close cases, especially out of deference to the elected branches of government; and third, the extent to which the Court should be bound by its prior decisions.

The most controversial aspect of judicial philosophy probably concerns constitutional interpretation. Those who believe in "original intent" interpretation believe that constitutional provisions should be interpreted in accordance with the understanding that was the basis on which the original Constitution and the subsequent amendments were ratified. Thus, the provisions of the Constitution should be interpreted to have the same meaning that the provisions were understood to have by the elected Representatives who consented to them on behalf of the American people—all being the process that makes laws legitimate in a democracy. The moral and policy judgments made by these Representatives must, of course, be applied to new circumstances, including those which result from new technology. The fourth amendment covers electronic surveillance even though this kind of "search" was not known 200 years ago. So the particular circumstances that a constitutional provision covers can change. But the policy judgments that are part of its meaning as a matter of principle remain the same.

Individuals who reject original intent interpretation as the basis for interpreting the Constitution usually believe that the meaning of a constitutional provision evolves, not merely in the sense that it applies to new particular circumstances, but also in its policy meaning. The two most common methods used to determine the Constitution's so-called evolved meaning involve either a Justice's assessment of the Amercian people, or his identification of rights which are not specifically mentioned in the Constitution but which are, he believes, implied by provisions that are there. For example, because there are several specific rights relating to privacy, it is concluded that there is a general privacy right, which covers not only the rights actually mentioned in the Constitution and originally understood to be covered, but also an unknown number of additional rights.

Neither of these methods of constitutional interpretation—neither the one based on the speculations about the current policy preferences of the American people, nor the method that involves deriving general rights from specific constitutional provisions—can be applied in a predictable manner. The use of these methods requires a Justice to exercise discretion, and frequently appears to lead to the same result as would the direct application of the Justice's own moral and other policy judgments. In practice, the result is often that the opinions of Justices about what the people want or should want overrules the judgment of men and women who are democratically elected by the people as representatives and who are certainly accountable to them for their performance.

Mr. President, the judicial philosophy which is usually described as "conservative" includes original intent interpretation of the Constitution, judicial restraint, and strong adherence to precedent. These positions on judicial philosophy do not imply a "conservative" political ideology, either in theory or in the history of the Court. As the New Republic recently pointed out to political liberals who have become accustomed to judicial activists who produce results that liberals like:

> There is nothing inherently liberal about judicial activism: conservative judges [—and, Mr. President, the reference here is to politically conservative judges—] can discover rights just as readily as liberal judges.

Indeed, this is exactly what happened on the Court during the late 19th and early 20th centuries, when judicial activists who favored a con-

servative political ideology—and who ignored the original intent of the framers of the 5th and 14th amendments—declared unconstitutional much of the prolabor statutes and other economic regulation enacted by Federal and State legislatures during that period.

I hope, therefore, that my colleagues understand that a so-called conservative judicial philosophy offers them a secure opportunity to fight for the implementation of their policy preferences—in the legislatures, where ideological battles belong. They would not need to fear that a judge adhering to such a philosophy would seek to overturn their legislative successes by some arbitrary second-guessing of the legislature in identifying the fundamental values of the people, or by the discovery in the Constitution of some new general right. In other words, a "conservative" judicial philosophy is one which both political conservatives and political liberals should believe in—if, that is, they believe in democracy.

Mr. President, at the beginning of this statement I said that much of the current opposition to Judge Bork's nomination is based on a view of the role of the Supreme Court that poses a serious threat to the democratic rights of the American people. I would now like to pursue that theme.

In my view, the most fundamental rights of the American people remain today what they have traditionally been considered to be: First, that their Government act according to the law and, second, that the laws by which they are governed be laws to which they have consented.

The only legitimate reason for the Supreme Court to overrule the actions of the elected representatives of the people is that such actions are inconsistent with a more authoritative expression of the people's will, the Constitution. The Constitution both sets forth the limits of those representatives' permissible actions, and sets forth the terms on which the actions of such representatives are to be binding.

When an activist Court acts as a supreme policymaker, law is created which has not been consented to by the people. Not only is such law not legitimate, but it can be contrary to their will. Furthermore, such judicial overreaching cannot easily be remedied. As a result, the will of the people can be frustrated and their right to self-government abridged. This has happened many times in the last 25 years. Yet an activist Court is what is sought by many of the opponents to Judge Bork.

I would like to mention the effects of just a few of the Supreme Court decisions that would appear to be both opposed by the great majority of the American people and unsupported by the Constitution or laws of the United States as these were understood by the elected representatives who consented to them on behalf of the people. Confessed murderers, rapists, drug pushers, and other dangerous criminals are sometimes released, without punishment, into the community because the police have failed to follow certain court-mandated rituals that even the Court admits are not required by the Constitution itself; the death penalty is prohibited for years and then is later allowed subject to severe restrictions; pornography is rampant in communities all across the country; public schools are prohibited from allowing time for prayer or even silence even on a voluntary basis; forced busing frequently prevents children from attending a school in their own neighborhood unless the family leaves their own hometown and moves to a new area; reverse discrimination and quotas based on ethnic background or gender prohibit consideration of the most qualified candidates for many job or educational opportunities despite the clearly expressed intent of Congress to the contrary. I believe that these are examples of policymaking by the Court, not examples of a reasonable interpretation of the Constitution on congressional statues.

Like all laws, the Constitution should remain in effect as written until changed through the proscribed, formal democratic procedure. The amendment process was understood by the framers to be the only method for changing the meaning of the Constitution. Furthermore, the formal amendment process was not expected to be used as a way to resist changes in meaning, that is, as a routine remedy for the problem of a court that routinely exceeds the judicial role. It is much easier for an activist Court to overreach than it is for the people to correct the overreaching through amendment. Yet an activist Court is what is wanted by many of the opponents to Judge Bork.

Mr. President, it is not desirable to require the people to rely on the appropriately and intentionally difficult amendment process to resist change that they did not initiate and do not want. It should not be necessary for the people to say to the Court, in effect, "we still mean what we meant when we gave our formal consent—no less, but also no more." Furthermore, as my colleagues well know, efforts to correct Supreme Court overreaching can often be blocked by a determined minority. In practice, therefore, the amendment process is frequently not available to restore the Constitution to what the people want it to be—surely a clearly antidemocratic result.

Mr. President, seldom in our history has a nominee been so clearly the right choice. Judge Bork believes in interpreting our Constitution and statutes based on the understanding through which the democratically elected representatives of the people gave their consent. He also believes in judicial restraint. Fifteen years ago, Judge Bork wrote:

> Courts must accept any value choice the legislature makes, unless it clearly runs contrary to a choice made in the framing of the Constitution.

For example, if the people of a State want rights that the Constitution does not require, such as additional privacy rights, all they need to do is instruct their legislatures to enact laws creating such rights. Judge Bork would be the last Justice to prevent them from doing so, unless of course a provision of the Constitution clearly required otherwise.

Similary, in a speech given 2 years ago, he said:

> In a constitutional democracy, the moral content of law must be given by the morality of the framers or the legislator, never the morality of the judge. The sole task of the latter—and it is a task large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances.

Judge Bork's views on the authority of precedent are quite moderate. He does not believe that the court should always follow precedent, even long-followed precedents. Thus, he supports the court's decision in Brown versus Board of Education, which overturned an earlier decision that we now abhor: Plessy versus Ferguson. Conversely, Judge Bork does not believe that all precedents improperly decided should be overruled. He has long stated that some precedents have become so integral a part of American life that the disruption that would result if they were overruled would be too great.

At this point I want to quote a few words of Judge Bork that describe what he calls "the morality of the judge." The American heritage dictionary defines "morality" in part as "the quality of being in accord with standards of right or good conduct." I believe this is the precise sense in which he uses the word. In Judge Bork's view, "the morality of the judge" consists of an "abstinence from giving his own desires free play;" a "continuing and self-conscious renunciation of power." Let me repeat these two phrases that so capture the essence of Judge Bork's message: "abstinence from giving his own desires free play;" "continuing and self-conscious renunciation of power."

Judge Bork is, of course, referring to what he believes is the ideal of judgeship, the conduct to which a judge should aspire. I believe it is important for my colleagues to remember that acting on the bench strictly within the boundaries of the judicial role—the role of fairly applying policies chosen by others—is not a casual matter with

Judge Bork. It is a matter of deep conviction. It goes to the core of his own self-respect and ambition to be a great Justice.

I would hope Senators and the American people will ask themselves who is more of a threat to the traditional rights and liberties of the people, including their right to self-government. Is it someone like Judge Bork, who is so self-consciously and by deep conviction respectful of America's constitutional democracy? Is it the Judge Bork who so deeply respects the right of the American people to be governed by laws to which they have consented, and their right to the known and definite protections of the Constitution as it has traditionally and historically been understood? Or is the greater threat somebody like one of Judge Bork's prominent critics in the Senate, who recently claimed "(Judge Bork's) rigid ideology will tip the scales of justice against the kind of country America is and ought to be." This critic implies that the wisemen who meet that Senator's standards know what America "is and ought to be" better than her people, and that this unelected group should be able to impose its vision of America on the people whether the people like it or not. I hope the American people will understand that, if a politician argues for a process different from our traditional system of separating legislative and judicial powers, this politician can only believe that other values and some other "will" are so definitely superior that they should be imposed on the people without their consent. I reject that notion, as I believe do most Americans.

Some of Judge Bork's opponents claim that his nomination represents an attempt by the President to promote an ideological agenda, an agenda that the American people do not want. How can this be true when it is Judge Bork who wants to defer to the elected representatives of the people except when clearly contrary to the Constitution?

It is Judge Bork's opponents who will not admit that the Constitution does not mandate everything they believe is right, and does not prohibit everything they believe is wrong. Some of Judge Bork's critics are so convinced of their own wisdom that the disagreement of neither the American people nor the framers of the Constitution is enough to make them hesitate in their efforts to impose their vision of what America "ought to be."

I have already spoken to Judge Bork's conception of "the morality of the judge." Well, I believe that in this body we must each have a conception of the morality of the Senator—not one soul here believes that Senators should do everything they have the raw political power to do. According to my conception of this morality of a judge, when the President's nominee to the Supreme Court is being considered, Senators should not seek to remake the Court in the political image of the Senate. Instead, Senators should respect the Court's integrity as a judical entity, just as the Court should respect the Congress's role as the only national legislative body. The Court's integrity as a judicial entity will be best preserved if justices follow a judicial philosophy which recognizes the separation of powers between the Court, and the branches of Government that are formally responsible for making policy—and that are accountable to the people if their performance is unsatisfactory.

Mr. President, I deeply believe that a rejection of Judge Bork, would be a vulgar and sad milestone in our history. His character, competence, background, and judicial philosophy make him a truly uniquely qualified nominee. It is very likely that he could be one of the greatest of our Justices. I am certain that at any other time in our history there would have been no doubt about his confirmation. It this great body is to come to the point where a man of this quality and these principles could not be placed on the Supreme Court, the implications would be wretched indeed. It would mean that the belief of the Senate of the United States in the right of the people to self-government—and the Senate's commitment to that right—were no longer strong enough to resist the concerted pressure and yes, lies, of those groups who wish to impose their favored policies on the American people against their will. I strongly urge each of my colleagues who has decided to oppose this nomination to reconsider. There is surely no disgrace in acknowledging that, as a result of new information or new insights, that a prior position is no longer believed to be in the best long-term interest of the America people. I firmly believe that Judge Bork's announced opponents should reconsider.

I will conclude with the thought that we weigh rights and responsibilities, duties and especially our advice and consent function; that it would be good the next time, and let us say that the next time—well, that will be soon, very likely—I hope that some time while I am here we will have another provocative, interesting, fascinating human being who loves to argue and scrap and say provocative things and we can place such a man on the Court whose intelligence and intellect were unquestioned by every single witness who testifies.

You know, we used to do a lot of this in this country years ago. In Salem they did a little of that. There have been other times, times in the Civil War, times of the Ku Klux Klan, called symbolism, savagery, and I do not think we need to do that again in America. I hope I will not be part of it. I hope as we go on in these types of hearings where this is a very sacred thing that we perform—advise and consent under the Constitution—that we will do it with reason and sanity and not be driven by symbols and fear, raw fear, and emotions and terrible distortions of a man's most precious thing, his integrity and his reputation.

I thank the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from Alabama, Senator HEFLIN.

Mr. HEFLIN. Mr. President, I do not rise to support or oppose the nomination of Judge Bork at this time. My words will be directed toward the effort to politicize the confirmation process. I think both parties have been guilty of efforts to politicize the confirmation process. Outside groups, groups representing those on the left and the right, have been guilty of these efforts to politicize the confirmation process.

In order to put this into proper perspective, let us go back to the time that Judge Bork was nominated. A few days after he was nominated, Col. Oliver North appeared before the select committee dealing with the Iran-Contra arms sale, and his testimony made him a national hero.

Immediately, every Senator began to receive telephone calls, telegrams, and messages pertaining to Colonel North.

I had a rather large number of rather unusual telephone calls that were followed by similarly worded telegrams and letters and other communications.

The telephone messages, in effect, relayed three messages: First, Colonel North is a national hero; second, vote for Contra aid; and, third, the telephone messages were repeating, vote for—and here, they would become confused in the pronunciation or spelling of the name. Some would say "Dort," some would say "Hork", some would say "Bork," as the proper name.

This indicated to me that these three messages that we were receiving, and we received thousands like this, were the result of an organized effort that was being orchestrated by some organization or by some organizations' telephone trees.

They came, and came in large numbers, to my offices in the State of Alabama and here in Washington. This was then followed by a letter writing campaign. Before the August recess the letter writing campaign was in full bloom. Most of the letters or telegrams contained the same message—which was, in my judgment, evidence of an organized, orchestrated effort to politicize the confirmation process.

Altogether, I would say that the count before the August recess ran 10 to 1 in favor of Judge Bork. I cannot break down how many messages we re-

ceived before the August recess, but altogether we got about 40,000 communications—letters, telephone calls, various forms of communication. This is only about one-fourth of 1 percent of the population of Alabama, but it was a tremendous effort in organization and communication.

After the August recess, the groups that opposed Judge Bork went into action. For about a week then the communications were about equal. But again, thereafter, the pro-Bork communications were three to one or four to one, something in that neighborhood.

At this time, certain organizations went into action from the left. The American Way ran newspaper advertisements. We have heard a lot about that. And the newspaper advertisements that they ran have been introduced into the RECORD. Gregory Peck had a TV commercial that was run, and we have heard a great deal about it. I understand that a transcript of his commercial has been entered into the RECORD.

Then, just before the vote in the committee, there appeared a full-page ad in USA Today, which is a newspaper published with nationwide circulation, by an organization known as "We the People."

This newspaper ad, a full-page ad—I have a copy here—down at the bottom has, "We the People." And it begins, "The assassination of Judge Robert Bork. How politics stink and you lose."

It continues, reciting various ideas, positions, and then it launches into an attack against three Members of the U.S. Senate, Chairman JOE BIDEN, Senator TED KENNEDY, and Senator HOWARD METZENBAUM.

I am not going to read all the language of the attack that was published in this ad, but I will, at a proper time, enter it into the RECORD and it can be viewed and you can give it your own interpretation. It called upon people to call their Senators at the main telephone number of the U.S. Senate, and then it ends with the plea, "You can help," asking for people to give authorization for their names to be used in support of confirmation of Judge Bork. Finally, it reads, "Enclosed is a contribution" and then appears a block marked $25, $50, $75, $100. It finishes by saying, "Rush to We the People," at an address in Los Angeles, CA.

I am not going to read this attack that was made on the Members of this Senate, but in the same edition of USA Today there was a small ad paid for by a man named Z.C. Bernstein of Englewood, NJ. I will read this ad because I think it expresses, in brief, the message that the previous full page ad by "We the People" was trying to convey. This is a type of campaign that, in my judgment, raises many ethical questions. The ad begins with the question:

Do you prefer Joe Biden, the plagiarist; Ted Kennedy, the Chappaquidick driver; Pat Leahy, the leaker, or Howard Metzenbaum, the finder's fee man? If you don't, let your Senators know that you believe they should vote for the confirmation of Judge Robert Bork to the Supreme Court.

At the proper time I will enter that into the RECORD. I believe that this is certainly designed to politicize the conformation process.

Following the committee action there was a delay in bringing the nomination to the floor. Efforts were made to bring before the full Senate the debate on Judge Bork. This would have occurred several days ago, I understand, but for various reasons it did not. There is now the appearance that an organized effort needed to be carried out, an organized effort to gin up the propaganda mills was to take place.

I do not know what has occurred in all other States. I have heard reports of efforts to politicize the confirmation process in a number of States. In my own State, however, I can verify that a great number of things have occurred. First, there were electronic telephone messages that were operated by computers. The majority of these phone calls had the voice of Senator HUMPHREY: "This is Senator HUMPHREY. I am honorary chairman of the National Conservative Political Action Committee." He next says, "I have a message from the President." The President then comes on. Following is another voice telling people to contact or phone their U.S. Senator, to phone me and Senator SHELBY, and then the electronic telephone message ends, "If you would like to make a contribution, give your name and telephone number after the beep." And then there was time for a message.

This telephone message was discussed last Tuesday on the floor. Senator PRYOR and Senator SANFORD talked about it. Senator HUMPHREY was here. At that time, I asked the Senator from New Hampshire about the fact that it had been reported to me from my offices in Alabama, from certain news correspondents, primarily one, that telephone calls were also mimicking my voice, saying, "This is Senator HEFLIN," with a message that was supposedly in my voice. I had certainly not authorized my name to be used.

I endeavored to try to find someone who knew of this campaign and who could write down exactly what was said. Most people indicated that they just remembered hearing my name; they did not remember all of the message, and that is true of these electronic telephone messages, you often don't remember much. Nevertheless, it was so frequently reported to us that my voice appeared on tape that we had to give some validity to the report that this was occurring. We thought that perhaps there might have been a mistake on the part of the listener, he may be mistaking the name of HUMPHREY with HEFLIN, since both started with an "H". But, on second thought, we realized that the distinguished Senator from New Hampshire's accent is a bit different from my accent.

So we cannot say that actually happened but there were enough reports to raise serious doubts that it did occur.

When Senator HUMPHREY was on the floor, I asked him about this. He denied that he knew anything about it, that his organization had anything to do with the possible use of my voice. I accept his explanation saying that he knew nothing. But that does not mean that it did not occur. There could be zealots in certain organizations, or in satellite organizations, or somebody else that could have mimicked my voice, and could have put that on the electronic telephone message.

Senator HUMPHREY, as I have always known him to be, is a person of integrity and I accept his word in regard to this matter pertaining to those telephone messages that would attempt to mimic me. But again it was a fundraising effort.

Then on Sunday of last week in the Birmingham News, which is the largest daily newspaper in our State with a circulation of over 200,000, there appeared a nearly full-page ad reading "Open Letter to Senator Heflin." It has a great number of names printed at the bottom, which would indicate to me that an organized effort was being made. This open letter to Senator HEFLIN read as follows:

Dear Senator HEFLIN: We know that you knew better. We know that perhaps better than anyone else in our Nation you knew and understand the events which were being played out in your presence before your very eyes. We know that every fiber of your being cried out against the lynch mob of a special-interest and media blitz against the nomination of Judge Bork. And yet in the end you capitulated. You bowed your knee at the alter of political expediency. You will have another opportunity to vote on Judge Bork's confirmation. It is imperative that our constitutional process not be destroyed by partisan politics. If legislators persist in this usurpation of authority from the executive branch of Government, that will cripple both the executive and the judicial branches and demolish the balance of powers. Your vote on Judge Bork will determine whether the Supreme Court is going to control America or whether we will remain a constitutional government of, by and for the people. Since no American wants the Supreme Court to run the country, please place principle above party and vote for Judge Bork. You have our deepest prayers. Signed, Your fellow countrymen who bow our knees not to political expediency but only to God.

This is the message some organization published in the Birmingham

News under the name of the "Citizens for Bork." We have not counted every name, but we can count and estimate. It appears there are more than 600 names of people. People in my office, both in Birmingham and here in Washington, particularly those from Jefferson County, which is the county in which Birmingham is located, have seen some of the names and know from the addresses that they are dispersed throughout the county. This would indicate that an organized effort was made to get those names, if they did get the approval from individuals, and I certainly hope that they did, before they ran their names in this ad.

The following day which was Monday, October 19, in the Birmingham Post-Herald, and then later that day, in the evening paper, the Birmingham News, there is an ad from "We, the People." The headline reads "Alabama, Set America Straight; Don't Let Politics Kill Judge Bork." Then there are messages. I will read an excerpt.

> Throughout the world, terrorists have recently demonstrated to them no sacrifice is too big in their quest for victory. They figure wrongly that the end justifies the means, and that is what is happening here.

Then it goes on in the ad to say:

> It takes a certain maturity and sense of confidence for a people to reevaluate and when appropriate, reverse a once-taken position. This needs to be done by some Senators who have indicated they will oppose Judge Bork. It is our desire that Senator HEFLIN and Senator SHELBY will take their leadership position and make Alabama and our Nation proud. If you care to discuss this issue, let them know that you want them to vote for Judge Bork's confirmation to the Supreme Court. Please act now. Time is of the essence. Call Senator HEFLIN at Tuscumbia——

At my office number or my Washington number. My office number then appears.

> Senator SHELBY can he reached in Tuscaloosa.

And then his office number and his Washington number. Next appears: "We, the People." And, "Sign up with We, the People." Again, it has a contribution request, reading, "enclosed is a contribution" with request blocks for $25, $50, $75, or $100. It again has "Rush to We, the People."

This ad also includes a list of national figures: "We the People" national chairman, Gov. William P. Clements, Jr., Texas; Gov. Bob Martinez, Florida; Richard Riordan, Esq., California, and some other national endorsers. It also has Alabama endorsers, and, of course, the indication of who ran the "We the People" with an eagles head appearing next to that.

Again, in my judgment, this is an effort to politicize the process.

I next have another ad that appeared on Tuesday, October 20, 1987, in the Alabama Journal, which is the newspaper published daily in Montgomery. This ad is sponsored by the Congressional Majority Committee. It has printed the names Robert Bork, Ronald Reagan, ORRIN HATCH, and STROM THURMOND, on one side, versus, on the other side JOE BIDEN, TED KENNEDY, and ROBERT BYRD.

The next message which appears is: "The Verdict Is Up to You." I will not read all of this advertisement but other messages that appear are something to the effect that citizens can make a difference, "Because it is also a battle of the concerned patriotic citizens of America, versus every narrow self-serving liberal special-interest group that comes down the pike."

It goes on to say:

> Your two Senators will pay a lot of attention to your telephone call or note than some hot-shot Washington liberal in a three-piece suit, if you act now.

Then it says: "Pick up your phone and call your Senator," finally it has printed the message, "Mail to the Congressional Majority Committee," and a block saying "I am enclosing my contribution." It has a block for $15, $25, $50, and $100, with your name and address on it.

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

Mr. HEFLIN. Yes.

Mr. BYRD. I have three-piece suits. I have two-piece suits. Sometimes I do not wear any jacket at all. Where does that put me on the ideological spectrum?

Mr. HEFLIN. I wouldn't know about that, but I do not suppose anyone can call the Senator a hot-shot Washington liberal. At least West Virginia folks would not.

Mr. BYRD. This three-piece suit, may I say to the distinguished Senator, is 10 years old. I have a date on the inside. I bought it 10 years ago, and it is not ready to be thrown away yet. I am trying to get some more wear out of it. But when I bought it, I suppose, what was I at that point? That is a rhetorical question.

Mr. HEFLIN. Mr. President, all of these ads are efforts to politicize the process.

I want to emphasize a point regarding this "We the people" ad. It says: "The following citizens have endorsed the nomination of Judge Robert Bork to the United States Supreme Court," and then it lists a good many names, and some names from Alabama. It has the appearance that these people who are listed are paying for the ad but it has some language that could mean that they have merely endorsed it.

One of the names that appears in this list is James Roosevelt, a former U.S. Congressman from Irvine, CA.

James Roosevelt, the son of the former President, and the chairman of the committee that deals with Social Security, has contacted my office and he asked me to put into the RECORD this statement by him.

> Regardless of what advertisements appearing in Alabama newspapers may indicate, I have not endorsed the President's nomination of Judge Robert Bork to the U.S. Supreme Court.
>
> In fact, I had no knowledge of the ad, sponsored by a group called "We, the People" prior to calls from friends who read it in Alabama newspapers.
>
> I have not endorsed Judge Bork and have no plans to do so.
>
> My only dealings with this group occurred in a telephone call which dealt with the President's right to nominate an individual of his own choosing to the high court—or to any other federal post.
>
> I believe strongly that Presidents have a constitutional right to select their own nominees for positions such as this. In cases, where the Senate has the duty to advise and consent, I feel the Senate should accept the President's nominee unless there are strong reasons why that individual should be disqualified.
>
> The decision on Judge Bork's qualifications rests with the members of the U.S. Senate. I would not presume to tell them how to vote.

Yet, James Roosevelt's name appears on this ad that was published in the Birmingham News and the Birmingham Post Herald, a full-page ad.

Now, a while ago I mentioned the electronic telephone messages, and, as I said, I asked Senator HUMPHREY about them. He, of course, explained them and, as I said before, I accepted his explanation. I consider him an honorable person. I disagree with him on a great number of instances, but if he tells me something, I believe it, and in that questioning that occurred on Tuesday, October 20, in this Chamber, I asked him the following question:

> Let me ask the Senator another question. There is an organization that is running full-page ads in the daily newspapers in my State under the name of "We, the people." Is that connected with this National Conservative Political Action Committee? And do you have any connection with those full-page ads that are running?

Senator Humphrey replied:

> I am totally unaware of those ads, Senator. I do not know what that organization is. As far as I know, it is no part of this effort.

speaking of the National Conservative Political Action Committee.

He then continued to speak on matters regarding how ads are run, which are not really pertinent to the point I am making here, but then he said, "But, in any event, to answer the Senator's question, I have no knowledge of those ads and no involvement with them."

Now, his name appears in this ad that was published, the full-page ad in the Monday Birmingham News and in the Monday Birmingham Post Herald.

The printing of his name almost gives the appearance that he paid for it or is a part of the organization called "We The People."

However, there is this language that appears there, "The following citizens have endorsed the nomination of Judge Bork to the U.S. Supreme Court."

My office contacted two other people whose names appeared on this ad, and they stated that they had not given their approval, but that about 3 months ago they were contacted by an organization, which they recalled was named "We The People," and it is possible that there could be some type of misunderstanding or else some feeling of approval that they might have given to some activities of such an organization.

So I am not going to say that they did or did not. But here we have two people, in effect, who knew nothing about it, had no involvement with it and certainly James Roosevelt's statement ought to speak for itself.

In regard to each of these instances, it seems to me that the telephone calls, the telegrams, the letters that I have received have increased in the last several days. People, it seems, are responding to an organized effort. It takes time for an organized effort to be orchestrated. Therefore, that lends credence to the speculation that this is the reason the debate has been delayed for so long after the committee action. At least there exists that appearance.

I would like to have printed in the RECORD these various newspaper ads and statements that I have, and I ask unanimous consent that the one appearing in USA Today on Tuesday, October 6; the short statement from the man named Bernstein in Englewood, NJ, which appeared in USA Today; the full-page ad that appeared in the Birmingham News on Sunday, an open letter to Senator HEFLIN; the full-page ad that appeared in the Birmingham Post Herald on Monday, October 19 and in the Birmingham News on that same day; and the ad in re Bork of the Alabama Journal on Tuesday, October 20, along with the statement from James Roosevelt be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. HEFLIN. Now, Mr. President, let me say that I do not bow before any altar of political expediency. I made up my mind on this nomination in the committee because of the doubts and fears I have regarding the nominee. When we consider the damages of the efforts to politicize the confirmation process, I would strongly say that this should not be done. This is not to say that there is not a legitimate way to organize efforts or to urge letter writing or telegrams or telephone calls to Senators. That is a necessary part of a grassroots movement. But when so many messages are so organized that you are left with the impression that there is an organized effort to politicize the confirmation process, this compromises the grassroots effort.

Much has been said about "The American Way" ads, the Gregory Peck ads, and others. I do not approve of those. I did not think they were right, but neither did I think that the ads appearing in USA Today, which have come from the other side, or the ads that appeared in the Alabama papers were right. I understand there are some 18 different States where similar ads from either groups like this or from the same groups have appeared. I do not approve of those.

I think that all of those are directed toward politicizing the confirmation process.

And I do not think that either side or group can cast blame without first accepting it.

I am reminded of an old saying that appears in the Bible: "May he who is without sin cast the first stone."

There have been a lot of stones cast that have politicized the confirmation process. I do not think that either side is without sin in this matter. I think that the documentation that I have presented here, along with the statement of James Roosevelt, will allow people to form their own interpretation of all of this. But my personal interpretation is that there has been a deliberate effort to politicize the process. Both sides have done it.

Now, many of my colleagues have been angered by the solicitations, the mass media campaigns, and the organized efforts of outside groups to generate constituent calls and letters. 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 he or she must vote.

My vote is mine alone. I make the ultimate decision. I stand behind it. I have to live with my conscience.

I would like to point out that all of these exhibits that I have put into the RECORD, and the attachments, in some way involve fundraising by these various organizations. And, it appears this is done by listing names of people without any stamp of approval. I believe that our system is compromised when organizations, such as those I have listed, raise money as they do by trying to bring into this organization certain famous or well-known people, who possess certain well-known attitudes or feelings and spread their propaganda.

In closing, I would like to say that there is no question that the conformation process has been politicized. However, the fault does not lie with any one political party or organization. Republicans, as well as Democrats, should be faulted. Rightwing organizations, as well as those on the left, are subject to criticism, and should share the blame.

While this is the first time in the history of the U.S. Senate that such an expensive, multimedia campaign, and that such an organized politicizing effort has been waged in an effort to affect the outcome of a Supreme Court nomination, it is not the first time that politicians have entered the process. Certainly, outside political organizations were just as active during the confirmation hearing and the floor debates of Judge John Parker, who was nominated to the Supreme Court by President Hoover in 1930. However, the major difference was that they lacked the sophisticated media tools of today. And I dare say that the same political efforts we have seen this month were not carried out during the confirmation battle on Judge Haynesworth or during the attempted elevation to Chief Justice of Justice Abe Fortas.

The effect that such actions have had in the near term is debatable. But in my estimation the effect has been greatly exaggerated. There is no indication that any Senator based his decision either in support or opposition to the nomination, on the advertisements, telephone calls, telegrams, and letters sponsored and organized by various organizations.

I would first say that the effect that is apparent is in the massive amounts of money these groups have raised.

While, as I have said, there is room for some debate on the near-term effects, there can be no doubt of the long-term effect. We all end up losers. Losing is no longer confined to just the nominee, a given political party, or administration, but affects all of us.

Politicization of the process demeans the Supreme Court, and, if allowed to continue, will greatly reduce the public's confidence in the independence and integrity of our judicial system. As a cornerstone of this country's democratic government, our judicial system should not be subjected to such attacks.

For the sake of the Federal judiciary and the American people, I urge the Senate to vote as soon as possible on this nomination, and to get this issue behind us.

The confirmation of a Supreme Court nominee is one of the most, if not the most, important jobs facing a U.S. Senator. It should not be reduced to a campaign of hype and hysteria.

It seems inevitable, at this point, that the President will have to submit

another nomination. I urge my colleagues to approach the next nomination with an open mind and to rise above the tactics that have been employed by both sides of this confirmation battle.

Thank you, Mr. President.

EXHIBIT 1

[From USA Today, Oct. 6, 1987]

THE ASSASSINATION OF JUDGE ROBERT BORK: HOW POLITICS STINK, AND YOU LOSE

Three months ago you probably had never even heard of Judge Robert Bork. Now you may recall his name and have some vague notion about who he is, and what he does. And oddly, you may not understand why you feel as you do.

What you have experienced is frightening. And if it makes you mad, join us and do something about it.

For the past several months you have been subjected to a stunning use of propaganda. Special interest groups and ambitious politicians have created perceptions that you may have unconsciously accepted. It has been slick and it is scary.

The committee that reviews presidential nominees to the Court delayed the confirmation hearings of Judge Robert Bork. Using the delay, political extremists in groups such as the ACLU, and NOW raised huge sums of money to run a scare campaign against Judge Bork. They manipulated the news with media events, ran television ads, print ads and even used computers to direct phone calls to targeted and vulnerable homes.

They spent millions of dollars to conjure images and perceptions of a one man court turning back accomplishments of an entire nation. They lied. They threw ethics and integrity out the window.

Think about it. They created a hate campaign to shape opinions that would suit their agenda. Their means could be justified by the end.

But is that what makes you most uncomfortable? Maybe. Maybe not.

Perhaps you are most uncomfortable because you know that a number of the senators conducting the hearing have serious personal character flaws. You see them using the opportunity to play politics. At your expense. And it is likely they are not even your senator.

Chairman Joe Biden, you recall, just admitted to lying and plagiarism as his presidential campaign self-destructed.

Biden with great cunning manipulated the hearing by staging who would be heard and when; personally seeking the media spotlight in an attempt to save his political life.

Ted Kennedy made you uncomfortable as he read his staff-prepared questions. Nervously and constantly pressing forward, hoping he wouldn't lose his place and have to start over again. You always wondered how he ever made it from the Chappaquiddick incident or getting expelled from Harvard for cheating, to now being in such a position of trust. Perhaps his name, and the nostalgia from a lost hope were his greatest inheritance.

You recall Senator Metzenbaum's ethical quick-shift as he returned a quarter of a million dollars when the public discovered and reacted badly to the way he realized great wealth by just making a few phone calls. And it was Senator Leahy who cared so little about our national security that he personally leaked secret information to the point that he had to be replaced on the Senate Intelligence Committee.

Not the kind of guys most people would entrust with making judgments of character, integrity and personal ethics, are they?

You and Judge Bork have been cheated.

We all lose when the politicians's game costs us the service of a capable person like Judge Bork.

Judge Bork has stood for senate confirmation twice before and both times he was unanimously confirmed; once for Solicitor General and once for Circuit Judge of the U.S. Court of Appeals.

The Senate did not play politics then. The test was Judge Bork's ability, integrity, knowledge and experience. Then, as now, the American Bar Association gave him their highest rating. Judge Bork's credentials are impeccable and he is ranked among the top justices in American history.

But now it is politics, and it stinks.

Do something.

Call your senators at 202-224-3121, and tell them you have had enough nonsense. That you want them to move the process forward and vote to confirm Judge Bork to the Supreme Court. That it is time for integrity and strong ethics to have a place in the process.

And the next time you vote, think about how your candidate would work to clear the foul air that some have brought to our political process.

---

[From USA Today, Oct. 6, 1987]

Do you prefer Joe Biden, the plagiarizer, Ted Kennedy, the Chappaquiddick driver, Pat Leahy, the leaker, or Howard Metzenbaum, the finder's fee man?

If you don't, let your senators know that you believe they should vote for the confirmation of Judge Robert Bork to the Supreme Court.

(Paid for by Zalman Chaim Bernstein of Englewood, New Jersey.)

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[From the Birmingham (AL) News, Oct. 18, 1987]

OPEN LETTER TO SENATOR HEFLIN

DEAR SENATOR HEFLIN: We know that you knew better.

We know that perhaps better than anyone else in our nation, you knew and understood the events which were being played out in your presence, before your very eyes.

We know that every fiber of your being cried out against the lynch mob of the special interest and media blitz against the nomination of Judge Bork.

And yet, in the end, you capitulated. You bowed your knee at the altar of political expediency.

You will have another opportunity to vote for Judge Bork's confirmation.

It is imperative that our constitutional process not be destroyed by partisan politics. If legislators persist in this usurpation of authority from the executive branch of government, they cripple both the executive and judicial branches and demolish the balance of powers.

Your vote on Judge Bork will determine whether the Supreme Court is going to control America or whether we will remain a constitutional government of, by and for the people.

Since no American wants the Supreme Court to run the country, please place principle above party and vote for Judge Bork.

You have our deepest prayers.

Signed: Your fellow countrymen who bow our knees not to political expediency, but only to God.

Stephen & Garji Abernathy.
Lisa Abernathy.
Sue E. & Heidi Adams.
Jane S. Adkins.
Mark A. & Pamela D. Andrews.
Frederick & Vesta Ard.
Mike & Joyce A. Bagwell.
Kay B. Bakke.
Dr. M. Joe Bancroft.
Leila Banks.
Jim & Brenda J. Barnett.
Robert D. & Dreama Barr.
Walter N. Battles.
David C. Battles.
Marion D. Battles.
Hugh & Agnes Bazemore.
Leslie Beard.
T.C. and Shirley Beaty.
Janette R. Beaumont.
John F. Beaumont.
Terry Wayne Beck.
Stephanie W. Bell.
Jeanice Bell.
James W. Belyeu, M.D.
Frank & Susan L. Benefield.
Marlin & Karen Benneth.
Mike Berry.
Vernon A. Betsch.
Mary & John B. Blalock, Jr.
Linda Bodner.
Joyce W. Bolen.
Louise Bond.
Jeff & Leta Sue Bone.
Robert L. Bonham.
Nell T. Bonner.
Daphne G. Booth.
M/M John A. Bostic.
Betty Bostwick.
Rev. Herbert J. Bowsher.
Robert and Glenise Boyd.
Sharon G. & Stephanie Brackner.
Ann Bradford.
Coy S. Bragg.
Gaynell Brakefield.
Oliver B. Brank, M.D., P.A.
Mike Brascome.
Hayes Braun.
Bill and Leila Brazeal.
Keith & Regehea Brewer.
M/M Mark Brezina.
B. Stanley Bruce.
John B. & Laura H. Brunson.
David P. Bryant.
Evelyn Burch.
Gene Burgett.
Lesley Burk.
William Roger & Charlotte Burns.
Jill Busenlehner.
M. Bruce & Jane M. Bush.
Kenneth and Karen Bush.
James D. & Darcy Bussey.
Elma Buzemore.
Jill Bynon.
Rev. and Ms. R.T. Callahan.
Ora Lee Calloway.
Linda and Jerry Campbell.
M/M E. W. Canada.
Candy L. Cantrell.
Teresa P. Capra.
Marta and David Caradine.
Randy and Vicki Carleton.
Mr. & Mrs. Troy Carpenter.
Jimmy C. Carrier.
Louise Carroll.
Vito A. & Lorrie A. Carruba.
David Carter.
Barbara E. Carver.
James H. Chalmers, Jr.
Gregory Champion.
Allan J. Chappelle.
Tracy Cherrix.
David W. Childers.
Sheila & Lynn Childress.
Scott & Shirley Childs.
Stacy J. Childs, M.D.

Allen & Susan Clark.
Harold Clark.
Thomas S. & Bettie H. Clark.
Charles F. Clark.
Charlotte Railey Clayton.
Janet Clement.
Harry & Martha B. Cobb.
Robin Coburn.
Frank & Janice Cochran.
Joseph M. Cocke.
JoAnn Coffey.
Cindy & Mr. Tony Combs.
Catherine F. Cook.
Mr. & Mrs. Charles R. Cooper, Sr.
Mr. & Mrs. C.R. Cooper, Jr.
Mr. & Mrs. John M. Cowart.
Ruth Crim.
Robert E. & Margaret Dabbs.
Curtis R. & Darlene Darden.
Linda J. Davis.
Mary Lou & James E. Davis, Jr.
Jeff Davis.
Ken & Sandy Deaton.
Turner Dees.
M/M Albert T. Dennis.
Joseph A. & Suzi Dentici.
Ed & Cheryl Denton.
Freddie and Gale Dickey.
Florence & C.T. Dodge.
Mason Donovan.
Gilbert F. & Cynthia N. Douglas.
Mary S. Douglas.
Dr. & Mrs. Gilbert Douglas, Jr.
Jon Dudley
Ronald T. & Lisa Dudley, Jr.
Ronald & Carol Dudley.
James H. Dunklin IV.
Floice Earley.
Kenneth W. & Ann W. Earley.
Todd Early.
Mr. & Mrs. Larry Early.
Bettye East.
Ken J. Eddings.
William S. & Joan Ellington.
Bill and Roxie Elliott.
Webb and Mattie Ellis.
R. Trenton Ellison.
Clay E. & Nancy W. Erwin.
Mr. & Mrs. James V. Fairley.
Mary Sue Farmer.
Jane Fennell.
M/M William Ficken.
Rosa Flanagin.
John and Damon Folmar.
Ann Z. Fortner.
Mary H. Fortner.
Mr. & Mrs. Roger Fowler.
Ken Francis.
Lori and David Franz.
Mr. & Mrs. Bill French.
Michael and Leslee French.
Kenneth O. Friday, DMD.
Kenneth G. Friday.
Pauline J. & David J. Fugazzotto.
Dr. & Mrs. Tom Fuqua.
Wanda Gamble.
Marie Gann.
James D. Garner.
Garywood Assembly of God Church.
Donna J. Giada.
Richard L. Gilmer.
M/M Parker A. Glasgow.
Glen Iris Baptist Ministries.
Gene V. & Faye Glover.
R. Alan & Martha D. Godwin.
Brenda K. Goggins.
Judy B. Golden.
Mr. & Mrs. Patrick M. Gordon.
Mr. & Mrs. B.P. Graham.
Peggy Green.
Dorcas & Hubert W. Greene, Jr.
Mr. & Mrs. John R. Grimes.
Roberta & Alastair Guthrie, M.D.
Valcie Gwin.
Rick A. & Deborah M. Halbrooks.
Jackie S. Hall.
James and Stacey Hall.
Donna Hamilton.
Ray Hardin.
S.S. Hargraves.
Wendell B. Harless, Jr.
Alvon A. & Robbie A. Harris, Jr.
Dona Harris.
Michael and Joanne Harrison.
Bruce & Burt Haukohl.
Juergen & Nancy Haukohl.
Arthur A. Hawkins.
C.L. and Becky Hayes.
James L. Head.
Robert S. Helms.
Sharon Myers Henderson.
Sandra Henley.
Mr. & Mrs. Daniel N. Herman.
George & Helen Hewson.
O.V. & Carolyn Hill.
Evelyn Hill.
Miriam Hipp.
Linda M. & Leta A. Hobdy.
James and Francis Hobdy.
Kenneth G. & Gladys Y. Hodge.
David K. & Lisa Hogg.
Mr. & Mrs. Terry L. Hogue.
Darian Holcombe.
Clara N. Holmes.
Susana & James O. House, III.
James F. & Joy S. Houts.
Jerry Rockford Hudson.
Paul Hunter.
Rosemary and Charles Jager.
Mary Jemison.
Mr. & Mrs. Joc T. Johnson.
Harry & Evelyn Johnson.
Charles Howard Johnson.
A. Eric Johnston.
Mr. & Mrs. Robert C. Jones, III.
O.C. Jones, Jr.
Bobbie S. Jones.
Yvonne E. Jones.
Marilyn S. Jones.
Greg Jones.
Larry and Gay Jones.
Bobby P. Jordan.
C. Frederick Judd.
Bruce & Connie Jurgens.
Harold D. & Marie G. Kelley.
M/M Henry C. Kendall.
J.L. & Dianne Kerr.
Bradley & Lynn Ketch.
Gayle Kiker.
G. Daniel Kircus.
Dr. & Mrs. Stephen Klein.
Kitty Knapp.
Laverne S. & Richard N. Lamb, M.D.
Cheryl A. Lankford.
Luke & Donna Lea.
Stephen Lee Ledford. Jr.
Ann B. Leopard.
Thomas Leopard.
Clyde W. & Avon H. Letcher.
T.J. Lewis.
Roy Lewter.
Phillip & Lisa Lichlyter.
Jackie Lighfoot.
Minnie Lee Livingston.
W.K. Livingston.
Mrs. John T. Long.
Jane Long.
Nancy Looney.
Karan Looney.
Julie & John, III Loper.
John & Sharon Loper, Jr.
Mark & Rhonda Love.
Iva L. Love.
Nola Ann Ludolf.
Robert & Joanne Lukasik.
Floyd A. and Jean Maharrey.
Randy Maharrey.
Linda Martin.
Sharon B. & Lester Mason, Jr.
Mr. & Mrs. P.H. McAbee, Jr.
Donald McCants.
Douglas J. McCollum.
Kathy McCollum.
Lisa A. McCord.
Mrs. Ethel M. McCarney.
William C. McDonald III.
Ann W. EcElroy.
M/M Charlie MacGregor.
Jane McInvale.
Mr. & Mrs. Owen W. McKinney.
Mr. & Mrs. G.E. McLaurine.
John A. McNeil, Jr.
Tommy & Barbara McNutt.
Lorene McWaters.
Henry L. Mellen, Jr.
M/M Henry Mellen.
E.U. Meullen.
Sandra E. Mikul.
Gordon W. Miller.
Janet Millican.
Susie Milligan.
Larry D. Moon.
June Moon.
Alan Moore.
Mark Morales.
Paula and Barry Morehead.
Stephanie Morgan.
John and Libbie Morris.
Beverly J. Morton.
Carla S. Mosley.
Harold & Laura Mulkey.
Dick & Betty Murphree.
Ann Muths.
Carol Myers.
Scott Myrick.
Eugene W. & Lois W. Nabors.
Michael A. Neel.
David S. Neel.
T.N. & Janet Norden.
Betty E. Norris.
Clarence & Joy Northcutt.
H.C. Nunnelley.
Denise O'Callaghan.
Opal O'Conner.
Dave O'Hara, Jr.
Rabena Orr.
Teresa Orr.
Paul & Josephine Pankey.
Winfred and Lucille Parker.
Timothy W. & Charlotte Parrish.
M/M. Richard K. Patton.
Mary Patton.
Junie C. Peavy.
James W. & Martha J. Peeler.
Robert & Renee' Pelfrey.
Skeet & Angie Pender.
Meredith and Wayne Pender.
Richard, Judith, and Caleb Pender.
C. Paul Perry, M.D.
Tedford F. Phillips.
W. Monroe Phillips.
Carolyn Pitman.
Alan J. & Virginia A. Pitts.
John F. Pitts.
Michael Polk.
Ron & Robbie Poole.
Faye, George, and Laurie Porter.
Martha and Charles Posey.
Judy Potts.
J.H. Pounds, Jr. & Family.
Lanie E. Radbill.
Dick & Pam Radke.
Lucile M. Railey.
David Ray.
Edward N. Reed, DMD.
M/M S.T. Reeder.
Reickenback.
Maralu Reid.
Mary and Brandon Reisman.
Arnold & Wanda Reuben.
David & Rhonda Richards.
Leah A. Ritchie.

Reba Roberts.
Mary A. Robinson.
Edith K. Robinson.
David B. Rogers.
Patsy Rogers.
Dawn Rollins.
Hank & Gail Roskamp.
Samuel R. Rubin.
Jim Russell.
Joyce Russell.
Ben H. Rylant.
Mrs. Melville S. Rylant.
Horace and Mary Jane Sanders.
Charles & Diane Sapp.
Eula Savage.
Mr. & Mrs. Kelly Schultz.
Paul & Norma Scott.
Lee and Timothy Scott.
Kevan C. Scott.
Julie and Mike Seals.
Sharon Sellers.
Dean Sessamen.
Cecil O. Sewell, Jr.
John and Mary Sharp.
Rev. William D. Shaw.
Ruth A. Shaw.
Clyde & Susan Sheehan.
David Shelton.
Mr. & Mrs. Hal Sheperd.
Louis O. Shifflett.
Keith & Teresa Silliman.
William Kyrle Simms.
Arvin Ray Simpson.
Jerry & Evelyn Simpson.
Jimmy L. & Delores Sims.
Lidie Watson Smith.
Gary & Jan Smith.
Hadden B. Smith, III.
Karen L. Smith,
Mr. & Mrs. Travis Smith.
Dennis H. & Nancy Smith.
Frank C. & Mary & Sarah Annette Smith.
W.T. Smith, Jr.
Donald R. Smith.
Margaret M. Smith.
Randall L. Snider.
J.H. Snow.
Southside Baptist.
Olive Spann.
Doris and Simon Speakman.
Andrew Spear, Jr.
Jacque Staed.
Gilbert Starns.
Mr. & Mrs. Ron Steel.
Brad & Kathy Steffler.
Ellen Griffin Stephenson.
Carolyn T. Stewart.
Mr. & Mrs. John M. Stewart.
Millie and John Summer.
Katherine J. Sutherland.
Mr. & Mrs. S.S. Swalley.
Henrie Ellen Swanson.
Henry S. & Mary Swindle.
Margaret T. Tanner.
Karen and David Tapley.
Mr. & Mrs. J.E. Taylor.
Randy Taylor.
Margaret R. Taylor.
Myrtle B. Templin.
Faye W. Terpo.
Debra Thompson.
Helen M. Thompson.
Ron & Betsy Threadgill.
Mr. & Mrs. Joe Tidwell.
Mark and Darby Travers.
Elisa N. Trott.
Annette and Phil Turner.
Bill & Deanie Uhrig.
Dr. Kenneth T. Usry.
Mr. & Mrs. H.T. Van Ness.
Thomas J. Vaughn.
Dr. & Mrs. Richard N. Vest, Jr.
Clara & Kathy Vickery.
Mr. & Mrs. Clifford N. Wade, Sr.
Ken Walden.
Geneva Waldrop.
Charlotte Waldrop.
Rex G. & Dorothy K. Walker.
Larry R. & Sharon I. Walker.
Bill E. Wallace.
Judy Walters.
William & Lori Watson.
Shelby & Elizabeth B. Watts.
Mr. & Mrs. Jesse M. Weaver.
Melanie T. Weeks.
Barbara O. Wenndt.
Charles Louis Whitson.
Rebecca J. Williams.
Al Williams.
Buzz & Carol Williams.
John Edwin Williamson.
Kenneth D. & Leslie H. Wilson.
Tracy W. & Michael B. Wilson, Sr.
Samuel W. & Margart H. Windham.
Mark & Pamela Winslett.
M/M Wintter Winter.
Ellen Wolfe.
Frances Womble.
Wanda Wright.
Jan Young.
Mr. & Mrs. Robert Zimmerman.

(Paid Pol. Adv. Citizens For Bork, Nancy Haukohl, coordinator, 3578 Rock Hill Road, Birmingham, Alabama 35223)

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[From the Birmingham (AL) Post-Herald, Oct. 19, 1987]

ALABAMA: SET AMERICA STRAIGHT. DON'T LET POLITICS KILL JUDGE BORK

President Reagan nominated Judge Robert Bork to the U.S. Supreme Court on July 1, 1987. Before the day was over one of our history's nastiest political and propaganda campaigns had begun by a few members of the Senate along with some radical but well financed political extremists.

In a frightening misuse of our constitutional liberties these people spent millions of dollars to scare blacks, women, and others into believing that their rights would be taken from them. Newspaper, radio and television ads were made that sought to mobilize political pressure against those who would have to vote on Judge Bork's confirmation.

People were lied to by people they trusted. They were scared into believing the unbelievable. And as good people became aroused they put pressure on their representatives to save them from the horrible future others had said would happen.

They made a reasonable request. For unreasonable reasons.

WHERE WE ARE

This embarrassing time in our history leaves us now just a few hours from the final vote on Judge Bork's nomination. There is a strange uneasiness drifting through the Senate. There is a sense of uncertainty among many of those Senators who were rushed in the tide of political pressure to take a stand in opposition to Judge Bork.

Perhaps the current hesitancy comes from the realization that the pressure was not really against Judge Bork. That Judge Bork was and, in fact, is among the most qualified persons ever named to the Supreme Court. They know that based on historical standards Judge Bork's credentials are impeccable.

People are just now understanding that the propaganda was really aimed against a presidential administration by its opposition and that the nomination of Judge Bork was simply a political opportunity.

Throughout the world terrorists have recently demonstrated that, to them, no sacrifice is too big in their quest for victory. They figure, wrongly, that the ends justify the means. And that is what happened here.

THE SCARS ARE PERMANENT

It could be a temptation for some senators to still vote no on Judge Bork, and assume that the next candidate could be approved and the nation would move on never the worse for the experience. And never the wiser.

That would be wrong. The experience of Judge Bork being maligned and politically battered will become precedent to future scurrilous and vitriolic campaigns. Political machines will be geared up to shake the nation each time any president nominates a candidate to the court. Qualified persons will be tossed by the wayside and worse, others won't allow themselves to be considered.

ALABAMA KNOWS

Given the truth, it is certain that a majority of the people of Alabama would support Judge Bork's confirmation to the U.S. Supreme Court. With cooled, relaxed factual evaluation one realizes that Judge Bork has the ethics, integrity, knowledge, experience and ability that are demanded of a person in such an important position.

It takes a certain maturity and sense of confidence for a person to re-evaluate, and when appropriate, reverse a once-taken position. This needs to be done by some Senators who have indicated they will oppose Judge Bork.

It is our desire that Senator Heflin and Senator Shelby will take that leadership position and make Alabama and our nation proud.

If you care to discuss this issue and let them know that you want them to vote for Judge Bork's confirmation to the Supreme Court please act now. Time is of the essence.

Call Senator Heflin in Tuscumbia at 205 381-7060 or his Washington office, 202 224-4124. Senator Shelby can be reached in Tuscaloosa at 205 759-5047 or in Washington at 202 224-5744.

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[From the Alabama Journal, Oct. 20, 1987]

IN RE: ROBERT H. BORK—RONALD REAGAN, ORRIN HATCH, STROM THURMOND VS. JOE BIDEN, TED KENNEDY, ROBERT BYRD—THIS VERDICT IS UP TO YOU

It's been called "the main event of this Congress," and "President Reagan's greatest legacy."

It's the battle over Robert Bork's nomination to the Supreme Court. And in this battle there's a secret weapon—you.

That's right. You can make the difference.

Because it's also a battle of the concerned, patriotic citizens of America versus every narrow, self-serving, liberal spécial-interest group that's come down the pike!

The liberals are spending millions to defeat Judge Bork. They know he will end their flagrant use of the Supreme Court as a political tool to further their own self-interests at the expeuse of a strong and free America.

They're running television commercials, full-page ads in all the major newspapers, and hiring high-priced lawyers and lobbyists to pressure U.S. Senators.

But the real key to the Senators' votes is people like you!

Your two Senators will pay a lot more attention to your telephone call or note than

some hot-shot Washington liberal in a three-piece suit . . . if you act now!

So pick up the phone and call your Senators at (202) 224-3121. Or mail them the coupons below. Or better yet, do both.

The stakes don't get any greater. And remember, this verdict is up to you.

STATEMENT BY JAMES ROOSEVELT ON THE BORK NOMINATION, OCTOBER 21, 1987

"Regardless of what advertisements appearing in Alabama newspapers may indicate, I have not endorsed the President's nomination of Judge Robert Bork to the U.S. Supreme Court.

"In fact, I had no knowledge of the ad, sponsored by a group called 'We, the People" prior to calls from friends who read it in Alabama newspapers.

"I have not endorsed Judge Bork and have no plans to do so.

"My only dealings with this group occurred in a telephone call which dealt with the President's right to nominate an individual of his own choosing to the high court—or to any other federal post.

"I believe strongly that Presidents have a constitutional right to select their own nominees for positions such as this. In cases, where the Senate has the duty to 'advise and consent', I feel the Senate should accept the President's nominee unless there are strong reasons why that individual should be disqualified.

"The decision on Judge Bork's qualifications rests with the members of the U.S. Senate. I would not presume to tell them how to vote."

Mr. CRANSTON. Mr. President, I believe that Senator DOMENICI is to be recognized next, and I ask unanimous consent that I may be recognized thereafter, to speak on the nomination.

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

UNANIMOUS-CONSENT AGREEMENT

Mr. BYRD. Mr. President, I have discussed this request with the distinguished Republican leader, and it is as follows:

I ask unanimous consent that on tomorrow, at not later than the hour of 2 o'clock p.m., the Senate proceed to vote up or down on the nomination of Mr. Bork; provided, further, that on any motion to reconsider, there be no time for debate; that on the disposition of the nomination, the President be immediately notified of the outcome and the Senate return to legislative session, at which time it proceed to the consideration of the military construction appropriation bill, followed by the catastrophic illness legislation, with the understanding that there be no rollcall votes following the disposition of the Bork nomination, and that any rollcall votes so ordered go over until Tuesday morning next; provided, further, that the time between 9 o'clock and 2 o'clock p.m. be divided as follows: 3 hours for the proponents and 2 hours for the opponents, with the further provision that Mr. MELCHER have 20 minutes from the time of the opponents and that Mr. EXON have 15 minutes to be charged against the time of the opponents.

The PRESIDING OFFICER. Is there objection?

Mr. DOLE. Mr. President, reserving the right to object—and I shall not object—I just wanted to indicate with respect to the military construction appropriation bill that I have not been able to reach the Senator from Pennsylvania [Mr. SPECTER]. I do not know of any objection he has to that; but if we could have some consultation with the two leaders, if I had a problem I could bring it up with the majority leader.

Mr. BYRD. Provided, further, that Mr. HEFLIN be guaranteed 15 minutes from the time of the opponents.

Mr. DOLE. Mr. President, I request that 1 hour of the time for the proponents be allotted to the distinguished Senator from Missouri [Mr. DANFORTH].

The PRESIDING OFFICER. Without objection, the request of the majority leader is agreed to.

Mr. BYRD. I thank the distinguished Republican leader. I also thank the distinguished Republican whip and the distinguished chairman and the ranking member of the Judiciary Committee, Mr. THURMOND—all of whom have worked to bring about this agreement. I will have further expressions of thanks and commendations to Senators on both sides of the aisle tomorrow.

May I say, before I yield the floor, that it would be my hope that the Senate could proceed with work on legislative matters tomorrow afternoon, after disposition of this nomination. At this late date in the session, I do not think we want to see several hours of a good afternoon go unutilized. It will help farther down the road.

So I close with this statement: If any Senators wish to come in ahead of 9 o'clock tomorrow to speak, they may do so. If I do not hear, however, within the next few minutes or by the time the Senate is ready to go out this evening, I will ask that the Senate come in at 8:30, so as to give the two leaders their time under the standing order; and there could be some morning business, with Senators speaking for not to exceed 5 minutes, and the Senate will go into executive session at 9 o'clock and proceed immediately under the agreement and in accordance with the agreement.

Mr. DOLE. Mr. President, will the majority leader yield?

Mr. BYRD. I yield.

Mr. DOLE. I am advised that Senator SPECTER is in the office. He is watching the debate on television. He will be prepared to go to military construction.

Mr. BYRD. I thank the distinguished Republican leader.

Mr. President, we will stay in session this evening as long as any Senators wish to speak.

I thank all Senators.

(Later the following occurred:)

Mr. BYRD. Mr. President, I earlier included in the order the provision that any rollcall votes ordered on tomorrow afternoon following the disposition of the Bork nomination be stacked for Tuesday next.

I ask unanimous consent, instead, that any rollcall votes ordered following the disposition of the nomination of Mr. Bork on tomorrow not occur before Tuesday next.

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

Under the previous order, the next Senator to be recognized is the Senator from California, Senator CRANSTON.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. It is my understanding that I would be the next speaker in place of Senator DOMENICI.

The PRESIDING OFFICER. The Chair will state there was a unanimous consent agreement that, after the Senator from Alabama, the Senator from New Mexico, Mr. DOMENICI, would be recognized, to be followed by the Senator from California, Senator CRANSTON.

Mr. PRESSLER. I was told that arrangements were made earlier with staff on the floor for me to speak in place of Senator DOMENICI. It is written in the special order, is it not?

The PRESIDING OFFICER. The Chair will state the only unanimous consent presented to the Chair was the one that the Chair has announced.

Mr. PRESSLER. Point of order, Mr. President.

The PRESIDING OFFICER. The Senator will state the point of order.

Mr. CRANSTON. Mr. President, if the Senator from South Dakota will yield for a moment to me, let me say that I am going to speak very, very briefly.

Mr. PRESSLER. I have to be someplace at 10 minutes of 10. I was going to speak briefly. I made the arrangements and I thought it was arranged and that there was no objection.

Mr. CRANSTON. I have no objection, since we are arguing about this, if the Senator has a brief speech, to go ahead.

I ask unanimous consent that the Senator from South Dakota may proceed.

The PRESIDING OFFICER. Without objection, the Senator from South Dakota is recognized.

Mr. PRESSLER. Mr. President, I rise in strong support of Judge Bork. I believe that he is a fine judge. When he was nominated to the U.S. Court of

Appeals, he was unanimously approved. He was given the highest ratings by the American Bar Association. Basically, I think that our President deserves his choice for the Supreme Court, unless there is some overwhelming ethical or competence problem, or if the nominee is not in the mainstream of American judicial thinking.

Indeed, when President Carter was in office, I followed this philosophy and voted for many of his well qualified nominees even if I may have disagreed with some of their views. At that time, some urged me to vote against certain nominees for the court of appeals or elsewhere and it was my strongest conviction that under our Constitution a President is entitled to his nominee unless there is some overriding concern.

Mr. President, I think that the Supreme Court in the 1950's, 1960's, and 1970's has been a very liberal Court, especially in the area of criminal law. I strongly believe that sometimes the victims of crime have fewer rights than the criminals. Because of the extensive Miranda warnings many criminals can slip through loopholes, creating difficulties for prosecutors. The fact that the National Association of Sheriffs, the National Association of Prosecuting Attorneys, the National District Attorneys, the chiefs of police, and other law enforcement agencies have all endorsed Judge Bork indicates a desire for the Supreme Court not to have so many loopholes for criminals to use.

The fact of the matter is that there is a feeling in this country that it has become very difficult to prosecute criminals, both white-collar criminals and non-white-collar criminals.

It has been my strongest feeling that the conservative side deserves an appointment. Ronald Reagan was elected and reelected. That is the way the system works. As a Member of the U.S. Senate, I am a believer in that system. I think it is the finest form of government devised by man. I believe what this Senate will probably do tomorrow at 2 o'clock will fly in the face of fair play.

I also happen to believe that Judge Bork is a fine man and a fair judge. He has written some provocative articles, and has taken some chances. He is a man, an academic man, who thinks and writes.

Are we to have only judges who have not written any Law Review articles, who have not made any provocative speeches, who have not had a repartee in some of their classes or have not had a repartee with some audience, thinking some extrapolative ideas?

Are we to nominate only people to the Supreme Court who are so cautious in what they say and so careful in every word that they write that we get almost an intellectual eunuch on the Supreme Court? That is what is going to happen if we hold people to every sentence.

There are Members of this body who in the 1960's voted and made speeches about certain civil rights pieces of legislation. Indeed, all of us have had changes of mind over the years. Certainly Judge Bork's 1971 article in the Indiana Law Review would indicate that he has changed his mind over the years. But would this not be expected of a university professor or of an active mind? Do we want someone who believes in exactly the same thing as they did in college, to the present day? Is that the standard we are imposing?

Mr. President, let me say that I have been disturbed by some of the statements about Judge Bork. Some of the ads that have been run have been very misleading. It seems that the national media, which normally gets very upset when anything misleading is said, has been completely silent. It seems that Judge Bork has been fair game, so to speak.

There has been an effort to, somehow, portray Judge Bork as a person who is antiwoman or antiblack. I must say that the image that has been projected by the national media and by ads has been quite successful in that portrayal. But I have read his cases and a lot of his judicial record—not all of the record but a lot of it—and that is not true.

Indeed, I would say he is prowoman and problack, in the sense of fairness.

I would predict that this body will go forward and quickly confirm the next nominee, whoever she or he may be. That nominee will probably be more conservative than Judge Bork, but probably will not have written as many articles or had so many extrapolative repartees with students. Because of this, I feel the Supreme Court and the country will suffer.

So, Mr. President, I shall vote with a great deal of pride and satisfaction for Judge Bork. I am disturbed by what has happened because I think we have politicized the nomination of a judge to the Supreme Court. I stand ready to evaluate the next nominee, if Judge Bork loses. However, I am saddened at making this speech because I believe very strongly that he deserves to be on the Supreme Court.

I also think that the country will miss out, and future generations of law school will miss reading some great opinions. I think that the freedom that we enjoy and the role that the Supreme Court plays will not be as efficient, in terms of preserving freedom, dignity, and decency throughout our land.

But worst of all, this sets a precedent, a very bad precedent, about the process of selecting a Supreme Court Justice. We are about to yield to a false national campaign and to Members becoming committed because of pressure groups. I am very, very saddened by this process.

Mr. President, I shall submit additional material. Tomorrow at 2 o'clock I shall vote with pride for Judge Bork.

The PRESIDING OFFICER. Under the previous order, the Chair will recognize the Senator from California, Senator CRANSTON.

Mr. CRANSTON. Mr. President, during this debate, there has been much discussion about character assassinations and the personal integrity of individuals.

I want to address specifically the personal integrity and reputation of one of the individuals whose name has been brought into this debate—a man who is one of my constituents—Gregory Peck.

Gregory Peck is a patriotic American whose integrity has never been questioned. He is a recipient of the Nation's highest honor for a civilian, the Medal of Freedom.

This afternoon a Senator made a statement on this floor that Gregory Peck had "lied" in a Bork TV spot. I am appalled at this personal insult to a man whose honor and reputation is above reproach and should not, in any way, be an issue in this controversy.

I spoke with Gregory Peck yesterday about the ctiticism which has been made about the TV spot which he narrated for People for the American Way. He asked that I make it clear to the Senate that he had personally read the material documenting the charges before he made the TV spot and that he made the spot only because he was convinced that it was a fair statement of Judge Bork's record and positions. He said he made this spot because, like many of us in this body, he felt a matter of high principle is at stake in this nomination.

I share that view and reached the same conclusion.

Mr. President, People for the American Way has prepared extensive documentation on each statement made in the ads. This organization is perfectly capable of defending the content of its ads and has done so ably. This detailed documentation, citing the statements made by Judge Bork which formed the basis for the charges made, was printed in the RECORD on Wednesday, October 21, at the request of the Senator from Delaware [Mr. BIDEN]. I urge a careful reading of this documentation by those who have loosely thrown heated charges at those who oppose this nomination.

Certainly the supporters of Judge Bork's nomination may disagree with the conclusions reached by the opponents. But Members of this body need to call a halt to the strident attacks upon the integrity and motives of those in opposition to this nomination. Suggesting that Gregory Peck lied

went beyond the bounds of tolerable debate.

The real issue is Judge Bork and his record, and we ought to stay on that issue.

Mr. President, the stakes are always high in a controversy over a nomination to the U.S. Supreme Court. A Supreme Court Justice, as we've heard said many times over these past several weeks, rules on matters of major constitutional importance that can affect the course of our Nation for generations.

And that Supreme Court Justice may be playing a major role in Court decisions years after the President who made the nomination—and many Members of the Senate who voted on it—have left office.

The Senate's exercise of its constitutional responsibility to review and evaluate a President's nomination to the Supreme Court is one of our most important duties.

I believe strongly that the Senate has discharged that heavy responsibility with respect to the Bork nomination in a judicious, thoughtful manner. The hearings and the deliberations have been extensive and intensive, and rightly so.

Like many of my colleagues, however, I deplore the efforts of some to divert this debate away from the real issue into bitter and strident attacks upon the motives and integrity of those who oppose this nomination. The real issue is Judge Bork's judicial philosophy.

There has been much talk and discussion about the role that outside groups have played in this debate.

The distinguished Senator from Alabama, Senator HEFLIN, himself a former supreme court chief justice in the State of Alabama, spoke about that matter at length just now in a very appropriate manner.

It is true that both proponents and opponents of the nomination have sought to make their case to the Senate and to the American people directly. Both sides have utilized mass media, mass mailing and telephone banks to promote their views. But that's a first amendment right.

There should be no misunderstanding, however, as to the basis for Judge Bork's rejection by a majority of this body.

A majority of Senators made a careful and extensive review of Judge Bork's judicial philosophy as expressed in his writings and speeches over a 25-year career, in his record as a Federal court of appeals judge over the past 5 years, and in his more than 30 hours of testimony before the Senate Judiciary Committee. And a majority of Senators have concluded he should not be elevated to our Highest Court.

They concluded that Judge Bork's judicial philosophy posed a serious threat to the protection of individual rights and personal liberties.

The Senators who have spoken out against Judge Bork have done so in thoughtful and detailed statements, as have many of those on the other side.

The differences have often turned on judgment as to which man, if confirmed, would take a seat on the Supreme Court—the Robert Bork who for 25 years derided and repudiated in extreme terms Supreme Court decisions upholding individual rights, or the Robert Bork who moderated and revised his positions during his confirmation hearing. The motives and the integrity of those who found this confirmation conversion not credible should not be challenged any more than the motives or integrity of those who accepted it.

By the same token, it is misleading for the proponents of Judge Bork to describe as baseless the concerns of those opposing the nomination. And it is insulting to the U.S. Senate and demeaning to individual Senators to suggest that these concerns were nothing more than a reaction to deft television commercials or full-page ads.

Many Senators who will vote to confirm Judge Bork have acknowledged that there are deeply troubling matters in Judge Bork's record. Over and over, Senators speaking on behalf of the Bork nomination have expressed reservations or disagreement with him on issues of constitutional importance. The existence of the troubling statements and positions in Judge Bork's record cannot be discounted or denied.

It was Judge Bork's own words which defeated him.

Last month I spoke on the Senate floor detailing in depth my concerns with his judicial philosophy, particularly in the area of civil rights, women's rights, the right of privacy, and the power of government to interfere in the lives of individuals. I do not intend to reiterate those arguments today.

Succinctly put, the basic and fundamental flaw in Judge Bork's judicial philosophy—the fatal flaw, in my judgment—is that he does not find in the Constitution of the United States any fundamental overriding purpose to protect individuals from the tyranny of government.

That is Judge Bork's views of the Constitution. It is a view he expressed over and over in his writings, speeches, and in his testimony before the Judiciary Committee.

It is a view which rejects the established part of our legal tradition which holds that a principal objective of the framers of our Constitution was the preservation and advancement of individual liberty and inalienable rights. Those include rights and liberties not specifically enumerated in the Constitution.

Judge Bork's view of the Constitution is that individuals are guaranteed only those rights which are explicitly granted to them by their government.

From the basic perspective flows Judge Bork's attacks upon many Supreme Court decisions which safeguard individual rights and liberties.

The Constitution of the United States has historically stood as a bulwark against government intrusion into the lives of Americans. Judge Bork's judicial philosophy rejects those principles of individual liberty and freedom which lie, in my view, at the very heart of the Constitution.

Those of Judge Bork's supporters who argue that he has been unfairly attacked for not supporting civil rights, or women's rights, or individual rights have missed the point.

It is, and always has been, Judge Bork's judicial philosophy—not his personal philosophy—that is in question. That judicial philosophy, if adopted by our Highest Court, would jeopardize the stability of Supreme Court precedents which have protected individual rights.

It is that philosophy which a majority of the Senate correctly rejects in defeating this nomination.

Mr. President, I yield the floor.

Mr. BIDEN addressed the Chair.

The PRESIDING OFFICER. The Senator from Delaware.

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

Mr. DIXON addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DIXON. Mr. President, over the last several weeks we have heard a great deal about how the nomination of Judge Bork was treated by the Senate. I believe that Judge Bork received fair consideration by this body, and will be rejected, not because of interest group campaigns, but based on problems with respect to his views on fundamental constitutional issues.

Some of Judge Bork's supporters have argued that Judge Bork is the victim of a highly organized campaign spearheaded by special interest groups. They claim that Judge Bork's record was unfairly distorted by disinformation, and that media ads and an unfair portrayal of Judge Bork's record poisoned the minds of the public and the Senate. According to this argument, Senators are being misled by false characterizations of Judge Bork, and they never had a clear view of the judge's record. This smear campaign theory simply does not hold up to scrutiny. Quite frankly, I think that the whole scenario is demeaning to the Senate. I do not believe that the votes of Senators can be so easily swayed.

Both supporters and opponents of Judge Bork organized emotional, simplified appeals to mobilize public sup-

port and raise money for their position. In those appeals there have been excesses and exaggerations on both sides. That cannot be denied. However, it was not the efforts of grassroots citizens groups, or media ads, that defeated the nomination, it was Judge Bork himself!

Public opinion polls clearly show that the advertising campaigns had no significant effect on how Judge Bork was viewed. The sharpest swing of public opinion against Judge Bork came as a direct result of his own 5-day testimony. The American people saw Judge Bork, considered his views on the Constitution, and rejected them.

When the President sent the nomination of Judge Bork to the Senate, my initial inclination was to favor the appointment. I had voted for Judge Bork's appointment to the D.C. Circuit Court of Appeals, and I remembered that the American Bar Association had rated him "exceptionally well qualified" for that position. Judge Bork was unanimously confirmed for the Circuit Court of Appeals.

However, after careful consideration, I decided to oppose the nomination of Judge Bork. My decision was not based on interest groups or media advertisements. Judge Bork's problems were caused by his own words in the Senate Judiciary hearings, and in his writings.

I believe that the hearing process was very fair to Judge Bork. He testified before the committee for an unprecedented 5 days. During his 32 hours of testimony, he had an opportunity to fully present his views on fundamental constitutional issues and directly answer the charges of his critics. Judge Bork clearly had ample time to make sure the Senate had a thorough and accurate record of his views.

I had hoped that Judge Bork would set to rest the concerns I had about his nomination. He did not. After hearing Judge Bork, I felt even more uncomfortable with his constitutional views regarding such important issues as civil rights, privacy, and equal protection.

During the Judiciary Committee hearings, it was not the public special interest groups that testified. Rather, the witnesses were a distinguished group of prominent lawyers, scholars, and Government officials. The witnesses did not present simplified, emotional pleas, but instead provided detailed arguments regarding Judge Bork's record and writings. Sixty-two witnesses testified in support of Judge Bork's nomination, and 48 testified against. The Senate heard from 14 more Bork supporters than opponents. Clearly, there was more than a fair opportunity for Judge Borks supporters to make their case before this body.

During these hearings it became clear to me and many of my colleagues, that Judge Bork's judicial beliefs were not within the broad mainstream of American thought. It was not a question of conservative or liberal philosophy. Rather, it was a question of his fundamental views about our Constitution; how he sees the power of government and individual liberties; and the role he sees for the Court in protecting rights guaranteed by our Constitution.

President Reagan urged that the debate over Judge Bork not be politicized. Yet, in the next breath, he urges the public to call their Senators in support of Judge Bork. The President cannot have it both ways.

Furthermore, the debate on a Supreme Court nomination is inherently a political process—in the best sense of that phrase—and in a democratic society that is exactly as it should be. It is entirely appropriate for the Senate to examine Judge Bork's views on fundamental constitutional issues.

Let me say again, that I do not object to the nomination of a judicial conservative to the Supreme Court. I think the President is entitled to nominees that share his philosophy. I have voted for judicial conservative nominees in the past, and I expect to support the nomination of judicial conservatives in the future.

After the Senate rejects the nomination of Judge Bork, I fully expect President Reagan to send a conservative nominee, and in the end, I fully expect that the Senate will confirm a conservative nominee.

Judge Bork had a full and fair opportunity to express his views on these matters of fundamental importance. The hearing process allowed him to field questions from his critics and state his own positions with precision and clarity. Over the course of his career, Judge Bork has written prolifically. His academic and judicial writings were also closely studied by the Members of this body.

After careful and thorough consideration, the majority in the Senate decided that Judge Bork's judicial views raise too many questions and concerns for him to be confirmed.

Mr. President, the nominating process is working in the case of Judge Bork. He received fair and full consideration by the Senate. It was not the work of special interest groups distorting Judge Bork's views which caused Judge Bork problems. To accuse the Senate of being swayed by these campaigns is without basis and demeaning to every Senator in this body. It was Judge Bork's views, themselves, articulated by Judge Bork in the hearings and in his academic and legal opinions that have caused the majority in the Senate to reject his nomination.

Mr. BIDEN. Mr. President, Senator Hatch said yesterday that the committee report "is a grossly slanted and biased distortion of what really occurred in the committee and what was really at stake in this nomination."

He listed at least 39 inconsistences, to use his term, in that report.

While Senator HATCH's rhetoric may have an appealing ring to some, his statements and the alleged inconsistencies simply have no basis in fact.

The committee report accurately reflects what transpired in the hearings before the Judiciary Committee, and I wholeheartedly stand by the committee report.

INCONSISTENCY NO. 1

Charge: Senator HATCH says that the report states the ABA found Justice Rehnquist "not qualified" when he was first appointed in 1971, and he went on to say that this is a "totally fallacious charge."

Response: In fact, the committee report accurately states that three members of the ABA Committee said in 1971 that they were "not opposed" to his confirmation: "Not opposed" was the language used in the report.

The report did not use the term "not qualified," as Senator HATCH says.

I am compelled today to respond to some of Senator HATCH's charges—charges which are very serious but which are completely belied by the record.

Senator HATCH is apparently unable to distinguish between documents which disagree with him over principle—over what our Constitution should mean—and documents which are distortions or lies.

Let us look at some specific examples of the so-called inconsistencies cited by Senator HATCH.

INCONSISTENCY NO. 2

Charge: Senator HATCH attacks the committee report for its discussion of the members of the ABA Standing Committee who found Judge Bork to be "not qualified."

He says that the report failed to point out that the reasons given by those members "are outside the standards for ABA assessment."

Response: This is, pure and simple, Senator HATCH's own opinion.

Judge Harold Tyler, chair of the Standing Committee; a former Federal judge and a former high-ranking member of the Justice Department; explained that the dissenters were evaluating "judicial temperament" which, according to the ABA's definition includes: "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equal justice."

Judge Tyler also said that political or ideological philosophy is relevant to judicial temperament.

Indeed, the ABA's guidelines state that "while the same factors considered with respect to the lower courts are relevant to * * * the Supreme Court," the standards are actually more rigorous; they require a person

"of exceptional ability," not just "a fine person or a good lawyer."

INCONSISTENCIES NOS. 3-10

Charge: Senator HATCH attacks the report for what he describes as its "heavy reliance on the extremist view that the Constitution is a mirror of an evolving 'image of human dignity.'"

He says that the report "assumes that judges manufacture new rights out of the 'open-ended phrases of the document.'"

Senator HATCH says that the "report's approval of substantive due process is appalling."

He says that Chief Justice Burger "shares Judge Bork's view of the Constitution's" liberty clauses, and that Chief Justice Rehnquist and Justice Scalia "are likely to share his views" on those clauses.

He says that the report "hits ecstacies when discussing the concept of fundamental rights."

And Senator HATCH says that the report's claim that Judge Bork's view of liberty sets him apart is "unsubstantiated."

Response: Before I respond to these charges, let me say one thing.

I believe that the wealth of the testimony of the hearings and the committee report itself demonstrate conclusively 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.

Let me quote what Prof. Philip Kurland, of the University of Chicago, said.

Professor Kurland, by the way, is generally recognized as a conservative scholar of the Constitution.

Professor Kurland said:

> I think it makes all the difference in the world whether you start with the notion that the people have all the liberties except those that are specifically taken away from them, or you start with the notion, as I think Judge Bork now has, that they have no liberties except those which are granted to them.

Professor Kurland said that he does "not know of anything more fundamental in our Constitution"; I agree.

There is nothing more fundamental than the idea that the people have all the liberties except those specifically relinquished.

Now let me take up some of Senator HATCH's charges on this particular issue.

Take the claim that Chief Justice Burger shares Judge Bork's view of the liberty clauses.

Judge Bork at page 89 said:

> Once the Judge begins to say economic rights are more important than marital rights or vice versa and if there is nothing in the Constitution, the Judge is enforcing his own moral values, which I have objected to.

Nothing could be further from the truth.

The committee explored at length Judge Bork's view that there are not unenumerated rights under the Constitution.

I need not further explore Judge Bork's view in detail; but the former Chief Justice takes a different view.

In his 1980 opinion in Richmond Newspapers versus Virginia, he said:

> Fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

For a full recitation of Chief Justice Burger's views, I refer the Members of this body to pages 18-19 of the committee report.

Suffice it to say that Judge Bork and Chief Justice Burger do not, as Senator HATCH would have it, agree on this critical issue.

Chief Justice Rehnquist and Justice Scalia also have a far different view than Judge Bork on the question of liberty under the Constitution.

In Turner versus Safley, Justice O'Conner wrote for a unanimous Court that "the decision to marry is a fundamental right."

Scalia and Rehnquist agreed with this view—a view emphatically rejected by Judge Bork.

The many Justices discussed in the report who have embraced the notion of fundamental and unenumerated rights have not done so in "loose dicta," as Senator HATCH claims.

Take Justice Powell. He wrote in Moore versus East Cleveland that—

> This 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.

And he said that—Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.

Senator HATCH can call this loose dicta if he wants. I think it expresses a view of the Constitution with which most Americans would agree—a view that Judge Bork emphatically rejects.

Senator HATCH also seems to say that substantive due process and the concept of fundamental rights are without limits, so we have to reject the concepts in toto.

But Justices of the Supreme Court have not had the difficulty finding limits that Senator HATCH seems to have.

Let's look at Justice Powell and Justice Stevens. Justice Powell said in Moore versus East Cleveland:

> Appropriate limits on substantive due process can be found. They come not from drawing arbitrary lines but rather from careful respect for the teachings of history and solid recognition of the basic values that underlie our society. . . .

Justice Stevens has said:

> Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the Federal system, Federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.

These quotes illustrate my point.

Justices of the Supreme Court have accepted limits on substantive due process and fundamental rights—that is the role of Court, and it is the responsibility that the Court has historically accepted. Judge Bork does not accept that tradition and history.

INCONSISTENCIES NOS. 11, 14

Charge: Senator HATCH says that the majority report "chooses to ignore the discount Judge Bork's explanations of his view of stare decisis."

Response: Apparently Senator HATCH has not read pages 21-29 of the committee report. This section deals at length with Judge Bork's views of precedent.

Furthermore, the committee report does not discount his views—rather, the report analyzes his views, and then reaches a conclusion that Senator HATCH apparently does not like. The fact that he does not like that conclusion, however, does not give him license to claim that Judge Bork's views have been "discounted."

INCONSISTENCY NO. 12

Charge 1: That "Judge Bork never recanted his position that Justice Holmes' reasoning for the 'clear and present danger' test is inadequate. Judge Bork does not accept Justice Holmes' reasoning that 'if * * * beliefs expressed in proletarian dictatorships are destined to be accepted * * * then the only meaning of free speech is that they should be given their chance and have their way.'"

Response: This charge shows a simple lack of understanding of both Justice Holmes' real basis for his "clear and present danger" test and Judge Bork's core criticism of that test. The cited passage about "proletarian dictatorship" hav[ing] its way" isn't Justice Holmes' reasoning for the test but is rather one application of the test.

As Judge Bork himself recognizes, the crux of the Holmes-Brandeis position, with which he disagreed, was "the closeness of the danger" as he quoted from Justice Sanford, the "single revolutionary spark" that may lie "smoldering for a time."

In contrast, Holmes felt that, if Government officials were allowed to draw a line on where speech could be prohibited short of "clear and present danger," that line would be arbitrary and stifle the marketplace of ideas that the framers intended us to have.

On September 16, Judge Bork set out a functional rationale that said he agreed with "clear and present danger" and effectively repudiated

Sanford's position. "I now think this society is not susceptible to that * * *" which is a recantation by anyone's standard—even though he said the next day only that he accepts Brandenburg as a judge.

Charge 2: Judge Bork can apply the "clear and present danger" test on other rationales than Justice Holmes'.

Response; Because the "rationale" that Senator HATCH cites was neither Justice Holmes' rationale nor properly a rationale at all, it is hard to know what this claim means.

But either Judge Bork agrees with the "imminence" rationale—which is a recantation—or he still disagrees with it—in which case he would prefer to allow Government officials to decide what speech advocating law violation might or might not become dangerous at some later time. You can't find "another rationale" for what is, in this one case, a "yes or no" answer.

INCONSISTENCY NO. 13

Charge: Judge Bork did not contest the Supreme Court's application of Brandenburg to Hess, but only thought Hess could still be punished on other grounds, that is, the obscenity of his speech.

Response: This charge is a mere quibble over semantics. The committee report said that "Judge Bork did not find that Brandenburg controlled the facts presented by Hess." If Hess indeed "could still be punished on other grounds," then Brandenburg would not control the case in the accepted meaning of the term, because the case would then be decided under a new rule banning obscene speech that Judge Bork would favor. And favor such a rule he would, on the grounds of protecting "the health of our political processes."

INCONSISTENCY NO. 15

Charge: Senator HATCH asserts that "the report's treatment of the privacy question is riddled with false assumptions and slanted commentary."

Response: One example offered by Senator HATCH is his criticism that "Skinner is read as a fundamental rights case rather than an equal protection case."

What Senator HATCH fails to realize, however, is that Skinner cannot be explained as an equal protection case without understanding what the Court was protecting. The Court said:

> We are dealing here with legislation which involves one of the basic rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.

The Court was ensuring equal protection for the fundamental right of procreation. It is this "fundamental right" aspect of Skinner that Judge Bork rejects.

Another example is Senator HATCH's statement that the report quickly dismisses without commentary the fact that Judge Bork might reach the same result as in Griswold by a different route. But Senator HATCH fails to recognize that Judge Bork's testimony left no room for arriving at a satisfactory rationale.

Judge Bork said that Griswold did not contain a correct understanding of the liberty and due process clauses of the 14th amendment.

He said that substantive due process "is a pernicious constitutional idea."

He rejected the ninth amendment as a possible basis for the Court's decision.

He said he would have dissented in Griswold.

And Judge Bork said that "I do not have available a constitutional theory that would support a general * * * right [of privacy]."

So Judge Bork left no room for reaching the same result in Griswold by a different route.

INCONSISTENCY NO. 16

Charge: Senator HATCH says that the committee report "protests too much about the privacy doctrine" and that "in fact, the privacy doctrine remains very controversial and has been criticized by four current Justices."

Response: Senator HATCH makes this rather conclusory statement without citing a specific case. I believe he may be talking about the Bowers versus Hardwick case.

In Bowers, however, the majority reviewed the privacy cases beginning with Pierce versus Society of Sisters and Meyer versus Nebraska and going through Griswold and Row versus Wade. The majority then said that it accepted the decisions in those cases.

Bowers, therefore, proves the point I have made before; namely, that the debate about unenumerated rights has always been about the scope of those rights, not about their existence.

INCONSISTENCY NO. 17

Charge: Senator HATCH claims that the committee report "repeats much of the erroneous demagoguery about Judge Bork's record on civil rights."

Response: In fact, what the committee report does is report what transpired at the hearings on a number of civil rights issues.

The committee report quotes from Nicholas Katzenbach, who was Attorney General during 1964-66.

The committee report quotes from Senator HEFLIN during a colloquy with Judge Bork.

The committee report quotes from former Congresswoman Barbara Jordan, one of the most respected persons ever to be a member of this body.

The committee report quotes from Andrew Young, the mayor of Atlanta and the former Ambassador to the United Nations.

The committee report quotes from William Coleman, former Secretary of Transportation and clearly one of the leading practitioners before the Supreme Court.

Most Members of this body, and most Americans, would agree with me that these individuals—these public servants—are not prone to "erroneous demagoguery," as Senator HATCH puts it. These are individuals who came to the careful, difficult and deliberate conclusion that Judge Bork's civil rights record should preclude his confirmation to the Supreme Court.

INCONSISTENCY NO. 18

Charge: Senator HATCH claims here that, among other things, the report fails to note "the distinction between Judge Bork and Professor Bork." "The function of a professor," says Senator HATCH, "is to be provocative."

Response: This charge raises an issue that has not been mentioned recently, but is one that is important. Judge Bork's own statements have made clear that his writings and speeches are not merely abstract exercises, divorced from his leanings as a potential Justice.

Less than 1 year ago—and more than 4 years after he began sitting as a member of the D.C. Circuit—Judge Bork commented on his roles as an academic and as a jurist.

In clear and unambiguous terms, he said: "Teaching is very much like being a judge and you approach the Constitution in the same way."

In a 1985 interview with the District Lawyer, Judge Bork said: "Obviously, when you're considering a man or woman for a judicial appointment, you would like to know what that man or woman thinks, you look for a track record, and that means that you read any articles they've written, any opinions they've written. That part of the selection process is inevitable, and there's no reason to be upset about it."

Thus, despite what Senator HATCH told us yesterday, Judge Bork's own statements inform the Senate as to where it should look in determining the nominee's views. And Judge Bork has told the Senate he approached the Constitution as a professor in the same way that he has as a judge.

INCONSISTENCY NO. 19

Charge: Senator HATCH here attacks the report's discussion of Shelley versus Kraemer, in which the Supreme Court unanimously held that the 14th amendment prohibits enforcement of racially restrictive covenants in residential real property agreements. One of Senator HATCH's points is that "the Supreme Court has refused to extend the principle of Shelley" and that "it has not proved to be a precedent of any significance."

Response: As pointed out on page 38 of the committee report, Shelley has been applied by the Supreme Court and it has proved to be precedent of significance.

In *Barrows* v. *Jackson*, 346 U.S. 249 (1953), for example, the Court held that the 14th amendment bars en-

forcement of a racially restrictive covenant in a State court action to recover damages for breach of the convenant.

In *Moose Lodge No. 7* v. *Irvis*, 407 U.S. 163 (1972), the Court cited Shelley for the proposition that "the impetus for the forbidden discrimination need not originate with the State if it is State action that enforces privately originated discrimination."

In *Palmer* v. *Sidoti*, 466 U.S. 429 (1984), Shelley was cited for the proposition that "the actions of State courts and judicial officers in their official capacity have long been held to be State action governed by the 14th amendment."

Thus, Shelley has had, in Judge Bork's words from the hearings, some generative force in the law.

INCONSISTENCY NO. 20

Charge: Senator HATCH once again takes issue with the committee report's discussion of Judge Bork's civil rights record, this time citing a decision in one of his court of appeals cases.

Response: It is again appropriate to remind the Senator from Utah what the minority leader, Senator DOLE, said in 1971 in connection with Chief Justice Rehnquist's nomination to the Court. Senator DOLE said:

The role of the [lower court] judge * * * is not to state or define the law but to predict what the higher court would do in the situation at hand. Thus, a judge might be liberal in construing decisions of higher courts, yet were he promoted to a higher bench, he might be conservative in his statements of legal principles to be followed by lower courts.

On the Supreme Court, the Justices do not predict the law; rather, they determine what it is in an absolute sense. There is a significant difference in these judicial roles.

Judge Bork's court of appeals record may thus tell us little about what he would do on the Supreme Court in civil rights matters.

INCONSISTENCY NO. 21

Charge: Senator HATCH criticizes the committee report's discussion of the poll tax issue.

Response: I addressed the poll tax issue last evening in my colloquy with Senator ARMSTRONG. But let me add one other point, which I did not make last night and which Senator HATCH does not mention in his list.

We should all bear in mind what Senator HEFLIN told Judge Bork during the hearings. Judge Bork defended his prior criticism of the Harper case by saying that there was no evidence of racial discrimination. Let me quote what Senator HEFLIN said in response—This is on page 39 of the committee report:

There was no allegation? Is that the distinction you made? Because there is no question to me that a poll tax that required three years of history of payment, that the last payment had to be six months in advance, and you had to go to the courthouse to pay it was designed to prevent the poor and blacks from voting. I do not think there is any question that that is it.

INCONSISTENCY NO. 22

Charge: In connection with the principle of one person, one vote, Senator HATCH says that "despite the erroneous report's insinuation, [Judge Bork] has not questioned and does not oppose the Baker versus Carr opinion."

Response: The report makes it abundantly clear that Judge Bork rejected, and continues to reject, the one-person, one-vote principle. Judge Bork repeated that rejection during the hearings.

The fact of the matter is that Judge Bork thinks courts can get involved in malapportionment cases; he just believes that courts, under the Constitution, should tolerate some peoples' votes counting more than others. That's the bottom line.

INCONSISTENCY NO. 23

Charge: Regarding literacy tests, Judge Bork only objected to the Supreme Court's validation, in Katzenbach versus Morgan, of a congressional ban on nondiscriminatory tests as changing constitutional interpretation by statute. Moreover, the Supreme Court rejected its Katzenbach rationale 4 years later in the Morgan [was actually Oregon] case dealing with the 18-year-old vote.

Response: as any careful reader of the committee report must see, the sole point under discussion on pages 42-43 was the constitutionality of enforcement clause powers. As is often the case in his list, Senator HATCH's dispute is not with the report but with the Supreme Court.

Just because neither he nor Judge Bork accept the Court's recognition of substantive enforcement clause powers in the 13th, 14th, and 15th amendments does not mean that the committee is mistaken when it says that the Court was right to find such powers.

In addition, the notion that the Supreme Court rejected Morgan in the Oregon decision is 89 percent wrong—only Justice Harlan took that position.

And regarding the nationwide ban on literacy tests, all nine Justices in Oregon found that enforcement clause powers in the 15th or 14th amendments made such a ban constitutional—a position that Judge Bork attacked in 1981. Once again, Judge Bork stands alone.

INCONSISTENCIES NOS. 24-25

The charges:

At pages 45-50, the report "repeats misleading distortions of Judge Bork's statements and views of women's rights and the equal protection clause. * * * the hearings indicated that he defend[ed] Ms. LaFontant against subtle discrimination in the Justice Department."

The Response:

(1) these pages present Judge Bork's views largely in his own words, with direct quotations. I invite my colleagues to read them.

As just one instance, in 1987—this year—Judge Bork said "I do think the equal protection clause probably should have been kept to things like race and ethnicity * * *"

His remarks indicate he views the equal protection clause as providing no particular sensitivity to the claims of gender based discrimination.

(2) With respect to his defense of Ms. LaFontant in the Justice Department, the criticism of the committee report falls into the error of thinking the Senators were trying to evaluate what Judge Bork believed was personally the right or wrong thing to do as a human being.

But as I explained at length yesterday, we were interested in his constitutional reasoning, not in assessing his personality.

I, personally, have no doubt that Judge Bork is an honorable and principled person.

It is his constitutional views, that the committee report analyzes, not his personal preferences, which Judge Bork repeatedly has said ought to be kept separate from a judge's professional decisions.

INCONSISTENCY NO. 26

Charge 1: The committee report does not acknowledge that Judge Bork "has already voted on many occasions to grant broad protection to many varieties of speech" as a judge on the court of appeals.

Response: The argument that Judge Bork's actions in following Supreme Court precedents as a lower court judge are the best determinant of his judicial philosophy has worn rather thin by now. Judge Bork himself acknowledged the vast differences between the roles of judges on the appeals and Supreme Courts during the hearings.

But perhaps the best answer to Senator HATCH was given by his own minority leader, Senator DOLE, during the Debate over the nomination of Mr. Justice Rehnquist in 1971:

"The role of the [lower court] judge . . . is not to state or to define the law but to predict what the higher court would do in the situation at hand. . . . On the Supreme Court, the justices do not predict the law; rather they determine what it is in an absolute sense."

Charge 2: The committee reports ignores Judge Bork's expansion of the first amendment beyond the "political speech" core prior to his nomination.

Response: It is utterly mistifying how Senator HATCH could say that the committee report "ignores" Judge Bork's post-1971 expansions of types of speech he considered protected when the report cites the supposedly

ignored writing to say precisely that—that he did broaden protection.

Rather than examine what the committee report actually said, Senator HATCH simply raises a straw man here. The report expressly states that, after 1971, "Judge Bork made clear that he no longer believed speech had to be clearly political to be protected."

And the report details Judge Bork's expansions of what he viewed as properly protected speech in 1984 and 1987.

But as the report also quotes, less than a month before his nomination Judge Bork insisted that these broader areas of protected speech still had to have some "relation to those [political] processes." Judge Bork's words are clear and unequivocal on this point.

Charge 3: Judge Bork was criticizing Justice Harlan's rationale in Cohen versus California that "one man's vulgarity is another man's lyric," a rationale that would prohibit any regulation of obscenity and that the Supreme Court has elsewhere repudiated.

Response: Once again, this listing of charges apparently cannot distinguish between the rationale of a case and dictum. The cited quote was, in the manner of dicta, an aside that was not essential to the actual controversy in *Cohen:*

That while

"The immediate consequence of this freedom [of speech] may often appear to be only verbal tumult, discord, and even offensive utterance, . . . the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."

Saying that the "one man's lyric" dicta was actually the rationale accuses Justice Harlan of establishing a much broader rule than was necessary to decide the particular case—which such a strong believer in judicial restraint neither intended nor thought the Court had power to do.

Finally, saying *Cohen* would protect obscenity is patently wrong on its face. None of the obscenity cases cited had any relevance to the issue in *Cohen*

Even the dissenters in *Cohen* did not argue that the speech was prohibited because it was obscene, but because it "was mainly conduct and little speech," and was provocative "fighting words" besides. While that dissent may be somewhat of an inconsistency itself, it certainly doesn't support Judge Bork's complete emphasis on the vulgarity of the speech as punishable per se.

INCONSISTENCY NO. 27

Charge: "The report raises unfounded concerns about Judge Bork's willingness to permit peaceful civil demonstrations. * * * Judge Bork drew a logical distinction between demonstrations to test the constitutionality of a law and a subversive inciting to violence."

Response: Senator HATCH here seems more intent on disagreeing with the position taken by the committee report rather than dealing with the substance of that position.

In fact, the report treats the distinction extensively; it simply concludes, on the basis of thorough analysis, that it is a less meaningful distinction than it might at first appear. This criticism is also utterly inconsistent with the assertion in No. 12, charge 2, that Judge Bork would "fairly apply *Brandenburg*" when No. 27 argues that he shouldn't apply it at all.

INCONSISTENCY NO. 28

Charge: Repeat of numbers 12 and 13.

Response: The charges in numbers 12 and 13 were completely inaccurate and misconceived in the first place, and their repetition here doesn't make them any less so.

INCONSISTENCY NO. 29

Charge: At pages 57-65, the report overlooks "significant evidence" before the committee. In particular, it ignores Solicitor General Bork's views on the pocket veto, which shows he has a limited view of executive power.

Response: In fact, Solicitor General Bork opposed appealing a court of appeals decision ruling against the Ford administration on the pocket veto because he feared the Supreme Court would make a bad law on the question of congressional standing, which was involved in that case, and which Judge Bork opposes.

The report quotes the relevant material from a memorandum, prepared by Solicitor General Bork, at page 62.

INCONSISTENCY NO. 30

Charge: Referring to pages 57-59 of the committee report, Senator HATCH says that the discussion of the War Powers Act "overlooks several critical points," such as the fact that the War Powers Act then contained a legislative veto provision.

Furthermore, his other objection was only that Congress cannot micromanage tactical military decisions.

Response: In fact, the report does mention Judge Bork's criticism of the legislative veto. It also mentions his substantive criticism of the War Powers Act, which was that the War Powers Resolution may be unconstitutional in its time limits on undeclared wars.

As Professor Sunstein testified, such resolutions have nothing to do with micromanaging tactical military decisions.

Their "purpose and effect are to ensure that Congress, rather than the President, decides whether the Nation is to be at war."

INCONSISTENCY NO. 31

Charge: At pages 61-62, the report misrepresents Judge Bork's opposition to the special prosecutor statute by failing to note that the act he criticized in 1973 was never enacted, and the present law is very different from that earlier proposal.

Response: In fact, the act Judge Bork criticized and the current act are in relevant part identical. That was the testimony, unrebutted, and that is what the report says.

INCONSISTENCY NO. 32

Charge: At pages 62-64, the report's discussion of Judge Bork's attacks on congressional standing "omits the perfectly defensive reasons for Judge Bork's concern about this doctrine."

Response: Again, this is hardly an inconsistency.

The committee disagrees with the minority—the committee does not find Judge Bork's reasons for rejecting congressional standing sufficient.

The minority can continue to make that argument on its time and in its report, but the committee was not convinced, and it said so.

It is clear from the testimony that the fears Judge Bork asserts need not materialize under reasonable interpretations of congressional standing. See the committee report, at 62-64.

INCONSISTENCY NO. 33

Charge: At page 65, "The report's treatment of executive privilege is wholly inadequate."

Response: The committee disagrees.

Judge Bork's opinion in Wolf is yet another indication of his expansive construction of the executive power, as anyone reading it will see.

It takes "executive privilege as far as, and probably further than, any judge who has yet addressed the issue."

INCONSISTENCY NO. 34

Charge: The firing of Archibald Cox was legal, as the district court decision finding it illegal was vacated.

Judge Bork undertook a campaign immediately to find a new special prosecutor.

Response: These charges are remarkable for their patent ignorance of both the record and the committee report.

First, the fact that the Nader versus Bork decision was vacated as moot does not make the legal reasoning underlying that decision any less compelling.

As the committee report points out and Senator HATCH's criticism ignores, that reasoning—which underlay the key conclusion of Nader—that the special prosecutor regulation remained legally binding while still in force—was explicitly reaffirmed by the Supreme Court in United States versus Nixon.

So far as the U.S. reports show, United States versus Nixon has not been expunged, erased, eliminated, dismissed from the law books.

Second, if Senator HATCH thinks that Judge Bork "undertook a campaign immediately * * * to find a new prosecutor," then he has a serious ar-

gument with Judge Bork, not with the committee report.

As the report quotes Judge Bork's own testimony, "We did not initially contemplate a new special prosecutor until we saw that * * * the American people would not be mollified without one."

Finally, anyone who draws from the Watergate episode the conclusion that a full and successful investigation of the cover-up could have been run from inside the Justice Department still does not understand, 14 years later, why Archibald Cox was fired.

The committee report does not dispute that Judge Bork was acting with the best of intentions throughout these events. He simply did not see, nor does it seem that the author of the criticisms of the committee report sees, that President Nixon would not at any point permit an executive branch official who served at his pleasure to conduct a full and successful investigation of Presidential wrongdoing.

INCONSISTENCY NO. 36

Charge: "The report's account of the allegations of Judge Gordon evience a calculated but wholly unsuccessful effort to impugn Judge Bork's professional reputation."

Response: Senator HATCH has every right to take issue with Judge Gordon's recollection of and Judge Hufstedler's interpretation of this matter if he so desires. But that issue is properly and forthrightly with Judges Gordon and Hufstedler. It is not with the committee report, that simply quoted from Judge Gordon's affidavit to reconstruct the chain of events, and from both that affidavit and Judge Hufstedler's letter to draw an interpretation of those events.

INCONSISTENCY NO. 37

Charge: At pages 81-92, the report makes ludicrous assertions that Judge Bork's record as solicitor general and judge are "irrelevant on the one hand and are evidence of his judicial activism on the other."

Response: In fact, the committee report does not say those records are irrelevant. It says they are "not of much relevance."

Furthermore, the report does not claim that Judge Bork's record as solicitor general is evidence of his judicial activism.

Instead, it says that that record is "substantially less reflective of his . . . legal viewpoints than his supporters have characterized . . ."

And it quotes Judge Bork's own testimony, at his own confirmation hearing for that post, as evidence that he viewed that job as being "attorney for the government" and that in such a post he would not define Government policy.

As to Judge Bork's court of appeals record, the report says that the statistics cited by his supporters do not tell us much—an opinion with which the minority leader, Senator DOLE, seems to agree, I might add.

It does not say that an examination of the substance of those opinions, the reasoning, the rationale, might not tell us some things, and in fact it does.

One of the cases examined was Vinson versus Taylor, which the list of inconsistencies says the report "stretches out of its responsible context."

This case has been so often discussed in the hearings that the record on it is quite long.

The simplest approach is to invite Senators to read Judge Bork's opinion and compare it with that of the Supreme Court.

The issue the report focuses on is what constitutes sexual harassment under title VII.

Judge Bork would have "voluntariness" recognized as a complete defense—the position taken by the district court and rejected by a three judge panel of his court.

Here is what Judge Bork said:

According to the panel opinion, when an employee charges sexual harassment in the workplace, the supervisor charged may not prove that the sexual behavior, far from constituting harassment, was voluntarily engaged in by the other person. [This] ruling[ ] seem[s] plainly wrong.

Now the Supreme Court flatly rejected voluntariness as a defense.

It said the only relevant question is whether the sexual advances were unwelcome, not whether the sexual activity was involuntary.

As to whether there is any difference between unwelcome and involuntary, let me tell you what Judge Shirley Hufstedler said:

A decision by a dissident who wants to leave the Soviet Union who is told, yes, you can leave; of course, your family must stay.

You can say that he stayed voluntarily. Did he stay because he welcomed that choice?

Judge Bork treated the issue of voluntariness without recognizing that when the elements of choice are so far reduced, so, you do it, you go to bed with me or you are not going to be promoted, or fired, is my way of saying that is the kind of nonchoice you get.

So that is a very significant difference between the way Judge Bork viewed the situation and the way the Supreme Court did.

That is her testimony, and that is in the committee report, too, at page 88.

I could go on at greater length and detail about each of the claimed inconsistencies, but let me sum up this way:

The Senator from Utah seems to be operating on the assumption that any statement he personally disagrees with is an inconsistency.

Some people have been trying to make so-called distortions, misinformation, and falsehoods the issue in these proceedings.

But it appears that these labels have come to mean that someone opposed to Judge Bork's confirmation has said something that his supporters disagree with.

Indeed, the report summarizes a number of concerns about Judge Bork's views—that is its function.

Senator HATCH obviously doesn't share those concerns, but they are none the less the sincerely held views of eight members of the Judiciary Committee.

The report, furthermore, gives citations to the record—which, I might add, is more than the minority views do—so that Senators can verify for themselves the accuracy of the statement made.

As to the arguments in the report, it is up to my colleagues to evaluate them, in light of anything Judge Bork's supporters might say on the merits.

But to call each argument or concern an inconsistency misuses the English language—perhaps in an effort to make it appear that the committee report and the ads that some of my colleagues have become concerned about are engaged in some kind of common scheme.

But there is no common scheme, and the concerns raised are not inconsistencies.

Likewise, it is a little extreme, to say the least, to cite repeatedly as inconsistencies places in the report that allegedly do not acknowledge certain facts, or overlook things, or fail to mention things.

The committee overlooked nothing in the record. The hearings were exhaustive and fair. To mention in the report everything that is in the record would obviously make the report as long as the three volume record. That is not the report's function.

What is clear is that, in the view of the committee, none of the omissions alter the conclusions the committee reached.

Perhaps what was desired is that the committee write the minority report for them—to make their arguments, to ratify their so-called evidence, and so forth. But that is the function of the minority. I shall leave it up to them.

And I shall leave it to my colleagues to read the reports, the record, and to listen to this debate to determine the better views.

Mr. President, many of Judge Bork's supporters appeared on national TV to defend and support Judge Bork.

President Reagan gave his position in an address televised last July in prime time and run on all three networks.

President Reagan's remarks on Judge Bork were placed on the nightly news shows on several other occasions.

Senators supporting Judge Bork, such as Senators HATCH and SIMPSON, have appeared on morning talk shows; weekend commentary shows; and programs such as "Nightline."

Prominent supporters of Judge Bork such as Lloyd Cutler, Ray Price, Paul Bator, and others also appeared on various morning, evening, and weekend news shows.

Journalists who strongly support Judge Bork such as George Will, Robert Novak, and John McLaughlin appeared on a number of TV shows and offered extensive pro-Bork commentary.

Mr. President, I ask unanimous consent that a chronology of events be printed in the RECORD.

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

CHRONOLOGY

V. Conservative groups begin with an aggressive campaign of organization and direct mail.

A. Groups coordinate closely among themselves and with the White House.

Patrick McGuigan of the Coalitions for America: "The meetings of conservative leaders to brainstorm and begin to start action were the very next morning." ("Lobbying Groups Gather Steam For Bork Confirmation Battle," Washington Post, 7/7/87).

"Conservative hard-liners in the Justice Department and pragmatists in the White House disagreed from the start about strategy; at one point in August, the divisions were so bad that Edwin Fuelner, president of the conservative Heritage Foundation, took it upon himself to convene a peace conference at his offices for top White House and Justice Department officials." ("How Reagan's Forces Botched the Campaign for Approval of Bork," Wall Street Journal, 10/7/87).

B. Existing groups swing into action with the rhetoric of an election campaign, promising that Judge Bork's confirmation would produce new political results on specific, litmus-test issues of the New Right, and ending with funding-raising appeals.

"The American Conservative Union sent its top 1,000 contributors what Executive Director Dan Casey described as a "here-we-go again letter," asking them to send contributions to support the Bork effort and to urge their Senators to back Bork. Casey said the group would send another 40,000 to 60,000 letters to supporters by the end of the month. Casey said "This is an issue that will fund itself because it's what they would say in the direct-mail world is a "hot button" issue." (Lobbying Groups Gather Steam," Washington Post, 7/7/87).

Citizens for Decency Through Law, July, 1987: "CDL has borrowed $140,000 from Peter to pay Paul for a massive counter campaign. Please help us defray our educational and media costs in this campaign to seat an upstanding individual—Judge Robert Bork—in the nation's highest court. . . . Your gift will block the efforts of the liberals who have had too much influence for too long."

Christian Voice, July 27, 1987: This is your one chance to help make history and to ensure a conservative America—even after President Reagan leaves the White House in 1988. . . . Now we have a prime opportunity to give the Supreme Court its first conservative majority since the 1930s. . . . Schoolchildren can't even say a silent prayer let alone study creationism. Bork could help correct this. . . . Your $10 or $20 gift or whatever you can manage to Christian Voice goes entirely to the work of this organization. Please help me carry this load?! In 10 years of operation this is the most critical battle we've fought and I need your financial support today."

Jerry Falwell/Moral Majority, Inc.: "I am issuing the most important "call-to-arms" in the history of the Moral Majority. . . . our efforts have always stalled at the door of the U.S. Supreme Court. . . . President Reagan has chosen Judge Robert Bork. . . . a pivotal person in getting the Supreme Court back on course. . . . I need your gift of $50 or $25 immediately. Time is short."

American Life League, Inc.: Judge Robert Bork has been nominated. . . . This is going to be a long and bitter battle. It will be the most massive, most critical and most expensive efforts you and I have ever undertaken. . . . I need your gift of $18 or $25 or $50—or whatever you can afford to help restore the paramount right to life."

Beverly LaHaye, Concerned Women for America: "we have prayed for an opening on the Supreme Court for many years, and now it is time to commit our efforts and money to back up our prayers. It will take pressure on the Senate and it will cost money to win the Bork nomination. . . . [A] plan we have developed involves the use of advertising to reach the American public. . . . With your contribution of $25 per advertising inch . . . we can be successful. . . ."

C. New groups and others jump in.

On July 21, Bill Roberts—a long-time Reagan supporter in California—held a press conference to announce the formation of "We The People," a pro-Bork group that sought to raise $2 million in 60 days ("Nationwide committee to Support Confirmation of Judge Robert Bork to U.S. Supreme Court Announced," news release by The Dolphin Group, 7/22/87).

Jack Kemp For President sent out mailings in mid-August asking recipients to send a postcard to Judiciary Committee Chairman Joseph Biden "to help President Reagan's Supreme Court nominee be confirmed," and as "a special favor, . . . Help me replenish my campaign funds." ("Kemp's Bork Two-fer," Washington Post, 8/23/87).

D. Kemp for President organizes pro-Bork, anti-Biden political rally/demonstration in New Hampshire ("Caught in the Middle," Delaware State News, 7/12/87).

VI. Right-wing groups then expanded into planning a full-scale media assault, the same kind of visible, election campaign-like effort that President Reagan and the Republicans now claim is dangerous and improper on judicial appointments.

A. In above direct mailings, see references to: "media . . . campaign" (Citizens for Decency Through Law).

"Through your gift of $25 to CWA, you will enable us to purchase an average of one square inch of advertising space in a major newspaper. . . . If 16 people give $25 each, we will have enough money to purchase an eighth of a page in a newspaper which will encourage hundreds of people to voice their support for Judge Bork." (Beverly LaHaye, Concerned Women for America).

Concerned Women for America writes its "area leaders" nationwide to activate "phone banks" in support of the nomination ("Lobbying Groups Gather Steam," Washington Post, 7/7/87).

Through the "Liberty Report" newspaper, lobbying on Capital Hill and a media blitz, we can make a difference." (Jerry Falwell/Moral Majority).

B. Public statements about plans for right-wing political campaigns for Bork.

"You can surmise that whatever the liberals have, we're going to have—radio, television, newspaper ads." Richard Viguerie, "Lobbying Groups Gather Steam," Washington Post 7/7/87).

"We're going in with newspaper ads, with television ads, with radio spots." Bill Roberts, on CBS Evening News, 7/23/87).

C. Public statements restating right-wing expectations about how their political interests would benefit from placing Judge Bork on the Supreme Court.

"This is the transition nomination. . . . The nomination has the potential not to institutionalize Reaganism, but to institutionalize the shift in political gravity—to the right." Patrick McGuigan, Coalitions for America, "Grass roots groups in frenzy over Bork," Christian Science Monitor, 9/2/87).

"Conservatives didn't work all these years to get a Ronald Reagan elected to have a centrist, a moderate appointed to the Supreme Court. We're interested in having someone with Ronald Reagan's views [appointed], and Bork is . . . right out of Ronald Reagan's ideology." Richard Viguerie ("Drawing Lightning," National Journal 9/12/87).

D. Right-wing advertising starts.

Coalitions for America runs pro-Bork radio spots in Washington, D.C. ("Groups Unlimber Media Campaigns Over Bork," Washington Post, 8/4/87).

Concerned Women for America run print ads in Alabama and Pennsylvania in support of Bork nomination ("Groups Unlimber Media Campaigns Over Bork," Washington Post, 8/4/87).

Coalition for America given free air time on three radio stations under Fairness Doctrine to reply to anti-Bork radio ads ("Washington Talk, Bork and Fairness," New York Times, 8/11/87).

Free the Court (conservative group) hires airplane to fly over Iowa State Fair with "banner denouncing 'Bork Bashers' and 'liberal lap dogs." ("Grass groups in frenzy over Bork, Christian Science Monitor, 9/2/87).

VII. The Administration and President Reagan campaign for Bork—and participate in the attack on Judiciary Committee Chairman Biden.

White House releases lengthy, unprecedented "briefing book" in support of Bork's nomination, July 27 (see table of contents page).

President Reagan addresses National Law Enforcement Council at White House, saying "that, if you want someone with Justice Powell's detachment and statesmanship, you can't do better than Judge Bork" ("Confirm Bork, Reagan Urges," Washington Post, 7/30/87).

Nationally televised address by President Reagan on August 12 ("Democrats Agree to Drop Iran-Contra Issue," Washington Post, 8/13/87).

Talk in Nebraska by President Reagan on August 13 ("Latin Peace is Priority for Reagan," Washington Post, 8/14/87).

President Reagan lobbies leaders of National Law Enforcement Council to support nomination on August 28 ("Police, Prosecutors Meet With Reagan on Bork," Washington Post, 8/29/87).

"Republican sources revealed that low- and mid-level White House officials privately distributed anti-Biden information to several GOP political consultants weeks before the Bork hearings began. The material . . . was given to the consultants to distance President Reagan and his top aides from suggestions they were orchestrating a smear campaign . . . . Among the

consultants is former White House political director Mitch Daniels. He pressed reporters last week to contact former Biden political foes who told the White House they had 'files' on Biden." ("White House aides 'helped sink Biden,'" Boston Herald, 9/25/85).

Interior Secretary Donald Hodel the featured speaker at a pro-Bork rally sponsored by the conservative Coalition for America at Risk on September 10, five days before the opening of hearings ("Bork Rally," Washington Times, 9/10/87).

Speech to convention of Concerned Women for America by President Reagan on September 25 ("Reagan Reasserts Support for Contras," Washington Post, 9/26/87).

VIII. As the nomination proves unacceptable to the Senate and the American people, the administration and the right wing intensify their political campaign of advertising, phone banks, direct-mail fund raising, and distortion, continuing their summer-long view of the nomination as a political election campaign.

A. The right wing media campaign turns to fear-mongering and character assassination.

"We the People" runs a full-page ad in USA Today seeking to fill its coffers (ad includes coupon to send contributions from $25 to $100) by a personal smear of four named members of the Senate Judiciary Committee (USA Today, 10/6).

American Conservative Union runs radio ads in Alabama, Mississippi, Georgia, Louisiana, Nebraska, and Vermont, "pressuring announced opponents to switch their position," according to ACU chairman Dan Casey. ("Conservatives fighting now for next nominee," Washington Times, 10/12).

B. President Reagan uses increasingly intemperate rhetoric.

After Judiciary Committee sends nomination to full Senate with a 9-5 unfavorable recommendation, President Reagan declares, "I think it has become a disgraceful situation because I think the process of confirming a Supreme Court nominee has been reduced to a political, partisan struggle." ("President Determined to Battle On for Bork; Some Officials See Loss," Washington Post, 10/2/87).

President Reagan announces that the Bork nomination will fail in committee "over my dead body." ("Reagan Spurns Call to Drop Bork as Likelihood of Defeat Grows," Washington Post, 10/6/87).

President Reagan says he will not withdraw the nomination because "it would be impossible for me to give up in the face of a lynch mob." ("President Says Decision Is Up to Bork," Washington Post, 10/9/87).

President Reagan stated that "What's at issue is that we make sure that the process of appointing and confirming judges never again is turned into such a political joke. And if I have to appoint another one, I'll try to find one that they'll object to as much as they did to this one." ("Reagan Resumes Attack on Bork's Senate Foes," Washington Post, 10/14/87).

C. Right wing phone banks and direct mail companies take advantage of the political and financial bonanza of the Bork nomination's impending defeat, and right-wing groups set up their political litmus tests for the next nominee.

"Urgent! The Bork Supreme Court nomination is now in trouble. . . . I am now committing money to a last-minute lobbying effort. . . . Your gift of $30 or $15 makes the overall outreach of Moral Majority a reality in these critical times—and could make the difference in Judge Bork's confirmation." (Jerry Falwell/Moral Majority mailgram, 9/24/87).

"New Right fund-raiser Richard A. Viguerie has eagerly drummed up support for Supreme Court nominee Robert H. Bork. But . . . the White House recently got an urgent call seeking reassurance that Bork's nomination would not be withdrawn in the face of a negative committee vote. 'I've got a million dollars' worth of "Save Bork" letters that I'm mailing out Monday morning [Oct. 5],' Viguerie reportedly explained, inquiring, 'You're not going to pull the rug out from under him, are you?' He was told, 'Go ahead and mail them, pal.'" ("Prudent Passion," National Journal, 10/10/87).

". . . the battle over Robert Bork's nomination to the Supreme Court . . . a battle of the concerned, patriotic citizens of America versus every narrow, self-serving liberal special-interest group that's come down the pike! . . . I'm enclosing my contribution to help CMC support Robert Bork and President Reagan's goal of a healthy, strong, safe, and secure America. [check boxes for $15, $25, $50, $100]" ("In re Robert Bork," advertisement of Congressional Majority Committee in the Washington Times, 10/15/87).

"'I think the time to start the 1988 election is right now,' said conservative strategist and direct-mail executive Richard Viguerie. Within 15 minutes after Judge Bork announced Friday that he would not ask President Reagan to withdraw his nomination, conservative political action groups mailed 350,000 letters on the Supreme Court issue 'to raise money for 1988 campaign ads,' Mr. Viguerie said." ("Conservatives fighting now for next nominee," Washington Times, 10/12/87).

". . . we strongly urge that you advise the President against the nomination of Patrick Higginbotham . . . advise the President to pick from among the sizeable pool of distinguished jurists who share the philosophy of judicial restraint, rather than seizing upon a nominee who has already demonstrated a disregard for the most defenseless members of the human family, and who would engender intense opposition from the right-to-life movement." Letter to Attorney General Meese from the Directors of the National Right to Life Committee, Inc., October 4, 1987.

D. NCPAC and a United States Senator hold the Senate's vote on Bork hostage to the timing of their fund-raising campaign.

"Next week, NCPAC will generate 500,000 telephone calls to votes in states where at least one senator has not expressed a position on the Supreme Court nominee." ("Conservative ire," Washington Times, 10/9/87).

"Continued Republican delays in scheduling a vote on Robert Bork's Supreme Court nomination appear tied to a conservative group's lobbying and fund-raising effort, Senate Democrats charge. Sen. Dennis DeConcini of Arizona accused a fellow senator of using the delay to help the National Conservative Political Action Committee work computerized telephone lobbying and fund-raising tactics against him. The Republican senator was identified as Gordon Humphrey of New Hampshire, the arch-conservative honorary chairman of NCPAC, who is heard on telephone recordings along with President Reagan . . . DeConcini spokesman Bob Maines said Humphrey had led the Republicans pushing to delay the vote to at least Tuesday, coinciding with the scheduled end of the NCPAC effort, and he called the delay a gross distortion of the process. If the two are connected, then the Senate is being held up by a fund-raising effort for an extremist group." ("Senate Democrats charge NCPAC delaying Bork vote," UPI wire, 10/16/87).

Mr. BIDEN. Mr. President, one of the points some of my Republican colleagues have raised with disapproval is that some of those who oppose this nomination announced that opposition too quickly, before the hearings took place. This is on its face a double standard. Did they condemn their colleagues who came out in favor well before the hearings?

But Judge Bork was hardly an unknown commodity to many of us on the Judiciary Committee. We were certainly sufficiently familiar with his record to know that there was much in it that warranted concern—just as those instantly came out in support knew what it was they liked about that record. There's nothing wrong with that—but let's keep it consistent, folks.

And just as there is plenty of historical support for the Senate's broad right to look at the constitutional philosophy of Supreme Court nominees, particularly when the President chooses that nominee on clearly ideological grounds, there is also plenty of historical support for fairly quick opposition to certain nominees whose philosophy or view on basic governmental issues was well known at the time of his nomination.

You don't have to look too far back to begin with, either. Just 19 years ago, when President Lyndon Johnson nominated Abe Fortas—a sitting Justice on the Supreme Court—to be Chief Justice, there was more instant opposition from the Republican side of the aisle than at any other time in history.

By the afternoon of the day Justice Fortas was nominated, 17 out of the 38 Senate Republicans—almost half of the Senate Republicans—had vowed not only to vote against confirmation, but to hold a filibuster to block the Senate from even voting on it. And that opposition was not on the basis of the concerns about financial matters that arose later in the summer.

No, it was on the basis of Justice Fortas constitutional philosophy that they opposed him. He was "too liberal," they said. They didn't like some of his Supreme Court opinions, they said. That episode was the closest we've come to recalling a sitting Supreme Court Justice because some Senators didn't like his results. Where were the Republican voices then to state their concerns about the independence of the judiciary?

And you can go further back, too. When President Jackson nominated Roger Taney to be Chief Justice in 1835, Taney was a known commodity,

too. He was fresh from taking Government deposits out of the Bank of the United States as Jackson's Secretary of the Treasury, after the two preceding Secretaries were fired for their refusal to do so.

The opposition Whigs knew where Taney stood on the great issues of the day: The relationship between Congress and the President and the role of the Federal Government in the life of the growing Nation. And they did not like his basic philosophy one bit. Quickly, the giants of the Senate—including Henry Clay—roared to the attack. Did that opposition fatally damage the judiciary and the stability of the country? I hardly think so.

And finally, you can go back to the first nominee defeated, also for Chief Justice—George Washington's nominee John Rutledge. Like Justice Fortas after him, Rutledge was a distinguished judge, the chief justice of the South Carolina Supreme Court and a former justice of the U.S. Supreme Court.

But, once he voiced opposition to the Jay Treaty—again, a very basic matter of how the new Nation would deal with the other nations of the world and our former enemy in particular—as I said, once he voiced opposition to the Jay Treaty, the majority Federalists quickly rose to the assault, and the Rutledge nomination was rejected. Was that quick opposition in defiance of the intent of the Framers? Hardly—3 of the 14 Senators in opposition were framers themselves.

So let us not get all distressed when concerns are voiced by some who have reason to know something about a Supreme Court nominee's basic philosophy when the nomination is made. Obviously, that will not happen very often, because few nominees are as well known as Rutlege, or Taney—or Judge Bork. But let us not insinuate that there's something indefensible about that quick opposition.

We have been told by one of our Republican colleagues that the close scrutiny given at the hearings to Judge Bork's numerous writings, speeches, and testimony will cause other academics to rein in their creative speculations in fear that they, too, might be called to account for their writings if nominated to high office some say.

Is this a realistic fear? Well, we had many highly distinguished academic witnesses testifying before us, and some of the most distinguished among them just didn't think so. I'd like to share some of their testimony with my colleagues:

Barbara Jordan, LBJ School of Government, University of Texas:

> Professors, in my opinion, will not be chilled by the examination you gave professorial theorizing. * * * Those theories he espoused were not lightly held theories, but deeply felt, and a part of a consistent ideology and philosophy which he was developing.

Laurence Tribe, Tyler professor of Law, Harvard Law School:

> I think [Professors] are expected to provoke discussion in a responsible way. I do not think that being a professor is an excuse for saying things one does not take seriously. I do believe that Judge Bork took very seriously the things that he wrote as a professor and that he has repeated as a Judge. Writing things with a certain flair is not the same thing as floating intellectual trial balloons which can be popped the moment one is nominated.

Lee Bollinger, dean, University of Michigan Law School:

> Judge Bork * * * is responsible for views that he has taken, or positions that he has taken, that bear on his likely performance as a Supreme Court Justice. These were not views that were expressed simply in one article, they were expressed throughout the 1970's and, as I understand it, up into the 1980's as well.

John Hope Franklin professor of history, Duke University:

> I do play the devil's advocate sometimes in my classes, but I do not take my position that I have in my classes as the devil's advocate, and then put those views in the American historical review, in the journal of Southern history, and in the journal of American history merely to provoke
>
> * * * and I would simply observe, Senator, that there are limits and that one, I think, cannot go to law reviews and other responsible learned journals and carry on there arguments which are for the purpose of provoking and stimulating, and then not bear the responsibility for the arguments.

Let me make one last comment. I listened to part of President Reagan's press conference today. He was asked a question about the Bork nomination. He made the statement, and I am paraphrasing, that the caliber of the witnesses who testified on behalf of Judge Bork was far superior to that of those who testified against him. The fact is the caliber of the witnesses who testified on both sides was of the highest, very distinguished Americans, both for and against Judge Bork.

I will just by reiterating remind the President that although there are very distinguished legal scholars to whom he referred, he said this evening there were six distinguished law deans who testified for Judge Bork and several other distinguished law professors who testified out of the 60-some witnessed who testified on behalf of Judge Bork, but there were also 32 law deans who testified against him; there were also 2,000 law school teachers at this very moment teaching in law schools accredited law schools in America, former presidents of the ABA, who testified for and against him.

The point being that not because the Senator from Delaware chaired those hearings, but because of the caliber of the people who testified for or against Judge Bork in a 12-day hearing that had over 100 witnesses, I challenge anyone, for or against Judge Bork, to find a set of hearings where the intellectual caliber of the witnesses was as consistently high and as consistently articulate as was demonstrated by those who testified at the hearing—not the Senators, those testifying.

I hope the President gets an opportunity to take a look at the record so when he is sending us up the next nominee he understands—and I am not being facetious when I say this—why this nominee will in all probability fall with 57 or more votes against him tomorrow when we vote.

Staff points out to me that I make something perfectly clear, that there were 32 law deans who did not testify against him but 32 law deans who wrote the committee expressing their opposition to his appointment. Several did testify. But the 32 I referred to wrote and did not testify.

I thank the Chair for its indulgence and I yield the floor.

PRIVACY

Mr. HATCH. Mr. President, we have heard repeatedly that Judge Bork is isolated on privacy, that Judge Bork is the only Justice or Supreme Court nominee who refuses to accept that the Constitution contains a generalized right of privacy found nowhere in the text of the document. In his eloquence, my colleague from Delaware says that every other Justice has "crossed the Rubicon on privacy, 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'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 on 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."

In another decision, Justice O'Connor dissented when the Court refused to allow parents to counsel with their minor children prior to an abortion. She said then:

> The 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 recognize 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 boat. 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 Rehnquist 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 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 vertiable 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? It was not found in the Constitution! All Americans can read the document and they will not find even a mention of this privacy notion. Despite the fleet of judicial boats arrayed with Judge Bork, some have tried to kick those boats out to drift by creatively interpreting their record. For example it has been said that Justice Black accepted the privacy 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 offending 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.

We have also heard that the recent unanimous decision in Turner versus Safley was a general privacy case. This is misleading. Turner was not about a superprotected, substantive due process right of privacy or marriage. The case arose in a prison context, raising fairly 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 should survive.

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 of 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 case's reasoning, Judge Bork, too, would have joined Turner.

CONCLUSION

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 conclusion, I would like to slightly change my colleague's metaphor. Judge Bork is opposed because he is in the mainstream on privacy, not because he is alone on the shore. Regardless of whether he is on the shore or in the mainstream, he is accompanied by an impressive judicial fleet.

NATURAL LAW

A few months ago during the Iran-Contra hearings, Fawn Hall justified some of her actions on the basis of laws higher than the Constitution. This drew great cries of derision. A few weeks ago during the Bork hearings, the Senate Judiciary Committee Chairman said that "my rights are not derived from the Constitution . . . they represent the essence of human dignity." This drew ethereal sighs of approval from Professors Tribe and Jordan and others listed in the slanted Judiciary Committee report.

We should clarify what is really at stake in this question about the source of constitutional rights. No one in America questions that every individual is "endowed by the Creator with certain inalienable rights." That issue was settled in 1776, not 1987. The question that is still under debate is how those inalienable rights are to be identified and enforced.

The framers of the Constitution felt that rights must be identified by the people. After all the people are the source of those rights and know best how to identify and protect those prerogatives. Accordingly the framers wrote a Bill of Rights to specify which rights are protected and how. Moreover, the framers permitted amendments to the Constitution so that new rights might be added. Indeed this has been done by the people and their representatives as recently as 1971—18-year-old right to vote.

The alternative is to allow Judges to decide what rights the people ought to have. This process occurs as described by the genuinely extremist Judiciary Committee report. Judges expand the "open-ended phrases of the document: 'liberty,' 'due process,' 'equal protection of the laws,' and others" to protect what the extremist report calls the "image of human dignity." (page 8) The problem is that some people think the "image of human dignity" includes the right to use hallucinogenic drugs in private or the right to engage in homosexual conduct or the right to terminate unborn fetuses. Others think the "image of human dignity" includes the right of parents to counsel their minority children prior to an abortion or the right to silent classroom prayer.

Rather than allow Judges to make unprincipled choices between these competing "images of human dignity," the framers expected the people to govern themselves. They gave the people the power to identify rights both in the Constitution by amendment and by statute. Accordingly the people's representatives have also passed volumes of civil rights legislation.

Nonetheless some Judges have continued to follow the falacious path charted by the skewed committee report. The Senate, however, ought to carefully consider the mixed results of these past judicial efforts to discover "human dignity."

In the first major instance of judicial activism, Justice Chase in 1798 decided that the ex post facto clause was limited to criminal statutes. I mention this example because the Senate committee report cites a statement by James Iredell of North Carolina for the notion that the Constitution contains unspecified rights. James Iredell was the primary dissenter in the Calder versus Bull decision. Iredell harshly criticized the Chase opinion on these terms:

> Some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that. If the legislature of the Union shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.

Rather than allow James Iredell's views of enforcement of rights to be misconstrued by the committee report, I would commend to my colleagues the remainder of his dissent.

Let's continue our stroll down judicial activism's memory lane. The next great attempt to expand the "open-ended" clauses of the Constitution came when the Supreme Court interpreted the due process "property" clause to include black persons. The infamous Dred Scott opinion was nothing more than a broad reading of the meaning of "property" which meant that black persons were not given any constitutional protecting as persons. An insightful scholar has noted that this decision was "an early indication of the vast judicial power that could be generated if political issues were converted by definition into constitutional questions."—Fehrenbacher, the Dred Scott case 1978. The result was tragic. The people lost the power to protect blacks by civil rights legislation.

The next great judicial flirtation with the "open-ended" clauses was the Lochner era of the Court. In that case, the Court read the due process clause to strike down a labor law governing working hours in bakeries. Regardless of health or safety considerations, the Court struck down numerous economic regulations as violative of an unprincipled reading of the due process clause. The result was the same as before: the people lost the power to protect health and safety by legislation.

More recent examples of this theory that judges may read their own "image of human dignity" into the "open-ended" clauses of the Constitution are familiar. Despite Cardozo's plea that the "criminal would go free because the constable blundered," the Court created an exclusionary rule in 1961—Mapp. The United States is still the only country in the free world with such a rule. Despite four or five constitutional references to capital punishment, the Court struck down 39 death penalty statutes in 1972—Furman. Despite statutes in all 50 States regulating abortion, the Court found a "privacy right to abortion" in 1973—Roe. This list could go on, but the point is clear. Every time the judges take it upon themselves to read "human dignity" into the Constitution, they deprive the people of the right to govern themselves. Moreover they reach some of the Court's most controversial and harmful results.

This is nothing more than Judge Bork has said throughout a brilliant legal career. This, however, is precisely why his nomination is under attack. Judge Bork believes in the rule of law, not the rule of men, to borrow a phrase from the famous Marbury versus Madison case. He does not believe that a few Judges ought to be able to tell the people of the Nation that a broad notion of "human dignity" forbids them from passing death penalty laws. Judge Bork believes in the Constitution, in law, in the right and ability of the people to govern themselves by law.

If judges can read any such notion into the open-ended clauses of the Constitution, then conservative Judges will create a right to a balanced budget amendment and liberal Judges will create a privacy right to homosexual conduct. Neither would be correct. Both would be wrong. The Constitution does not mention "human dignity," nor a "balanced budget," nor "privacy." If the people embrace these rights, a constitutional amendment will soon pass or at least a statute.

Fawn Hall was not correct. Even she, however, without extensive legal training did not presume to suggest that we ought to be governed by unwritten notions of "dignity." In this sense, Fawn Hall is at least one step ahead of the air-headed Judiciary Committee report.

When Senator PACKWOOD spoke earlier today, he grounded his notion of the privacy right in the ninth amendment. We should all realize that this is a new idea that sprang out of this nomination. Even the Supreme Court has not relied on the ninth amendment to support any decision, let alone a privacy decision.

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NINTH AMENDMENT

The ninth amendment states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Many have criticized Judge Bork because he maintains that this language does not authorize judges to construct rights not found elsewhere in the Constitution. A few facts would suffice to put this issue into legal focus:

One might well ask how many times has the Supreme Court relied only on the ninth amendment to create a new right. The answer is zero. The Court has never based a right solely on the ninth amendment.

One might well ask if the ninth amendment has been frequently relied upon for any kind of support in Supreme Court jurisprudence. The answer is no. It is probably relied on less than most any other provision of the Constitution. The times it has been cited can be quickly listed: First, the ninth amendment was mentioned, most prominently by Justice Goldberg, as part of the "penumbral" support for the Griswold opinion; second, similarly it is mentioned in the abortion privacy cases of Roe versus Wade and Doe; third, the ninth amendment is mentioned passingly in Justice Burger's first amendment decision on media access to the courts in Richmond newspapers. My quick research indicates that these three instances cover the complete volume of ninth amendment jurisprudence in the Supreme Court.

In other words, Judge Bork's comments about avoiding use of this broad and undefined language to create new rights does nothing more than describe 200 years of Supreme Court practice.

Asked what this amendment means in the Senate Judiciary Committee, Judge Bork gave a very credible answer. In the first place, it is of great historical significance, according to the Judge. It was drafted to cope with the fear that the enumeration of some rights in the Bill of Rights might omit others which the States are entitled to protect.

Thus, this amendment has importance as a guarantor that the people in their State governments may protect rights beyond those listed in the Bill of Rights. Thus, the absence of an equal rights amendment in the Bill of Rights does not prevent States from providing this additional protection. Indeed the people have provided themselves with a wide variety of additional protections in their State constitutions.

Judge Bork's reading is completely supported by responsible scholarship. As Russell Caplan states in the Virginia Law Review, the ninth amendment "is not an cornucopia of undefined Federal rights, but rather * * * the maintenance of rights guaranteed by the laws of the States." It would perhaps be beneficial to examine what other scholars have said. Justice Black stated that the "amendment was passed not to broaden the powers of this Court, but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly."—Griswold.

Rather than recite a lengthy list of scholars, because as we now know, the Supreme Court in its entire history has not relied on the ninth amendment a single time, I would make just one final point. If judges relied on the ninth amendment to create new rights, there would be no standards to limit the judicial discretion. A conservative judge might find that the people retain the right to a balanced Federal budget. A liberal judge might find a right to engage in homosexual conduct. Both would be sure that the amendment created just that kind of right and that the "higher natural law" required this result. In the long run, those judges would both be reading their own views into the document and nothing more.

Judge Bork has been criticized for referring to the ninth amendment as an inkblot on the Constitution. This has been distorted out of context. He was not suggesting that the ninth amendment has no significance. It has an important historical significance, but he is correct that in terms of setting up standards to guide judges in the creation of new rights, it contains none of these standards. In the sense of granting judges the license to create new rights, the ninth amendment has no substantive content. Indeed the Supreme Court agrees. Judge Bork was saying nothing more and nothing less. He used colorful language to make his point memorable and obviously he succeeded.

Once again, Judge Bork's views are in tune with the current and all past Supreme Courts. In fact, it is those who criticize him on this point who are extreme. They cannot cite a single Supreme Court opinion for the notion that the ninth amendment creates rights not found elsewhere in the Constitution, yet they fault him for stating that fact.

Just a few moments ago we heard my colleague from Massachusetts raise many of the old myths—poll taxes, civil rights concerns, the sterilization case, and so forth. This litany demands a response.

Therefore, I ask that the following materials be put in the RECORD: my remarks on poll taxes, civil rights record as judge, civil rights record as Solicitor General, one man, one vote, Katzenbach versus Morgan, cyanamid case, Shelley versus Kraemer, Bakke statement, 1964 Civil Rights Act, and equal protection.

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

POLL TAXES

One of the most offense forms of distortion and innuendo employed against Judge Bork involved the poll tax issue. Poll taxes, by their history and nature, invoke images of racial insensitivity. Judge Bork has not ever evinced that insensitivity in his public service as SG and as Judge, but the poll tax issue is raised to create the false impression that Judge Bork is insensitive to minority rights.

The genesis of this matter are a few questions Judge Bork raised about the form of reasoning used to reach the result in the *Harper* v. *Virginia Board of Elections* (1966) case. This case struck down all poll taxes, regardless of whether they disadvantage minority voters. In fact, in the Harper case the Court expressly stated that the poll tax in question did not involve discrimination or disadvantages to minorities. When asked in Committee hearings what he would do if a poll tax were levied in a racially discriminatory manner or were shown to exclude minorities from the polls, Judge Bork replied that he would invalidate the poll tax.

In other words, if a poll tax were ever levied for the purpose of discriminating or excluding minority voters, it would not withstand Judge Bork's ire. Nonetheless those who strain to find fault with the Judge will stop at nothing. They exaggerate the few words of the 1971 law review article completely out of context.

In fact, in his 1971 analysis, Professor Bork did question the social or political merits of poll taxes, but probed for the legal reasoning of the case. Professor Bork could not find in the equal protection clause sufficient justification to invalidate nondiscriminatory poll taxes. If they discriminate, that is a different matter.

Moreover Judge Bork's concerns were limited to this equal protection basis for the Harper case. The Judge has conjectured that he might well reach exactly the same result by employing a different constitutional provision, namely the republican form of government clause. Not only would the Judge strike down any discriminatory poll tax, he might strike down all poll taxes if the evidence of the case shows that it inhibits the voting process and the guarantee of republican governments.

Frankly this position makes criticisms of his position seem ludicrous. Moreover, Judge Bork's position on this issue is identical to that of almost every prominent jurist of this century including Justices Harlan, Stewart, Frankfurter, Jackson, Brandeis, and Cardozo. Each of these jurists either dissented in Harper or joined the opinion which it overruled. In the words of Justice Black, who should be added to that list, the Court in Harper was "using the old 'natural-law-due-process formula' . . . to write into the Constitution its notions of what it thinks is good government policy." Justice Harlan similarly stated that "it is all wrong for the Court to accept the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious . . ."

Judge Bork is in very august company. Moreover his critics need to be ready to say why Justices Harlan or Brandeis or Cardozo

were insensitive to civil rights if they persist in hauling out this idle "poll tax" charge.

One final point, Mr. President. In the Sumter County case Judge Bork had to review a voting rights claim involving minority rights. He found that South Carolina's county had not adequately shown its voting plan to be free of prejudicial taint. One other act of Judge Bork is relevant here. As SG, he filed the brief in the *United Jewish Organizations* v. *Carey* case and the *Virginia* v. *U.S.* case, both of which protected minority voting rights.

This is hardly the record of someone who is anxious to deprive minorities of their voting rights. In fact, this is someone willing to go to great lengths to uphold those rights. In light of his actual record, it is scandalous to drag out the "poll tax" charge—which is without foundation—and insinuate that Judge Bork would do anything other than what he has consistently done, namely, protect minority voting rights.

Here again, I would suggest that actions speak louder than words.

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CIVIL RIGHTS RECORD AS JUDGE

To hear some of Judge Bork's critics talk, you would believe that he had struck down every civil rights law he reviewed. In fact, 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* v. *U.S.* 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 had 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, E.G., *City of Rome* v. *U.S.* (1980).) I think that I am beginning to conclude that my critical colleagues would probably not confirm Justice Powell if he were before the Senate today. In fact, my 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 that 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* v. *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* v. *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 lock step 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* v. *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 hallow.

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* v. *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 cases in which Judge Bork 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 he has heard—the non-unanimous 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* v. *D.C.* where the Judge rejected a District Court's attempt to dismiss a prisoner's complaint of mistreatment or *Doe* v. *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.

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CIVIL RIGHTS RECORD AS SOLICITOR GENERAL

We have heard many allegations that Judge Bork is insensitive to the civil rights of minorities and women. Some distorted charges even allege that Judge Bork would only enforce with reduced vigor the *Bolling v. Sharpe* case which desegregated D.C. schools. This is extremely unfair criticism. Judge Bork has repeatedly emphasized that he would feel compelled as a Justice on the Supreme Court to refuse to enforce any law or policy that denied any citizen the right to vote or the right to equal protection of the laws because of his or her race. On this point, he was emphatically clear in 1971 as well as in 1987.

Beyond these words, however, Judge Bork's actions are even more eloquent. His actions are even more impressive than his words with respect to civil rights. 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 v. 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 this 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's look at another example. In 1976, Judge Bork was responsible for the case of *Washington v. Davis* concerning the disparate impact on minorities of written examinations given to job applicants. Judge Bork, then SG, 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 v. U.S.* (1976), the Judge contended that a New Orleans reapportionment act violated the Voting Rights Act because it diluted black voting strength. In *Teamsters v. U.S.* (1977), he argued that a seniority system that perpetuated the effects of discrimination violated Title VII. In *Pasadena v. 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 SG, 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 SG, he filed 19 amicus briefs in civil rights cases. By the way, the SG has no obligation to file amicus briefs, but exercises 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 have just stated, however, an SG 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 SG. The classic example is the 1976 case of *Runyon* v. *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 his action to make some discriminatory private 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 Organizations* v. *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. He 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 five 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* v. *Nichols* (1974). This case was a landmark in its day. It mandated bi-lingual education and held that Title VI, and possibly even the Constitution, reached actions that were discriminatory in effect, though not 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 v. 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 jots 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 hallow 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 v. Moody*, involving the showing an employee had to make to demonstrate that a pre-employment test was discriminatory, and the 1976 case of *Franks v. 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 v. U.S.* (1975) where he required the state of Virginia to comply with special burdens imposed by the Voting Rights Act or *Fitzpatrick v. 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 SG 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.

ONE MAN, ONE VOTE

Each of the charges against Judge Bork seems to fall apart upon a closer look. Another of the charges against him in the domain of civil rights regards his position on the one man, one vote cases. When this criticism of Judge Bork is subjected to careful scrutiny, it too falls apart.

This issue was resolved long ago, but Judge Bork's position is sound. When the question of inappropriate restrictions on representation of minorities began to arise, the major obstacle to court involvement with reapportionment was always the political question doctrine. Thus the landmark case in this area was *Baker v. Carr* which established that reapportionment questions are justiciable. Based on criticism of the Judge, one might conclude that Judge Bork opposed this case. The opposite is true. In his view, the *Carr* decision on the political question doctrine was adequately supported by the Constitution and correct.

This is very significant. Many giants in the legal world would not have agreed that

courts may get involved in apportionment decisions. Indeed, Justice Harlan and Justice Frankfurter disagreed with Bork on this issue. That does not mean that these Justices were insensitive on civil rights. They dissented in *Baker v. Carr* because they disagreed with the legal reasoning of the Court's majority.

Right at the outset, we realize that Judge Bork's position is not the extreme position that your critics would like us to believe.

Judge Bork's concerns about apportionment issues have nothing to do with the basic concept but center on the Court's standard for deciding when a district or state is properly apportioned. In this regard, the views he expressed as a Professor are not out of the mainstream. Justices Frankfurter, Black, and Stewart also objected to this aspect of the Court's decisions because they felt that the Court was merely voting its preferences into law. Indeed as the Court has moved toward requiring mathematical perfection in apportionment formulas, Justices Harlan, White, Rehnquist, Burger, and yes, Powell, too, have dissented. (*Kirkpatrick v. Preisler* (1969) and *Karcher v. Daggett* (1983)) In fact, Powell states that his reading of the Constitution lead him to doubt that the document "could be read to require a rule of mathematical exactitude in legislative reapportionment." (Karcher) He went on to say the Court's insistence on such a reading—an absolute one man, one vote reading—is "self-deluding."

In the field of academics, Professor Bickel warned that the Warren Court should be "wary of its one man, one vote simplicities." Professor Kurland fears that "these decisions turned a slogan into a constitutional doctrine." In short, Judge Bork's legal views about the judicial standard used in apportionment have extensive support in the legal community.

It is important to realize that Judge Bork has always held that courts may legitimately review apportionment decisions. In addition, he has a very strong alternative standard for ensuring fair apportionment. He supports Justice Stewart's approach of upholding any rational state plan that does not permit the systematic frustration of the majority will. Once again, Justice Stewart is known as a responsible and powerful Justice. Judge Bork's agreement with him is hardly cause for concern of any kind.

Upon close examination in this area, we find again that Judge Bork will allow courts to review the problem of malapportioned legislatures and that he will invalidate any apportionment plan that attempts to systematically frustrate the majority will. This would solve the crux of the problem. In any event, his views as a Professor are hardly out of the mainstream when they are shared by many Justices and scholars. As a Judge or SG, his views are clear. Time after time, he has upheld minority rights and particularly voting rights.

KATZENBACH VERSUS MORGAN

Among the most slimey of the charges levelled against Judge Bork is the allegation that he supports "literacy tests to keep minorities from voting." This is an outrageous falsehood. Everything about this charge from its substance to the way that Judge Bork's actual statements are taken out of context and distorted is wrong. This entire matter began when Judge Bork appeared at a congressional hearing to testify against the Human Life bill. This bill attempted to redefine the Constitution's word "person" to include "unborn children," thus overturning the Supreme Court's Roe decision by a majority vote of Congress. In testifying against this bill, Judge Bork was harshly criticized by many who desired passage of that bill.

Judge Bork maintained, despite the pressure, that Congress must not be able to change the Constitution by majority vote. This had only happened once before—in connection with literacy tests. Judge Bork, in opposing the Human Life bill, criticized the literacy test case which had allowed Congress to do the same thing. This shows how such distortions develop.

In the case of *Katzenbach v. Morgan* (1966), the Supreme Court upheld a congressional statute that redefined the words of the Constitution. This case involved the constitutional validity of nondiscriminatory literacy tests. Earlier, in 1959, the Supreme Court had decided that a state may employ a literacy test as long as it did not discriminate. *Lassiter v. Northhampton.* Congress disliked this 1959 interpretation and therefore overturned it by statute.

Although critics contend that the Judge's comments in opposition to Katzenbach were an effort to reinstate literacy tests for voting, that is not the case. In fact, Judge Bork clearly said that he was only concerned that if Congress can undertake its own interpretation of the Constitution by a mere majority vote, then the Constitution is not an anchor holding our nation in place during political storms. Instead it becomes just another part of the storm itself. Moreover the venerable doctrine of judicial review becomes the doctrine of political review because the political branch can determine the meaning of the Constitution. In sum, Judge Bork argued that Katzenbach is at odds with the 1803 Marbury doctrine of judicial review, not that literacy tests ought to be reinstated.

This became entirely evident when Judge Bork stated clearly that he would overturn any literacy test employed for a discriminatory reason. Thus, to say that Judge Bork favors literacy tests to exclude minority voters is absurd. He never said that. He never meant that. He only commented on whether Congress ought to change the Constitution by majority vote.

This is the only sound course of constitutional interpretation. It is amazing how such a sound legal reasoning process can be distorted by those intent upon finding some fault with President Reagan's appointees.

Once again, it would be informative to check other jurists on their views of this issue. Professor Bork's views on the Katzenbach case were shared by Justices Harlan and Stewart who dissented from this decision saying that it would be a "sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function." Four years after Katzenbach, the Court refused to extend the doctrine to uphold the constitutionality of Congress's attempt to lower the voting age from 21 to 18. *Oregon v. Mitchell.* In that case, Justices Burger, Stewart, Harlan, Black, and Blackmun voted against the Katzenbach principle. Moreover Justice Powell cited Harlan's Katzenbach dissent with approval in the City of Rome voting rights case. He, too, endorsed the view Professor Bork had taken on this case. Once again, the Judge is in excellent company. Those who criticize his views on this case should explain why they also criticize Harlan, Stewart, Black, Burger, Blackmun, Powell and so forth because this list could be expanded.

The complete irony, however, is that this falsehood was taken from Judge Bork's testimony against the Human Life bill in 1981. This was an attempt by some Congressmen to define the term "person" in the Constitution to include unborn children. He was criticized by some for opposing a right to life initiative—albeit a misguided right to life initiative. Nonetheless he had the courage to stand up for the legal principle involved regardless of whether it was employed against abortion or against literacy tests. He was interested in the law not the outcome. This is precisely the kind of judge we need on the Supreme Court.

This demonstrates that the Judge was dedicated to the legal principle enough to risk political fall-out in an Reagan Administration which favors right to life initiatives. In a similar vein, Judge Bork could have used the Katzenbach principle to obtain the objective of limiting forced school busing when he was asked by President Nixon to prepare a paper on that subject. Once again he refused to employ this false doctrine for his own objectives. He was faithful to the legal principle and advised against this course.

By the way, a good way to see the inconsistency in this argument against Judge Bork is to realize that if his position on Katzenbach means he is "anti civil-rights" (which it clearly does not), then his position against the Human Life Bill means that he is "pro-abortion" (which is unknown).

Once again this is a powerful rebuttal to those who contend that he was willing to be judicially active or to bend legal principles to achieve your own political objectives. When he had that opportunity in the area of busing, he advised against employing Katzenbach to his own advantage. In any event, the important point is that the Judge's criticism of Katzenbach had nothing to do with voting rights, but had everything to do with protecting the constitutional function of the courts.

CYANAMID CASE

Rarely in the history of Senate debates has a single question been more sensationalized and stretched out of all proportion than the discussion of Judge Bork's opinion in the Cyanamid case.

The best way to discuss this issue is to focus on what critics have said in sensationalizing this case.

Those with little concern for the facts have gone so far as to charge by insinuation that Judge Bork engaged in "sterilizing workers." This is preposterous. Judge Bork did not, nor could he, force any sterilization. In what Judge Bork has described as a "heart-wrenching" case, the court was asked to construe a statute which simply did not classify the company policy as a hazard. If there was a problem it was Congress's failure to pass a statute on this subject, not the court's inability to do something outside the law.

The company policy was to only allow sterile women to work in an area polluted with lead and therefore unsafe for fetuses. Some women chose to be sterilized rather than move to another job. Subsequently those women brought a Title VII suit which was eventually settled. The case in question did not feature any of these women as plaintiffs; they had already been compensated in a separate suit. The case was an effort to fine the company for exposing women to "hazards," but as stated the language of the statute did not make this situation a hazard.

At the time Judge Bork heard the case, the five women were already sterilized and there was no chance that any other women could be subjected to a similar threat. Now how, I ask any fair-minded individual, can that be stretched into a charge that Judge Bork sterilizes women?

Those making the allegations do not stop there, however. They contend that the "company was pumping so much lead into the workplace that female employees were at risk." This creates a false impression by failing to mention that an Administrative Law Judge had found that there was no way to eliminate the lead levels sufficient to eliminate the risk. I do not want to defend the company, that is not my point. My point is that Judge Bork was bound by that finding. Any insinuation that he permitted the company to pump lead is ridiculous. The binding evidence showed that the company had no choice. Judge Bork could not choose to ignore the evidence. A judge cannot choose the facts of a case.

The purveyors of falsehood continue to say that "the company ordered all women workers to be sterilized or lose their jobs." This makes it sound like the Judge permitted the company to do this. In fact, this was not even before the Court. The only thing before the court was whether to fine the company for past hazards. Moreover, the company offered the women a choice. Due to the hazard, fertile women could not work in the plant. Rather than release the women outright, they were offered a choice. Judge Bork had nothing to do with that policy, only the question of whether this was a violation of law.

The allegations continue that "when the union took the company to court." This is only part of the truth. It is never mentioned that the OSHA review commission, the expert government agency, had already found the company policy was not a hazard. Moreover it does not mention that the injured women had been compensated.

The falsifiers never quit. They continue to say that "Judge Bork ruled in favor of the company." This sounds like Judge Bork approved of the "unhappy choice" the women had to make. In fact, he deplored it. Moreover the company's choice was not before him. He could not have made the company stop; it already had. He could not make the company pay the women; it already had. None of these was the case before Judge Bork. He was only asked if this was a hazard. The law said no.

This is political Falsehooding at its worst. Judge Bork is solely blamed. It is not mentioned that the court was unanimous. One of the other judges voting to uphold the law as written was Judge, now Justice, Scalia. Indeed the rest of the Circuit judges refused to overturn the unanimous court ruling.

Moreover, this is blatant sensationalism. It is not mentioned that the law as written by Congress did not include this situation as a "hazard" within the terms of the OSHA Act, To the extent that failure to anticipate this regrettable situation is cause for blame, Congress caused it and should correct it by legislation.

Finally, the falsifiers say quickly that "five women underwent surgical sterilization." This makes it sound like Judge Bork approved the action. Ridiculous. This, as I say, may be the worst distortion I have ever seen in Senate debate history

SHELLEY v. KRAEMER

We heard in the hearings and elsewhere that Judge Bork would permit discriminatory private contracts. This is absurd. Once again, this criticism follows a familiar pattern. Judge Bork has actually commented as a professor on a legal principle found in a case dealing with discriminatory contracts. The Judge's critics ignore what he really said and jump to the false conclusion that he opposes civil rights. A quick analysis reveals the foolishness of this charge.

In 1948, when the Supreme Court had just begun to grapple with many of the implications of the state action doctrine, it decided the case of *Shelley v. Kraemer.* In this case, it held that the fourteenth amendment forbids state court enforcement of a private contract containing a racially restrictive covenant. In a 1971 article, Professor Bork explained, as had Professor Herb Wechsler before him, that this decision was not supported by neutral reasoning. Unfortunately that legal concern has been misconstrued by many of your opponents. They seem to think that he supports racially discriminatory contracts. Judge Bork has repeatedly stated that he too opposes racially discriminatory contracts.

In fact, Judge Bork has done more than talk about his opposition to these contracts. When he was Solicitor General, he presented the case of *Runyon v. McCrary,* a case involving enforcement of private contracts under Section 1981—and won. He established that Section 1981 reaches private discriminatory contracts. This clearly indicates Judge Bork's disgust for discrimination in any form and his effort to deal with that problem in a legal manner.

Returning for a moment to Professor Bork's point, it too is well supported. Professor Bork's point was that the 14th Amendment reads: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is the "NO STATE SHALL" language that note is of significance. The amendment, by its language, prohibits, state discriminatory actions. It does not comment on private actions. Once again, Professor Bork was concerned about the constitutional justification for a Court decision, not the result in the decision. He even supported the result, but felt compelled as a professor to raise questions about the reasoning used to reach that result.

Clearly his argument had nothing to do with a lack of sensitivity to civil rights concerns, but was based on a legal reading of the Constitution. It would help, however, to inquire into what other legal scholars read the Constitution the way Professor Bork did. In the first place, we have the case of *Evans v. Abbey* decided in 1970. In that case, the Court was called upon to once again decide whether a state court could honor a racially discriminatory private contract. Justice Brennan for one said the the *Shelley* case governed. The majority of the Court, however, ruled 5-2, against that proposition. Or in other words, Justices Black and four of his colleagues followed the same reasoning as Professor Bork. In fact, since then, a series of cases—*Lugar* in 1982, *Flagg Bros.* in 1978, *Moose Lodge* in 1972, and the opinion authored by Justice Powell last term *San Francisco Arts v. U.S. Olympic Committee*—all have confined *Shelley* to its facts. In other words, the majority of the Supreme Court since 1970 has agreed with Professor Bork's legal reading. Moreover, the Fair Housing Act in 1968 invalidated racialy restrictive covenants and *Shelley* is no longer necessary for that purpose.

For those worried about this silly "balance" argument, however, Judge Bork's presence on the Supreme court would not alter its current doctrines on state action in the slightest. This seems to me to be another issue that has been blown out of proportion by those who want to employ political tactics in a legal context.

Because there was so little substance to the charges relevant to *Shelly,* you would be correct to conclude that the result is the same with regard to the *Reitman v. Mulkey* case, a subsequent Supreme Court case involving a California law which said that a seller may sell to whomsoever he chooses. California's law simply said that individuals may sell or lease to whomsoever they choose. The question was whether this violated the 14th Amendment because some people might rely on this general law to discriminate in their selling decisions. This was a case decided by a vote of 5-4. Justices Harlan, Black, Clark, and Stewart found that the California law was not "by its terms offensive" and that the State had not engaged in any "positive state cooperation" with discrimination. Justice Harlan concluded that the court "has taken to itself powers and responsibilities left elsewhere by the Constitution."

Professor Bork criticized the reasoning in this case as well. Even in 1968, it appears that he was in good company, but a 1982 case authored by Justice Powell, *Crawford v. LA Board of Education,* with the concurrence of 8 members of the Court, distinguishes and does not follow *Reitman.* In that case, the Court permitted the State of California to pass a proposition that limited busing to those circumstances necessary to comply with the constitution. In fact, Justice Powell wrote: "In this case, the Proposition (restricting busing except when necessary to conform to the federal constitution) was approved by an overwhelming majority of the electorate. It received support from members of all races. The purposes of the proposition are stated in its text and are legitimate, nondiscriminatory objectives. Under these circumstances we will not dispute the judgment of the Court of Appeals." This follows Judge Bork's reasoning to a tee.

In sum, Judge Bork deplores racially discriminatory private contracts. In fact, he argued a Supreme Court case to restrict them under federal law as Solicitor General. His concerns as a Professor were limited to legal considerations that have been supported by a majority of the Supreme Court since the early 70s. This makes one wonder who the extremists are. Those who do not agree with the majority of the Supreme Court or Judge Bork who does.

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BAKKE STATEMENT

Despite an outstanding record on civil rights—a record that is certainly no more "conservative" or "liberal" than that of Justice Powell—Judge Bork has been criticized for opposing major civil rights advances. Much of the misconception about his commitment to civil rights springs from an article he wrote while still a law professor that was critical of the *Bakke* opinion. The 1978 *Bakke* decision authorized preferential treatment on the basis of race in some circumstances. Accordingly, I believe it would be very valuable to clarify some of the Judge's present and past words and actions with respect to affirmative action.

Once again on the theory that actions speak louder than words, it is interesting that Robert Bork never filed a brief as Solicitor General or voted in a case as an appellate judge in opposition to the principles

in *Bakke*. In other words, he has never opposed race-conscious remedies or actions in SG briefs or in votes on the D.C. Circuit.

Moreover it is fair to say that his brief as Solicitor General in the *United Jewish Organizations v. Carey* case advocated race-conscious electoral redistricting to protect minority voting strength. Thus, in Bork's 1977 brief which preceded *Bakke*, he advocated race-conscious affirmative action in the context of a sensitive voting suit. He was at the vanguard of this civil rights action as well.

In five years on the D.C. Circuit, he never voted against or wrote a criticism of the *Bakke* decision. Once again, in terms of actions, where it really counts, the Judge has acted in full compliance with and perhaps even helped lay the groundwork for *Bakke*.

Before examining his written comments about *Bakke* itself, it is important to note that Judge Bork was a law professor at Yale University when *Bakke* was decided. His status as a law professor encouraged him to publish provocative critiques of Supreme Court opinions. He was paid to stir up intellectual dust. He did it well.

This does not mean that his opinions and procedures as a Supreme Court justice would be the same as his opinion and procedures as a law professor. In fact, these different roles have affected his thinking processes markedly—as they should. A Judge is deciding questions of life, liberty and property. He must wait for briefs, hear the facts and evidence, weigh the implications. In the judicial setting, Judge Bork's performance has been exemplary.

Recognizing again the he was writing as a law professor and not as a Justice of the Supreme Court or even as a judge, let me repeat some of his words on the *Bakke* decision: [In Bakke], "we have at bottom a statement that the 14th Amendment allows some, but not too much, reverse discrimination. Yet that vision of the Constitution remains unexplained. Justified neither by the theory that the amendment is pro-black not that it is color-blind. It must be seen as an uneasy compromise resting upon no constitutional footing of its own." Professor Bork's main point in this 1978 article was not to question the political and social merits of quotas or affirmative action, but to make the lawyer's observation that the result was not legally justified by the reasoning.

This is important to reemphasize. As a law professor, he was striving as a lawyer to find a legal basis for the conclusions reached by the Supreme Court. Even in stirring up intellectual dust, Professor Bork was a consummate lawyer.

At another time, Professor Bork stated apprehensions about the dangers of reverse discrimination. He expressed that "the thrust of Bakke is toward proportional representation. This would be a major change in American society and in what Americans have traditionally viewed as social justice. The merit of the individual and the efficiency with which society accomplishes its work will be ideals submerged in a new ethos of group entitlement. It is a thoroughly bad idea." Perhaps the best way to judge the merits of this concern would be to see if Judge Bork's legal scholarship is shared by other lawyers. Permit me to read a few quotes. First is this comment:

"Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."

This author seem to be making the same legal criticism that Professor Bork made about the justification for some affirmative action systems. This quote was taken from Justice John Steven's dissent in the *Fullilove* decision. Next I would like to read this quote:

"Under our Constitution, the government may never act to the detriment of a person solely because of that person's race . . . Governmental action that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination."

Once again, this author seems to be making a legal point similar to that made by Professor Bork about the *Bakke* case. This quote was taken from Justice Potter Stewart's dissent in the *Fullilove* decision. Justice Stewart was joined by justice Rehnquist. Perhaps one more will suffice to make the point.

"Whatever his race, [the plaintiff] had a constitutional right to have his application considered on its individual merits in a racially neutral manner . . . any state-sponsored preference to one race over another . . . is in my view invidious and violative of the [Constitution]"

Once again this author seems to be making a legal point consistent with Professor Bork's observations. This is a quote from the celebrated Justice William O. Douglas dissenting from dismissal of the *Defunis* case.

In other words, Professor Bork's legal concerns about *Bakke* are hardly out of the mainstream of legal though and criticism. Justice Douglas is popularly categorized as among the most liberal justices of our era, Justice Rehnquist amongst the conservatives, and Justices Stevens and Stewart are known as moderates. I dislike attaching political labels to judicial officers, but in this instance it demonstrates that Bork's views have been echoed by all sectors of the legal spectrum. I cannot resist just one more quote: This author is commenting directly on Powell's opinion in *Bakke*. He says: "If that is all it takes to overcome the presumption against discrimination by race, we have witnessed an historic trivilization of the Constitution. Justice Powell's opinion is thoroughly unconvincing as an honest, hardminded, reasoned analysis of an important provision of the Constitution."

This quote comes from Justice Scalia when he was a law professor. This is the same Antonin Scalia who was confirmed by a unanimous vote a few Months ago. Moreover Professor Scalia uses much of the same language and style—including the phrase "trivializing the Constitution"—which have been severely faulted in Judge Bork.

I could cite still others who share Professor Bork's opinion and style, including the revered Professor Bickel. His statement is worth repeating: "If the Constitution prohibits the exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds, for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded." *Morality of Consent* (1975). In other words, whether working in forward or reverse gear, discrimination is offensive.

It goes without saying that Professor Bork's legal views are principled concerns that are well within the mainstream of traditional constitutional jurisprudence. In fact, anyone anxious to label him as extreme on the basis of these views must be prepared to affix the same label to five esteemed present and former Supreme Court justices and Professor Bickel whose reputation is beyond reproach.

Let's return to Bork's record as a judge. Since *Bakke*, the Supreme Court has decided numerous affirmative action or reverse discrimination cases, including the *Stotts*, *Weber*, and *Fullilove* decisions to name only a few. Judge Bork has not commented either as a judge or a scholar on any of these decisions.

To recap this matter of Bork's words about *Bakke*, his actions as SG and as judge have never been out of harmony with *Bakke* and indeed may have laid the groundwork for *Bakke*. Moreover his comments—made as a law professor not a judge—were not a commentary on the political or social merits of affirmative action and quotas, but only a search for a legal justification. Finally, Judge Bork has not revisited this issue after any of the Court's subsequent decisions. Finally, and perhaps most important, Professor Bork's views are shared by at least five current and former Supreme Court justices. In this light, it is almost a laughing matter for anyone to seize on these writings from ten years ago in search of something insensitive about Judge Bork's civil rights record.

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### 1964 Civil Rights Act

Mr. President. Judge Bork's significant actions in behalf of civil rights are also undervalued because of his comments nearly 25 years ago about the public accommodations portions of the 1964 Civil Rights Act. In the hearings as well as dozens of times earlier in his career, Judge Bork has stated several times that he no longer espouses these views he held as a young law professor. This ought not to arouse any concern. Every Senator, in fact, every American has probably held an opinion that they later changed.

One of the reasons that this 1963 article was criticized was because in his capacity as law professor Judge Bork criticized the Court's Commerce Clause justification for the public accommodations law. By the way, the revered Justice Black also felt that the Commerce Clause was an inadequate basis for the public accommodations law. (See Daniel versus Paul (1969)) Nonetheless, as judge or even justice of the Supreme Court, Judge Bork contends clearly that stare decisis would require him to uphold the Commerce Clause as justification for this civil rights law.

This judicious response from Judge Bork underscores once again the difference between a law professor and a judge. As a law professor, Judge Bork was paid to generate controversy and to stimulate discussion. As a judge, he has a responsibility to honor precedents and uphold the continuity and predictability of the law. Judge Bork knows that difference. It seems to me unfair, therefore, for us to have to endure endless attacks on him based solely on what he may have said 25 years ago as a young law professor. The more relevant indicator of Judge Bork's likely performance as a Supreme Court Justice is his service as Solicitor General and as judge. In those capacities he has demonstrated an extraordinary sensitivity to civil rights.

### Equal Protection

We have often heard Judge Bork's views on equal protection questioned. I would like to respond. The equal protection clause of the fourteenth amendment states that "no state shall . . . deny any person . . . the equal protection of the laws."

Application of the equal protection clause is a two-step process. A judge must first con-

sider 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. This first step is applied automatically and without question. The second step is the standard of protection to be granted. This is the question which has been extensively debated in judicial and legal circles, as well as in the hearings.

Judge Bork's view, which is shared by Justice Stevens among others, on this standard question is that the Congress or a State legislature may not treat individuals differently unless they substantially justify the distinction. As Judge Bork explained in the hearings, this means that women and minorities will receive at least as much protection as under the alternative standard. The Judge's view is also in complete harmony with the words of the fourteenth amendment which protect "any person," rather than specific groups.

The alternative view grants some groups great protection against unreasonable legislative distinctions and leaves other groups with practically no protections. This approach is difficult to reconcile with the Constitution's language guaranteeing equal protection to every person. Ironically, the equal protection clause 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 equal protection clause. As he stated time and time again during the hearings, he reads the Constitution to cover every "person." After all this is what the Constitution says.

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 dissimilar treatment in a statute, that statute will be invalidated as a denial of 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, that women may not be denied service as jurors, that women may not be denied bartending licenses, that women may not be denied credentials as lawyers, and that no other form of invidious discrimination will be tolerated on the basis of sex. Incidentally, when the four examples above came before the Supreme Court, it rejected the first two instances of discrimination and permitted the latter two. Under Judge Bork's view, any State or Federal law based on outmoded stereotypes or arbitrary distinctions would be invalidated.

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 his reasonableness test is nothing more than the old rational basis test, which was almost synonomous with a license for discrimination. This is not Judge Bork's view. 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 equal protection clause. This is the law to be applied, regardless of whether the 39th Congress was able to live up to the principle it contained. We know that the 39th Congress did not fully live up to the principle or racial equality that it wrote into the Constitution, but the principle governs, not the personal shortcomings of men who lived over 100 years 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." Judge Bork's jurisprudence will apply the language of the Constitution in light of current values, or "the world we know."

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. 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 what standard applies. 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 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 Constitution 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 why Judge Bork's equal protection is not 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, other than race, should not receive a special standard of protection under the equal protection clause. 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." Thus, his equal protection view was articulated to some degree as early as 1971.

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 Schultz, 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 unconstitutional 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.

I 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. 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, Judge Bork covers every person according to the language of the Constitution. On the separate question of standard, Judge Bork provides 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 qualifications, sensitivity, and judicial temperament to serve on our nation's highest court.

Mr. HATCH. In conclusion, Mr. President, I believe the Senate has missed the point on this entire debate.

JUDICIAL ACTIVISM

From the opening gun of this debate, we have heard charges that Judge Bork is an extremist. As I have repeatedly stated, I think that this charge is wholly unfounded. I have spent much of my time in this debate rebutting that point. Rather than pursue that point further at this time, I will ask simply that a study entitled "Commentators Who Have Taken Positions Like Those of Judge Bork" and a listing of "Bork's Judicial Philosophy Supported by 200 Years of Supreme Court Jurisprudence" be placed in the RECORD at this point. These demonstrate once again that Judge Bork is a nominee in the finest tradition of American jurisprudence and constitutional theory.

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

COMMENTATORS WHO HAVE TAKEN POSITIONS LIKE THOSE OF JUDGE BORK

KATZENBACH V. MORGAN

Professor Bickel of Yale wrote of *Morgan*, "if the Court's reasoning is taken seriously, Congress could bestow the vote on these groups, and on any group which it fears may be discriminated against, even though its fears are grounded solely in the fact that the group in question is deprived of the vote. There is then nothing left of any constraint on the power of Congress to set qualifications for voting in state elections. Yet the Court did not purport to vest plenary power in Congress." Bickel, *The Supreme Court and the Idea of Progress* 63 (1970). He also noted that, "[t]he Court's ground of decision purported to be limited, but was in truth not limitable." *Id.* at 76.

Although he ultimately supports the decision in *Morgan*, Professor William Cohen of Stanford noted that: "Justice Brennan's 'ratchet' interpretation of section 5 presents two problems. First, it does not satisfactorily explain why Congress may move the due process or equal protection handle in only one direction. If Congress' interpretative power is grounded on special legislative competence not possessed by courts, then congressional insistence on English language literacy as a qualification to vote would seem to involve the same special competence as the decision to extend voting rights to those literate in a foreign language. In other words, if Congress is in a better position than the Court were to make some kinds of due process fairness judgments and to balance state interests against the demand for equal protection, that competence should extend to a judgment that the courts have gone too far in expanding the scope of individual rights."

"The second and more significant problem with the ratchet theory is the difficulty in determining the direction in which the handle is turning. For example, could a congressional expansion of the power of courts to give gag orders to the press in criminal cases be justified as an enhancement of fair trial without the necessity of any judicial determination of the freedom of the press issue? Any issue involving competing claims of constitutional rights poses the dilemma of determining whether a particular decision 'enforces' or 'dilutes' constitutional rights." Cohen, *"Congressional Power to Interpret Due Process and Equal Protection."* 27 Stan. L. Rev. 603, 606-07 (1975).

CONFIRMATION OF JUDGES

Professor Kurland has written: "Allow me to make clear my position on judicial appointments. I believe that a judicial nominee's political preferences are no more relevant to a capacity to perform the judicial function than are the nominee's sex, race, national or state origin, or religion. No one should be appointed or refused appointment for such considerations. And surely every President has exercised the prerogative of choosing nominees for the bench because they are close to rather than distant from his philosophy." Chicago Trib., May 12, 1986, *reprinted in* CONG. RECORD, June 25, 1986, at 8486.

Senator Kennedy has, in the past, stated: "I believe it is recognized by most Senators that we are not charged with the responsibility of approving a man to be Associate Justice of the Supreme Court only if his views always coincide with our own. We are not seeking a nominee for the Supreme Court who will always express the majority views of the Senate on every given issue of fundamental importance. We are interested really in knowing whether the nominee has the background, experience, qualifications, temperament and integrity to handle this most sensitive, important, responsible job." Hearings on the nomination of Thurgood Marshall to the U.S. Supreme Court.

During Justice O'Connor's confirmation process Senator Biden noted that "no one, in the approximately 200 years of the Court, has been accurately able to predict what a justice of the Supreme Court would be like." Associated Press, Sept. 28, 1981, p.m. cycle.

Senator Biden was reported to "enthusiastically" support the nomination of Justice O'Connor because she "had demonstrated legal skill, moral character and judicial temperament. 'That is all I have to ask,' he said." N. Y. Times, Sept. 22, 1981, at § A, p. 1, col. 3.

In discussing the approaching hearings on the nomination of Justice O'Connor in 1981, where it was expected that she would be opposed by conservatives concerned about her views on abortion and the ERA, Senator Biden noted that: "It troubles me that we would require of a judge something beyond a profound sense of the law."

"I am a little concerned that in effect we try to get commitments from a judge on how he or she is going to vote in the future. . . . I think it is very appropriate to get a sense of the ideological perspective of a justice, but that is different from getting specifics on how he or she would rule." 39 Congressional Quarterly Weekly Report, July 11, 1981, at 1235.

Regarding the nomination of liberal Congressman Abner Mikva to the Court of Appeals for the District of Columbia Circuit, Senator Biden stated: "The necessary qualifications of a judicial nominee are somewhat different [than those required of a cabinet post]. Although a nominee's personal views on matters likely to come before him are relevant, they are not nearly as important as the more elusive qualities of demeanor and judicial temperament. The real issue with a judicial nominee is whether he is capable of performing the delicate role of objectively reviewing questions of law and fact. He must be able to put aside any personal prejudice he might have on the matters before him. Therefore, I believe, what is properly before us here as we consider Congressman Mikva's nomination is not the views he has expressed on public issues as a Member of Congress, but rather the degree to which he possesses those attributes experience has shown to be desirable in a judge, particularly the ability to be objective on the bench." CONGRESSIONAL RECORD, Sept 25, 1979, at 26029.

ROE V. WADE

Professor Gunther of Stanford Law School has stated: "The bad legacy of substantive due process and of ends-oriented equal protection involves a block to legislative ends, an imposition of judicial values as to objectives. That is something from which the Burger Court is overtly retreating—as to equal protection at least, though not as to due process, as *Roe* v. *Wade* shows." *Forum: Equal Protection and the Burger Court*, 2 Hastings Const. L. Quarterly 645, 664 (1975).

Professor Forrester of Cornell Law School has stated: "Certainly, so far as the Burger Court is concerned, you can't find a more interventionist decision in the books than *Roe* v. *Wade*, whether you agree with it or not." *Id.* at 667.

Professor Kurland of the University of Chicago has stated that *Griswold* v. *Connecticut* and *Roe* v. *Wade* are examples of "blatant usurpation(s) of the constitution making function" to be compared with the generally discredited *Lochner* v. *New York*. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Villanova L. Rev. 3, 25 (1978-79).

Professor Archibald Cox of Harvard writes: "My criticism of *Roe* v. *Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment. . . . Constitutional rights ought not to be created under the Due Process Clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place." Cox, *The Role of the Supreme Court in American Government* 113-114 (1976).

Professor Lyne Wardle of Brigham Young University writes: "Incorporating the doctrine of abortion privacy as part of the supreme law of the land resulted from an accident of history. The accident was that in 1973 and for more than a decade afterward a majority of the seats on the Supreme Court were occupied by persons who believd that the state should no longer be permitted to restrict abortion." Wardle, *Rethinking Roe* v. *Wade*, Brigham Young Univ. L. Rev. 231, 245 (1985).

Professor Ely of Standard wrote soon after *Roe* was decided that: "The point that often gets lost in the commentary, and obviously got lost in *Roe*, is that *before* the Court can get to the 'balancing' stage, *before* it can worry about the next case and the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority. A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it." Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L. J. 920, 949 (1973).

Constitutional scholar Alexander Bickel has also criticized the Roe decision agreeing with the dissenters that the decision involved legislative not judicial action. Bickel, *The Morality of Consent* at 28-29 (1975). He

argued that the Court merely asserted the result it reached, and "refused the discipline to which its function is properly subject." *Id.* at 28.

GRISWOLD V. CONNECTICUT

Professor Kurland of the University of Chicago has stated that *Griswold* v. *Connecticut* and *Roe* v. *Wade* are examples of "blatant usurpation[s] of the constitution making function" to be compared with the generally discredited *Lochner* v. *New York*. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Villanova L. Rev. 3, 25 (1978-79).

In his dissent in *Griswold* v. *Connecticut* 381 U.S. 479 (1965), Justice Black began by flatly stating that: "In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers Harlan, White and Goldberg who, reciting reasons why it is offensive to them, hold it unconstitutional." *Id.* at 507.

Justice Black concluded that: "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not." *Id.* at 508. "I like my privacy as much as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional." *Id.* at 510.

In response to Justice Goldberg's dissent, Justice Black wrote: "one would certainly have to look far beyond the language of the Ninth Amendment to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the [Ninth] 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, and the very material quoted by . . . [Justice] Goldberg shows that the Ninth Amendment was intended to protect against the idea that 'by enumerating particular exceptions to the grant of power' to the Federal Government, 'those rights which were not singled out, were intended to be assigned into the hands of the General Government [the United States], and were consequently insecure.' That Amendment was passed, not to broaden the powers of this Court or any other department of 'the General Government,' but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold conceives to be the '[collective] conscience of our people' is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court." *Id.* at 519-20

HOMOSEXUALITY

Professor Jesse Choper of Boalt Hall has stated: "In several opinions dating back to *Griswold* v. *Connecticut*, the justices have been very careful to exclude any implication that they would protect homosexuality. So I rather doubt that the Court would go that way [recognizing homosexuality as a suspect classification under the Fourteenth Amendment]." *Forum: Equal Protection and the Burger Court*, 2 Hastings Const. L. Quarterly 645, 669 (1975).

SHELLEY V. KRAEMER

Professor Wechsler wrote: "That the action of the state court is action of the state, the point Mr. Chief Justice Vinson emphasizes in the Court's opinion is, of course, entirely obvious. What is not obvious, and is the crucial step, is that the state may properly be charged with the discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make. Again, one is obliged to ask: What is the principle involved?" Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 29 (1959).

Professor Louis Henkin of the University of Pennsylvania also noted the lack of a neutral basis for Shelley: "*Shelley* v. *Kraemer* was hailed as the promise of another new deal for the individual—particularly the Negro individual—but students of constitutional law were troubled by it from the beginning. Those alert to the responsibility of the Court to afford principled decisions, justified by language, history, and other considerations relevant to constitutional adjudication, were disturbed by an opinion of the Court which, to them, did not 'wash'." Henkin, *Shelley* v. *Kraemer: Notes for a Revised Opinion*, 110 Univ. of Penn. L. Rev. 473, 474 (1962).

Even Professor Tribe has had to admit that *Shelley's* reasoning, "consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement." Tribe, *American Constitution Law* 1156 (1978). He also recognized *Shelley's* lack of a neutral base—doctrine—and wrote: "Because the Supreme Court does not currently have access to a general theory of liberty allocating public and private responsibility, the Court can no longer derive doctrinal rules from any accommodation of the premises underlying the state action requirement. To the extent that the Court has nonetheless *attempted* to produce a state action doctrine, it is not surprising that its efforts have yielded little which does not appear to be too readily manipulable to be called doctrine: doctrine in this context is inevitably cut off from its roots. Those who simply criticize the Court's attempts are thus both correct and irrelevant. Plainly, the state action decisions fail as doctrine; the question is, do they make sense as anything else?" *Id.* at 1157.

WAR POWERS

Professor Eugene Rostow of Yale University has also stated that the limitations on Presidential power suggested in the early 1970s was an unfortunate reaction to "the bitterness and tragedy of Vietnam" and argued that "[w]e should find safer outlets . . . for the hydraulic pressure of our present discontents about Vietnam." *See Great Cases Make Bad Law: The War Powers Act*, 50 Tex. L. Rev. 833-835 (1972). He noted that "[t]he Javits Bill, [for instance], rests on a premise of constitutional law and constitutional history which is in error. Its passage would be a constitutional disaster, depriving the government of the powers it needs most to safe-guard the nation in a dangerous and unstable world." *Id.* at 836. He carefully explained the difference between the formal declaration of war and the President's inherent power to direct the use of the United States Armed Forces as Commander-in-Chief. "Congress has the last word on matters of peace and war, but the President's authority goes far beyond that to repel sudden attacks." *Id.* at 865.

In his veto of the War Powers Resolution, President Nixon noted that "the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation." "House Joint Resolution 542 would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years." The President's Message to the House of Representatives Returning H.J. Res. 542 Without His Approval, Oct. 24, 1973.

SELF-HELP AND THE BLACK COMMUNITY

In his 1968 article "Why I am for Nixon" Judge Bork argued, among other things, that the solution to the problems of blacks in our society is not unlimited increases in federal spending. The solution "requires not merely the alleviation of Negro poverty but the encouragement of black pride and independence." The Judge observed that "[o]nly through the development and expansion of black capitalism can Negroes be brought into the main economic stream, finding opportunities at all levels of business and the professions, and building the pride and independence that can come only with economic power and self-sufficiency."

These sentiments are being echoed today by many of the leaders of the black community. For instance:

Benjamin L. Hooks, the executive director of the National Association for the Advancement of Colored People, recently opened the associations annual convention with a ringing call for black self-help. "In the old days the black poor found hope and relief in work, in education, in the stability and security of a strong, extended black family structure. . . . Today, many are condemned to the debilitations of the welfare system the opium of dependence." (Chicago Tribune, July 14, 1987, at § 1, p. 12)

Leaders like Jesse Jackson, Marion Barry and Marian Wright Edelman have called for a return to the virtues of "self-discipline, education, the willingness to take responsibility for one's own actions." (Wash. Post, Aug. 9, 1987, at C5)

Harold J. Logan recently wrote, "let's stop calling those appeals [black self-help efforts] black conservatism. Let's call them what they really are: common sense." (Wash. Post, Aug. 9, 1987, at C5).

RACIAL QUOTAS

Professor Bickel once wrote: "If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded. The lessons of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support for equality, they now claim support for inequality under the same Consti-

tution. Yet a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice." Bickel, *The Morality of Consent* 132-133 (1975).

Although he was not overly troubled by the result in *Bakke*, Professor Kurland has written: "not until racial categories are obliterated from our laws can there be even a hope for the realization of equality in our society." Kurland, *Bakke's Wake*, 60 Chicago Bar Record 66, 69 (1978).

Although he appears to support the result in *Bakke*, Professor Alan C. Dershowitz of Harvard appeared of counsel on an amicus brief filed in support of Alan Bakke's claim of reverse discrimination. The brief concluded that the position advocated by the University of California, in support of its racial quotas: "sacrifices the principle of racial equality for a short term advantage. It permits each generation to conclude that a prior generation was disadvantaged and to repair the discrimination by discriminating against members of the current generation. The process is likely to be interminable, particularly when it is caught up in campus, community and political pressures. There is no cut-off principle. Though most of the justification for the position is said to come from an effort to compensate for slavery, there is no limit in the Medical School's action to descendants of slaves; there is no limitation to blacks; the policy includes Mexican-Americans and Asian-Americans—those who were arguably wronged by the United States and those who came recently. It includes Hispanic-Americans with no real effort to distinguish among them. In short, it uses the grossest sort of stereotypes to decide who 'deserves' an advantage." Brief of American Jewish Committee *et al.*, *Amici Curiae, Regents of the University of California* v. *Bakke*, No. 76-811, at 69 (Aug. 1977).

Another champion of equal opportunity and individual liberty, Justice William O. Douglas, was no less adamant in his rejection of race-conscious solutions. In 1974, in connection with the first case to come before the Supreme Court involving the allegedly benign use of race to allocate to minorities a certain number of places in a professional school, Justice Douglas stated: "A De Funis [and, one might add, a Bakke or a Weber] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. . . . The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . . So far as race is concerned, *any* state-sponsored preference to one race over another. . . is in my view 'invidious" and violative of the Equal Protection Clause." *De Funis* v. *Odegaard*, 416 U.S. 312, 333, 342, 343-44 (1974) (Douglas, J., dissenting) (emphasis added).

Similarly, Jack Greenberg, Director-Counsel of the NAACP Legal Defense Fund, in urging the Supreme Court to invalidate a state statute requiring that a candidate's race be designated on each ballot, argued: "[T]he fact that this statute might operate to benefit a Negro candidate and against a white candidate. . . is not relevant. For, it is submitted the state has a duty under the Fifteenth Amendment and the Fourteenth Amendment to be 'color-blind' and not to act so as to encourage racial discrimination. . . against *any* racial group." Jurisdictional Statement Brief, *Anderson* v. *Martin*, 375 U.S. 399 (1964), p. 11-12 (emphasis added).

"Affirmative Action", when first used, had no connotation of preferential treatment or racial balance. It was first used in President John Kennedy's Executive Order No. 10925 which directed federal contractors to take "affirmative action to ensure that applicants are employed. . . without regard to their race, creed, color or national origin."

HARPER V. VIRGINIA BOARD OF ELECTIONS

Professor Bickel of Yale wrote of *Harper*: "The poll tax, said the Court, is not plausibly related to 'any legitimate state interest in the conduct of elections.' But 'the Court gives no reason,' complained Justice Black in dissent, and it did not." Bickel, *The Supreme Court and the Idea of Progress* 59 (1970).

Professor Archibald Cox, although ultimately praising the decision, has admitted that the Court's opinion in *Harper* "is strangely open to [Justice Black's and Judge Bork's] criticism," that the court has used " 'the Equal Protection Clause . . . to write into the Constitution its notions of what it thinks is good governmental policy.' " Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* 125 (1968). Professor Cox wrote that, "[e]xcept for reliance upon the Reapportionment Cases [*Harper*] seems almost perversely to repudiate every conventional guide to legal judgment." *Id.*

ORIGINAL MEANING JURISPRUDENCE

Professor Henry Monaghan, Harlan Fiske Stone Professor of Constitutional Law at Columbia University, writes: "All law, the constitution not excepted, is a purposive ordering of norms. Textual language embodies one or more purposes, and the text may be understood and usefully applied only if its purposes are understood. No convincing reason appears why purpose may not be ascertained from any relevant source, including its 'legislative history.' " Monaghan, *Our Perfect Constitution*, 56 N.Y. Univ. L. Rev. 353, 374-75 (1981).

"I think it would be an intuitive, wide shared premise that the supreme court in 1800 *should* have accorded interpretive primacy to original intent in ascertaining the 'meaning' of the constitution." *Id.* at 375.

In 1986, Senator Byrd praised Justice Scalia for following a philosophy of judicial restraint as defined in Judge Bork's opinion in *Dronenburg* v. *Zech*, 746 F.2d 1579 (1984): " '[t]he philosophy that courts ought not to invade the domain the Constitution marks out for democratic rather than judicial governance.' " 132 *Cong. Rec.* S12838 (Sept. 17, 1986). No court, he continued, " 'should create constitutional rights: That is, rights must be derived by standard modes of legal interpretation from the text, structure, and history of the Constitution.' What a refreshing approach to constitutional interpretation. No notions of applying contemporary standards, or today's values, or 20th century notions to help us figure our constitutional meaning. Just the plain, old fashioned, lawyerly notion that the Constitution means the same thing today as it did when it was crafted by those brilliant minds almost 200 years ago."

Some 50 years ago Justice Robert Jackson, then an assistant attorney general in Franklin Roosevelt's Justice Department, stated; "Let us squarely face the fact that today, we have two Constitutions. One was drawn and adopted by our forefathers as an instrument of statesmanship and as a general guide to the distribution of powers and the organization of government . . . The second Constitution is the one adopted from year to year by the judges in their decisions . . . . The due process clause has been the chief means by which the judges have written a new Constitution and imposed it upon the American people." *See* Cooper & Lund, *Landmarks of Constitutional Interpretation*, 40 Policy Rev. 10 (1987).

Professor Berger has written that: "[f]rom Francis Bacon on, the function of a judge has been to interpret, not to make, law." Berger, *"Original Intention" in Historical Perspective*, 54 Geo. Wash. L. Rev. 296, 310-11 (1986).

Justice Harlan wrote in his dissent to *Reynolds* v. *Sims*, 377 U.S. 589, 591 (1964) that when the court ignores "both the language and history of the controlling provisions of the Constitution" to invalidate laws, its "action amounts to nothing less than an exercise of the amending power."

Thomas Cooley wrote: "In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But his intent is to be found in the instrument itself." Cooley, *Constitutional Limitations* 89 (7th ed. 1903).

Justice Sutherland wrote in his dissent in *Home Building & Loan Ass'n.* v. *Blaisdell*, 290 U.S. 398, 449 (1934) that constitutional language "does not mean one thing at one time and an entirely different thing at another time." He quoted the following with approval: "But it may easily happen that specific provisions may, in unforseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended . . .' " *Id.* at 451.

In *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944), Justice Black (in interpreting the Commerce Clause), wrote: "Ordinarily courts do not construe words in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. To hold that the word 'commerce' as used in the Commerce Clause does not include a business such as insurance would do just that. Whatever other meanings 'commerce' may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: business [like insurance] in which persons bought and sold, bargained and contracted."

THE INTERPRETATION OF THE NINTH AMENDMENT

In a 1983 article published in the University of Virginia Law Review, attorney Russell Caplan writes that the "historical evidence . . . suggests that the ninth amendment is not a cornucopia of undefined federal rights, but rather that it is limited to a specific function, well-understood at the time of its adoption: the maintenance of rights guaranteed by the laws of the states." Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. Rev. 223, 227 (1983).

Professor Francis Canavan of Fordham University also rejects the idea that the Ninth Amendment is a respository of unstated rights that the federal courts may enforce as they choose. He writes that: The Tenth Amendment states that the powers given to the federal government are delegated and limited; the Ninth states that the express declaration of certain limits on federal powers is not to be construed as meaning

that those are the only limits. The other rights retained by the people are all the other limits implicit in the fact that the grant of powers to the federal government is a limited one: a power not granted to the federal government is a right retained by the people." Canavan, *Judicial Power and the Ninth Amendment*, The Intercollegiate Review 25, 27 (Spring 1987). He concludes that the "first eight amendments state expressly that certain powers are *not* contained among the federal government's delegated powers, and the Ninth explains that the failure to mention other powers as not delegated does not mean that they are delegated: silence is not to be taken as consent." *Id.* at 28.

In his dissent in *Griswold* v. *Connecticut*, 381 U.S. 521 (1965), Justice Black wrote that: "one would certainly have to look far beyond the language of the Ninth Amendment to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the [Ninth] 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, and the very material quoted . . . [Justice] Goldberg shows that the Ninth Amendment was intended to protect against the idea that 'by enumerating particular exceptions to the grant of powers' to the Federal Government, 'those rights which were not singled out, were intended to be assigned into the hands of the General Government [the United States], and were consequently insecure.' That Amendment was passed, not to broaden the powers of this Court or any other department of 'the General Government,' but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because what this Court conceives to be the '[collective] conscience of our people' is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court." *Id.* at 519-20.

FREEDOM OF SPEECH

Criticizing the Court's decision in *Cohen* v. *California*, Professor Bickel of Yale wrote that "there is such a thing as verbal violence, a kind of cursing assaultive speech that amounts to almost physical agression . . . ." Bickel, *The Morality of Consent* 72 (1975). Like Judge Bork, Bickel distinguished between "carrying a sign in public that says, 'Down with the Draft,' and a sign that says—I bowdlerize—fornicate the Draft." *Id.*

With respect to government regulation of political speech urging lawless action Judge Learned Hand also noted that words which counsel violation of the law ought not to be considered protected speech. In *Masses Publishing Co.* v. *Pattern*, 244 Fed. 535 (S.D.N.Y. 1917), (a case involving the interpretation of the Espionage Act of 1917), he overturned the actions of the postmaster of New York in refusing to accept for mailing a magazine advocating revolution. In that case he stated: "Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of authority in a democratic state." *Id.* at 540. Judge Hand upheld the rights of the magazine publishers on the theory that "if one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me that one should not be held to have attempted to cause its violation." *Id.*

Professor Bickel has noted that the clear and present danger test: "states rather than solves a free-speech problem." Bickel, *The Supreme Court and the Idea of Progress* 77 (1970). He illustrated his point with an oft quoted passage of Professor Paul A. Freund: "The truth is that the clear-and-present danger test is an over simplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity, and availability of more moderate controls than those which the state has imposed; and perhaps a specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values." *Id.* at 77 (*quoting* P.A. Freund, *On Understanding the Supreme Court*, 27-28 (1951)).

Senator Byrd has stated on the Senate floor: "In 1983, there was an appeal before Judge Scalia's court which involved the right of protestors to sleep in Lafayette Park, across from the White House. *Community for Non-Violence* v. *Watt*, (703 F.2d 586 (1983); Rev., 468 U.S. 288 (1984)) dissenting from the court's majority decision, Judge Scalia [joined by Judge Bork] said he did not believe that, 'sleeping is or ever can be speech for first amendment purposes. That this should seem a bold assertion is a commentary upon how far judicial and scholarly discussion has strayed from common and commonsense understanding.' That, to my way of thinking, reflects the approach of a strict constructionist, in the very best sense of that term." 132 CONG. REC. 23809 (Sept. 17, 1986).

REAPPORTIONMENT—ONE MAN, ONE VOTE

Professor Bickel has criticized the Warren Court's philosophy stating that: "More careful analysis of the realities on which it was imposing its law, and on appreciation of historical truth, with all its uncertainties, in lieu of a recital of selected historical slogans, would long since have rendered the Warren Court wary of its one-man, one-vote simplicities." Bickel, *The Supreme Court and the Idea of Progress* 174 (1970).

Professor Kurland has written: "Like the cases concerned with the Negro Revolution, the reapportionment cases rested on the equal protection clause. But unlike the racial discrimination cases, the reapportionment cases were concerned more with form than they were with substance. They represent a sterile concept of equality for the sake of equality. Given the premises of 'one man-one vote' and 'one vote-one value,' the Court needed nothing more for its decision than the principle of reductio ad absurdum. There is an element of Catch-22 in the opinions in these cases. The Court has repeatedly said that justifiable deviations from the arithmetical formula will be tolerated, but it has yet to accept any justification proffered." Kurland, *Egalitarianism and the Warren Court*, 68 Mich L. Rev. 629, 677 (1970).

Professor Kurland has also noted with respect to the Reapportionment cases, "[t]hese decisions turned a slogan into a constitutional doctrine: one man-one vote." Kurland, *Equal Education Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 Univ. of Chi. L. Rev. 583, 585 (1968).

Professor Kurland also writes that these decisions have basically succeeded "because the Court ignored the complexities that would concern political theorists about the nature of representative government and imposed a simple, easily determined, and readily observed standard: one man-one vote. The Court has displayed neither the desire nor the will to complicate its job by variations of its theme. In essence the rule is an expression of Dr. Seuss' admirable proposition that 'a person's a person, no matter how small.' The only price of simplicity is the elimination of values of ancient lineage in American political life. But then it has long been recognized that the cost of egalitarianism is the suppression of individualism. And when the Court is now prepared to go to the one extreme, as an earlier Court was prepared to go to the other, simplicity of rule is of the essence of success." *Id.* at 593.

BORK'S JUDICIAL PHILOSOPHY SUPPORTED BY 200 YEARS OF SUPREME COURT JURISPRUDENCE

Alexander Hamilton: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." *Federalist No. 78.*

President James Madison: "I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone is it the legitimate Constitution. And if that not be the guide in expounding it, there can be no security for a consistent and stable, more than for fanciful exercise of its power." *Quoted in* Cooper & Lund, "Landmarks of Constitutional Intepretation," 40 *Policy Review* 10, 11 (Spring 1987).

"[If] the sense in which the Constitution was ratified by the Nation . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers." 9 *The Writings of James Madison* 191 (G. Hunt ed. 1900-1910).

President Thomas Jefferson: "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a [judicial] construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. . . . Let us go then perfecting it, by adding, by way of amendment to the Constitution, those powers which time and trial show are still wanting." Letter from T. Jefferson to Wilson C. Nicholas (Sept. 7, 1803), collected in 10 *The Works of Thomas Jefferson* 10-11 (P. Ford ed. 1904-05)

Chief Justice Marshall: "[I]t was said that nations are governed by political considerations, and may choose . . . to overlook conduct at which they might justly take offense, . . . but that courts of justice are bound by the law, and must inflexibly adhere to its mandates. . . ." *The Commercen*, 14 U.S. 382, 401 (1816) (dissent).

"[T]he enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. . . . [W]e know of no rules for construing [the Constitution] other than is given by the language of the instrument . . . taken in connection with the purpose for which [federal

powers] were conferred." *Gibbons* v. *Ogden*, 22 U.S. 1, 188–89 (1824).

"[I]t is the province of the Court to conform its decisions to the will of the legislature if that will has been clearly expressed." *Foster & Elam* v. *Neilson*, 27 U.S. 253, 307 (1829).

Justice Story: "The questions arising upon the record . . . embrace some considerations, which belong more properly to another department of the government. It cannot, however, escape observation that this Court has a plain path of duty marked out for it, and that is, to administer the law as it finds it. We cannot enter into political considerations, on points of national policy. . . . [T]his Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive suitable redress." *The Apollon*, 22 U.S. 362, 366–67 (1824).

Justice Thompson: "I certainly . . . do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. . . . It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.

"The court can have no right to pronounce an abstract opinion upon the constitutionality of a state law." *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 75 (1831) (dissent).

Chief Justice Taney: "If in this Court we are at liberty to give the old words new meanings when we find them in the Constitution, there is no power which may not by this mode of construction, be conferred on the general government and denied to the states." *Smith* v. *Turner* (The Passenger Cases), 48 U.S. (7 How.) 283, 478 (1849).

Justice Curtis: "I dissent . . . from the part of the opinion of the majority of the court, in which it held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compromise act, and the grounds and conclusions announced in their opinion.

"The word regulate, or regulation, is several times used in the Constitution. It is used . . . in the eighth section of the first article . . . , 'Congress shall have the power to regulate commerce.'

"If, then this clause does contain a power to legislate respecting the territory, what are the limits of that power?

"To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress . . . contained in the Constitution.

"Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, not a judicial question. Whatever Congress deems needful is so, under the grant of power.

"The Constitution declares that Congress shall have power to make *'all* needful rules and regulations' respecting the territory belonging to the United States.

"The assertion [from which I dissent] is, though the Constitution says all, it does not mean all—though it says all, without qualifications, it means all except such as allow or prohibit slavery. . . .

"For these reasons, I am of the opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within the part of the territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the river Mississippi, were constitutional and valid laws." *Dred Scott* v. *Sanford*, 60 U.S. 397, 588–633 (1857) (dissent).

President Abraham Lincoln: "[T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." First Inaugural Address by Abraham Lincoln, March 4, 1861, in A. Lincoln, Speeches and Letters 171–72 (M. Roe ed. 1894)

Justice Holmes: "[A] constitution . . . is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Lochner* v. *New York*, 198 U.S. 45, 75–76 (1905) (dissent).

President Franklin D. Roosevelt: "In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policymaking body.

"When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these Acts of the Congress—and to approve or disapprove the public policy written into these laws.

"In the case holding the New York Minimum Wage Law unconstitutional, Justice Stone said that the majority were actually reading into the Constitution their own "personal economic predilections," and that if the legislative power is not left free to choose the methods of solving the problems of poverty subsistence and health of large numbers in the community, then "government is to be rendered impotent." And two other Justices agreed with him.

"In the face of such dissenting opinions, it is perfectly clear, that as Chief Justice Hughes has said: 'We are under a Constitution but the Constitution is what the judges say it is.' [C. Hughes, Addresses 139 (1908)].

"The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress—a super-legislature, as one of the Justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there.

"We want a Supreme Court which will do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men."

"I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized." Address of President Roosevelt, broadcast from the White House (March 9, 1937).

Justice Robert Jackson: "Let us squarely face the fact that today we have two Constitutions. One was drawn and adopted by our forefathers as an instrument of statesmanship and as an instrument of statesmanship and as a general guide to the distribution of powers and the organization of government. . . . The second Constitution is the one adopted from year to year by the judges in their decisions. . . . The due process clause has been the chief means by which the judges have written a new Constitution and imposed it upon the American people." (writing as AAG in 1937)

"What role ought the judiciary to play in reversing the trend of history and setting the nation's feet on a new path of policy?

"A judgment as to when the evil of a decisional error exceeds the evils of an innovation must be based on very practical and in part upon policy considerations. When . . . such practical and political judgments can be made by the political branches of the Government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress.

"Moreover, this is the method of responsible democratic government. To force the hand of Congress is no more the proper function of the judiciary than to tie the hands of Congress." *United States* v. *Underwriters Ass'n*, 322 U.S. 533, 586–95 (1943) (dissent).

Justice Frankfurter: "Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from the political entanglements and by abstention from injecting itself into clashes of political forces in political settlements." *Baker* v. *Carr*, 369 U.S. 186, 267 (1961) (dissent).

Justice Harlan: "This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system." *Wesberry* v. *Sanders*, 376 U.S. 1, 48 (1963) (dissent).

"When the court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which is its highest duty to protect." *Oregon* v. *Mitchell*, 400 U.S. 112, 203, (1970) (concurring in part and dissenting in part).

Justice Black: "While I completely subscribe to the holding of *Marbury* v. *Madison*

. . . 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 to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notion of 'civilized standards of conduct.' Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution." *Griswold* v. *Connecticut*, 381 U.S. 479, 513 (1965) (dissent).

Judge Learned Hand: "I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon, and Carlyle, with Homer, Dante, Shakespeare, and Milton, with Machiavelli, Montaigne, and Rabelais, with Plato, Bacon, Hume, and Kant as with books that have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly everything he will." *See* H. Abraham, *Justices & Presidents* 53 (1985).

"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it." L. Hand, *The Spirit of Liberty* 189-90 (1974) (New York, Alfred A. Knopf).

Chief Justice Rehnquist: "John Marshall's justification for judicial review [in *Marbury* v. *Madison*] makes the provision for an independent federal judiciary not only understandable but also thoroughly desirable. Since the judges will be merely interpreting an instrument framed by the people, they should be detached and objective. A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution. A merely temporary majoritarian groundswell should not abrogate some individual liberty truly protected by the Constitution." W. Rehnquist, "The Notion of a Living Constitution," 54 *Tex. L. Rev.* 693, 696-97 (1976).

"[T]he Constitution . . . was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times." 54 *Tex. L. Rev.* at 699.

"Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." 54 *Tex. L. Rev.* at 700.

Columnist Anthony Lewis: "[Chief Justice Earl Warren is] the closest thing the United States had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what was seen as the good of society. Fortunately, he was a decent, humane, honorable, democratic Guardian." G. White, *Earl Warren: A Public Life* 359 (1982).

Justice White: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Bowers* v. *Hardwick*, 106 S.Ct 2841, 92 L Ed 2d 140, 148 (1986).

Mr. HATCH. In reality, however, the real issue here is not whether Judge Bork is an extremist. I do not believe any Senator really believes that is the issue. If that were the issue, we would not have this debate. The reason we are having this debate is that Judge Bork is not an extremist. If he were an extremist, he would never gain the four additional votes necessary to have his views prevail amongst the extraordinary individuals who comprise that 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. Instead he will make a difference on the Court. As my colleagues and the numerous news accounts of this issue have conceded, Judge Bork replaces Justice 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 does 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. That is why we are having this debate. That is why Judge Bork's opponents have stopped at nothing to block his nomination.

In that vein, we ought to look at what is really at stake for Americans in the abstract question of judicial activism versus judicial restraint.

1. DEATH PENALTY

Capital punishment is mentioned four or five times in the Constitution, but in Furman capital punishment laws in over 30 States were struck down as being against the Constitution. This is activism.

2. SCHOOL BUSING

I am not questioning whether there ought to be redress for intentional discrimination but sending some children to distant schools simply because they are black or white was the issue decided in Brown versus Board—we must be concerned about that kind of discrimination or race-conscious remedies that the Constitution outlawed. This is activism.

3. RELIGION

No one wants a national orthodoxy but we are talking about bans on silent prayer, bans on remedial aid for students in parochial schools, questions about chaplains in Congress—this is hostility to religion not the policy of the first amendment. This is activism.

4. QUOTAS

The Constitution outlaws discrimination on the basis of race—as Harlan said in Plessy we have a color blind Constitution—yet the Court permits quotas that exclude some from workplaces or promotions because of race—Weber or Fullilove. This is activism.

5. EXCLUSIONARY RULE

The Constitution outlaws unreasonable searches but does not require us to let the criminal go free because the Constable blunders—Cardozo—even technical flaws in a warrant have released criminals. This is activism.

6. DRUG PROSECUTIONS

Drug prosecutions fail, if at all, because of the exclusionary rule and other technical legal rules—habeas corpus, Miranda—which sometimes allow guilty individuals to escape accountability. This is activism.

7. ABORTION

We all would protect privacy in the home, but that doctrine has nothing to do with 15 million abortions since the Court overturned 50 State laws on abortion in 1973. This is activism.

8. HOMOSEXUALITY

We all protect privacy and have enacted statutes to do so, but that has nothing to do with privacy to engage in homosexual conduct. Hardwick got four votes for homosexual rights in the Constitution, Bork makes the difference on this issue.

9. JUDICIAL INTERVENTION

Federal courts have first, supervised homecoming queen procedures; second, governed eligibility for summer basketball camps; third, dress codes and hair lengths for local school systems. This is activism.

10. JUDICIAL ADMINISTRATORS

Federal courts have taken over prisons or ordered new facilities built; have even ordered tax increases to pay for new prisons or school busing when the people refused to raise the money for the judge's program. This is activism.

11. PORNOGRAPHY

The Court has paralyzed local efforts to clean up their communities by constructing a difficult, complex, and constantly changing three-part test for what comprises obscenity. Roth and Miller.

This debate occurs because Judge Bork will make a difference on these issues. The real issue is judicial activism versus judicial restraint.

My only hope is that this will not be the final battle in the war. President Reagan will make another appointment if this one fails and that appointment will be another individual who stands for the proposition of judicial restraint.

QUOTES FROM JUSTICES

Mr. President, Judge Bork has been characterized as differing from every other justice in history on the question of reading the "open-ended clauses" of the Constitution to protect what the report calls the image of human dignity. In particular, Judge Bork is faulted for failing to read broad substantive content into the liberty and due process clauses and for failing to find a broad undefined privacy right. The report then proceeds to select a few quotes from a couple of Justices known for their judicial restraint as evidence that they would not agree with Judge Bork. This exercise of lifting selective quotes out of a Justice's entire career can be very misleading. We can easily select many more quotes that indicate complete agreement with Judge Bork. Apparently that exercise is necessary to show that Judge Bork is entirely in the mainstream of past Justices. He truly carries on the tradition of Holmes, Frankfurter, Harlan, Black, and others.

OLIVER WENDELL HOLMES

Far from the notion of creating new rights or enforcing "unenumerated rights"—a euphemism for unwritten and unacknowledged judge-made privileges—Justice Holmes hotly criticizes this form of judicial activism. In the Tyson case which struck down a State's attempt to fix prices for markups on theatre tickets, Justice Holmes said:

* * * police power often is used in a wide sense to cover, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change.

I do not believe in such apologies. I think the proper course is to recognize that a State legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in 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. (273 U.S. at 446.)

FELIX FRANKFURTER

Justice Frankfurter severely questioned the Supreme Court's position as the supreme law of the land if it engaged in judicial intervention into essentially political issues. In Baker versus Carr, a reapportionment case, he noted:

Disregard of inherent limits in the effective exercise of the Court's "judicial power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from the political entanglements and by abstention from injecting itself into the clash of political forces in political settlements (369 U.S. at 267.)

JOHN MARSHALL HARLAN

Judge Bork's view that the original meaning of the Constitution must guide constitutional interpretation is shaped by Justice Harlan. In Oregon versus Mitchell, involving constitutional challenges by several States to provisions of the Voting Rights Act Amendments of 1970, Justice Harlan stated:

[W]hen the court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which is its highest duty to protect. (400 U.S. at 203.)

HUGO BLACK

Justice Hugo Black, noted for his stands on civil liberties, has forcefully expressed his views on applying and interpreting the Constitution according to its text as opposed to values not found therein. In his dissent in Griswold versus Connecticut, he said:

While I completely subscribe to the holding of Marbury versus Madison * * * and subsequent cases, 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 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. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution. (381 U.S. at 513.)

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 "traditions and [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. Our 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 in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. (381 U.S. at 518.)

BYRON WHITE

In the famous abortion cases of Roe versus Wade and Doe versus Bolton, Justice White expressed his views with regard to judicial restraint:

I find nothing in the language or history of the Constitution to support the Court's judgement. 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. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. 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.

Justice White's opinion as to judicial intervention has also been joined by several other sitting Justices, Justices Powell, Rehnquist, and O'Connor, and retired Chief Justice Burger. In his discussion in Bowers versus Hardwick, dealing with the existence or absence of a constitutional right to engage in homosexual conduct, Justice White

was joined by these other Justices when he said:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. * * * There should be, therefore, great resistance to expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. (106 S.Ct. at 2846.)

ANTONIN SCALIA

Justice Scalia, whom this body unanimously supported last Congress, is perhaps more stringent than even Judge Bork when it comes to the Judiciary's searching between the lines of the Constitution to find a basis for judicial activism. In the recent case of Tyler Pipe Industries, Inc. versus Washington State Department of Revenue, involving a State tax and its effects on interstate commerce, Justice Scalia stated:

The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce. * * * I think it beyond question that many "apprehensions" would have been "entertained" if supporters of the Constitution had hinted that the Commerce Clause, despite its language, gave this Court the power it has since assumed. As Justice Frankfurter pungently put it: "the doctrine that state authority must be subject to such limitations as the Court finds it necessary to apply for the protection of the national community * * * [is] an audacious doctrine, which, one may be sure, would hardly have been publicly avowed in support of the adoption of the Constitution." * * *

In sum, to the extent that we have gone beyond guarding against rank discrimination against citizens of other States * * * the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.

"EXTREMISM" AND JUDICIAL RESTRAINT

The well-orchestrated campaign of opposition to Judge Bork has emphasized one theme more than all others: "Robert Bork is an extremist who will take away our individual liberties." That's been the crux of the very successful campaign to scare the American people about Robert Bork—to make them worry that many of their worst fears will come true, from a resurgence of racism, to sterilization of women, to police in our bedrooms, to denial of the right to speak out against the action of our Government. It has been a masterful campaign of deceit, effectively spreading doubt, fear, hatred throughout the land.

The distortions and cynical manipulation of emotions are well-documented. I want to make a different point for a moment—one that seems to have been missed completely by those Senators who have risen to profess concern about Judge Bork's supposed "extremism" in interpreting the Constitution. Wholly apart from the falsity of that charge, there is this: One Justice believing in judicial restraint—even carrying it to an extreme—is a threat to no one.

Let's take any of the concerns that have been expressed about Judge Bork's approach to the Constitution—the first amendment, the right to privacy, the equal protection clause—any of them. And let us suppose, contrary to the weight of the evidence, that Judge Bork's interpretation of these rights really is unusually narrow. Let us suppose that Judge Bork carries judicial restraint—that is, his faithfulness to the framer's view of the Constitution—too far. Let's say he is flat wrong about how far the Constitution goes in protecting rights.

Even granting all that, I ask my colleagues, where is the threat to our liberties?

What my colleagues seem to be missing is that, even if all the rhetoric about him were true, Judge Bork could not turn back one clock, reopen one wound, deprive one liberty, or deny one right unless four other Justices, and a majority in both Houses of Congress and the President agreed with him, or unless four other Justices and a State legislature and Governor agreed with him. It simply can't happen.

You can't say that about a judicial activist, of course. He doesn't defer to the elected branches; he rests power from them. He doesn't interpret the law; he makes it up as he goes along. There isn't a Member of this body who can't cite an example where a Federal judge has taken control of something—schools, prisons, the criminal justice system—and thwarted the will of the elected legislature in his State. Sometimes, perhaps, that's good; other times it's bad. But the point is, if an advocate of judicial restraint gets it wrong when he decides a constitutional question, the elected representatives of the people serve as a check on him, a backstop. But when an activist judiciary makes up new constitutional restrictions, there is nothing the people can do about it short of changing the Constitution.

If there is doubt about this man, then let us err on the side of democracy rather than government by judiciary, and confirm him.

Of course, even before you get to the people's representatives, there is another safeguard to these liberties that are said to be in peril. In assessing the future of those liberties, we are talking about a Supreme Court of nine Justices, not one. I have never figured out how my colleagues can in the same breath say Judge Bork is "outside the mainstream" and also say he will "upset the balance" on the Supreme Court. If he's really outside the mainstream, who on the Supreme Court will vote with him on these key issues? Or, to state it the other way, if four Justices agree with him so that he is able to change the balance of the Supreme Court, how can he be outside the mainstream. Unless my colleagues here have been asleep at the switch and have confirmed a cadre of "extremists" to the Supreme Court already, this talk about Judge Bork "turning back the clock" is all nonsense. Is Chief Justice Rehnquist outside the mainstream? Is Justice O'Connor an extremist? Or Justice Scalia? Would Justice Stevens or Justice White join in "reversing decades of progress" or "reopening old wounds"? Of course not. And neither would Judge Bork. But the point is, even if he wanted to, he couldn't. That's the reality of what a Justice Bork would mean. That's the conclusion you come to if you think it through for yourself rather than buying the line that Gregory Peck is peddling.

But now let's suppose that there are four others just like Judge Bork on the Court, and all are bent—as the interest groups and some of my colleagues here tell us Judge Bork is—on reading the Constitution so narrowly as to deprive us of basic liberties. That is absurd, of course, but that's been the theme of the anti-Bork media blitz and the stampede to judgment here on the Senate floor. We've all heard it again and again. So let's say a Supreme Court majority decides not to go as far as some of us might like in carving out new rights or liberties. Do we lose those rights and liberties by virtue of that?

No. The issues will be decided in these Halls, in State legislatures, and in town halls across America. The people and their elected representatives will decide. And that's the way it should be in this free country. Whether some will be given liberties at the expense of those currently enjoyed by some others is a question that arises again and again. It is the essence of democracy that such questions are answered by those elected by, and accountable to, the people. Why should we be afraid of that?

So when you stand up on this floor and say that Judge Bork's commitment to judicial restraint is a threat to our individual liberties, be honest about what you are saying. You are saying three things, or your argument makes no sense. You are saying first, you think Judge Bork is too extreme; second, you think there are at least four others on the Court who are similarly too extreme; and third, you think

at least 51 percent of the people's elected representatives are too extreme, too. That's what you are saying or you are just filling the room with empty, hollow rhetoric.

If we are serious about this, we will pause and ask, where is this charge of "extremism" coming from. Extremism is in the eye of the beholder. I don't doubt for a minute that they regard at least four other members of the Supreme Court and at least 51 percent of the American people—in fact, a much larger percentage than that—as "extremist." Those groups really do perceive a threat from Judge Bork. And it's because they have such a deep distrust of the American people.

The American people are those "extremists" who support the death penalty and who want a criminal justice system that protects them. They are the "extremist" who think parents should know when their teenage child faces the traumatic decision whether to have an abortion. The American people are the "extremist" who don't believe that society ought to be ordered along racial and gender lines through numerical quotas. They are the "extremists" who prefer traditional values to the trendy agenda of the gay rights activists or the ACLU crusade to wipe every vestige of religion from the face of our society. The American people have all these looney ideas and more. They are the ones who elected the "extremists," Ronald Reagan, in not one historic landslide, but two. Obviously, Robert Bork and his philosophy of judicial restraint poses a mortal threat to those interest groups: he would let these crazy American people run amok, leaving them free to chart their own futures and make their own laws, except where the Constitution commands otherwise.

I don't believe that 51 Members are hiding behind illogical and unrealistic slogans like "turning back the clock" and "reopening old wounds," and labels like "extremist," in an effort to mask their submission to interest group pressure.

I respect those who fear the excesses of majority rule and who look to the courts for the protection of individual rights. That is an important aspect of the judiciary's role in our constitutional system. I, of course, disagree strongly with those who think the place a judge should look for those rights is inside himself—his own values and preferences—rather than indeed the Constitution. But it is clear to me that neither approach is served by what has happened in this confirmation process. If slick, multimedia disinformation campaigns waged by special interest groups are to guide judicial selection in America, our liberties will be entrusted neither to the consensus of the majority nor to the conscience of an independent judiciary. Instead, the definition of "rights" in America will become the vaunted prize in a contest of who can yell the loudest, create the most hatred and fear, and make the most intimidating threats. This replaces majority rule with mob rule, and replaces fair-minded judges with promise-bound politicians. You may like the result today, but we will all—Bork supporters and Bork opponents—live to regret it.

My colleagues who have their sights fixed on the opinion polls may rest confidently in the knowledge that they will escape the judgments of the voters, but those who pause to ponder the verdict of history will not sit so comfortably. Unlike many of my colleagues, those who review our work in years hence will look at the record. And they will surely wonder why, when the roll was called, so many Senators were unwilling to stand up for this good and decent man, this brilliant scholar and outstanding judge, who has so much to offer the Court, and for the integrity of this process and the independence of the judiciary—independence that is vital if the judiciary is to fulfill its crucial role in our democratic society. I ask you—each of you—to think again.

A PHILOSOPHY OF JUDGING FIT FOR A KING

As I have listened to my colleagues speak in opposition to Judge Bork, I have wondered what the great democrats—little "d"—who have graced this Chamber would think about this debate. Clay, Webster, LaFollette, Dirksen, Humphrey: What would they and others who believed deeply in the political and legislative process as a means of improving society think about a U.S. Senate that said "no" to a Supreme Court nominee because he looked to the Constitution as his lodestar and resolved doubt in favor of letting the people, through their elected representatives, decide the great issues of the day?

I wonder what the architects of the New Deal and the social programs that followed it would say about this debate on the role of judges in our democratic society. Their efforts, of course, were thwarted initially by a politically conservative activist judiciary reading a host of private economic rights into the Constitution. They would be shocked, I think, to see Members of this body rushing to endow judges with broad powers to define "liberty" and manufacture "rights," and thereby chart a course for America into the future without regard for the popular will. They had faith in the people.

This debate about activism or restraint is a debate, fundamentally, about who governs America. It is a question older than the Constitution. It is older than the Republic. It goes right to the very essence of freedom. Who will choose? Who will decide? Can the people be trusted with the most profound and difficult decisions that confront our society?

As I have listened, I have wondered and am now moved to ask, "Why do my colleagues think we fought the Revolution 200 years ago?" Why did those bold visionaries who lit the torch of freedom 200 years ago go to the trouble? Did they not believe that free men and women could govern themselves better than kings could govern them? And what is a Federal judge appointed for life, accountable to no one, and unrestrained by the written law, if he is not a king?

Those courageous freedom fighters 200 years ago pledged their lives, their fortunes and their sacred honor to a cause they fervently believed was right, but which had a most uncertain future. Not only the War for Independence but the very idea, the radical notion, of democratic self-governance was revolutionary. It was a roll of the dice. It was an experiment. And it still is. Are we the people good enough; are we smart enough; are we calm enough and courageous enough and compassionate enough to govern ourselves? Jefferson put it succinctly:

> Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the form of kings to govern him? Let history answer this question.

History is answering that question right now, and we're making history here today. The Senator from Delaware, who chaired the hearings on this nominee, has framed the issue for us well: Are our rights to be derived from the written Constitution, through the consent of the governed, or are there natural rights—derived from a higher law—that each of us has simply by virtue of the fact that, as Senator BIDEN puts it, "we exist on this planet." That indeed is the issue before us.

My colleague from Delaware and some others here have urged upon us the latter view, and in stating their opposition to Judge Bork, they have invoked the ninth amendment to the Constitution. But let us be clear about this: The ninth amendment does not incorporate a vast, undefined body of natural law into the Constitution. It, in fact, confers no additional rights. I know my colleague from Delaware is quite taken with the theory of Professor Lawrence Tribe that the ninth amendment is a vessel into which judges may pour their morality and values and sense of what is fair and good, mix it up, and out will come a portion of properly protected "rights". But the Supreme Court has never read the ninth amendment that way—never. It was not some reactionary but Justice William Douglas who observed in 1973,

The ninth amendment obviously does not create federally enforceable rights.

Nevertheless, we have heard Judge Bork criticized over and over during the hearings and on this floor for reading the Constitution too narrowly because he sticks to the words that are written there and enforces only the rights that flow logically from the values suggested by those words. Senator BIDEN has pronounced the negative committee vote on Judge Bork a verdict on this natural law versus written law question. I must say I find it strange, to say the least, that some of my colleagues are prepared to reflect Judge Bork as "outside the mainstream" because he refused to embrace a radical reading of the ninth amendment that has never commanded a Supreme Court majority in any case and almost certainly never will.

But, more fundamentally, if the distinguished committee chairman's framing of the basic issue here is correct, I find it not only strange but profoundly distressing that a majority of the Members of this elected body, sworn to uphold the Constitution, is prepared to cede to the judiciary the authority to go above, or beyond, the written law. If that happens, we will indeed make history here, because we will take a giant step toward making ours not a government of laws but of men. We will signal our acquiescence in an approach that will place beyond the reach of the people and their elected representatives the most difficult, controversial, and important issues that will face this country in the years ahead.

You may say that is an overstatement. But I ask my colleagues to look at the record and you will see that it is not. The chief complaint about Judge Bork—aside from the hysterical ravings of the mulitmillion-dollar disinformation campaign—is that he "reads the Constitution too narrowly." What does that mean?

Does it mean he takes it too literally? Does it mean he thinks the enduring values of the Constitution don't apply to contemporary situations? No. It cannot mean that because Judge Bork's record and his testimony don't permit that conclusion. One needs only to look at Justice Scalia's—then—Judge Scalia's—criticism of Judge Bork's position in the Ollman case to see that Judge Bork's is not the strictest view. Judge Scalia was far more rigid in his approach to interpreting the language of the Constitution, and we confimed him 98 to 0. No, when my colleagues say that Judge Bork "reads the Constitution too narrowly," one of two things are possible. Either they haven't examined the record and are just parroting the phrase in an effort to make their submission to interest group pressure, or they buy the argument of Professor Tribe, Senator BIDEN and some others that a judge ought not to be bound by the written Constitution—that he ought to be free to discover and enforce against the legislatively expressed will of the people's natural rights that we have just by virtue of being us. I'm not sure which possibility is worse.

Those who argue that judges have broad license to discern and enforce their own views of natural rights—their own moral codes—should be honest about what that means as a practical matter. As Judge Bork explained to the committee, free-wheeling judges do not create new rights; they redistribute rights. By giving rights to some, they take them away from others. The recognition of a criminal's right not to be subjected to the dealth penalty denies the rest of society the right to impose that punishment for brutal acts of violence. The right of a purveyor of pornographic magazines to sell his wares deprives the citizenry of the right to guard against the demeaning, devaluing impact of obscenity. The right of a frightened teenage child to abort her unborn baby without her parents knowing about it deprives those parents of the right to help and counsel that daughter during one of the most traumatic periods in her young life.

These are real-world examples, and I could cite many more. In the real world, there is not an endless array of natural rights out there to be plucked from the sky and bestowed on individuals at no cost to anyone else. And so the question is, "who will decide?" Who will decide about the death penalty, about pornography, about parental consent, about 100 other issues of importance to each of us.

This debate is not about whether the Government will be involved in these issues, as some would have us believe. It is about who in Government will decide: Will the choices be made by elected representatives accountable to the people or will they be made by unelected judges appointed for life and accountable to no one?

The authors of our freedom experienced the tyranny of a monarch appointed for life and accountable to no one. They sought refuge in the written law. They crafted a Constitution to define and protect our liberties, and presumably they intended it to mean something. They placed their trust in the American people, working their will through democratic processes under the rule of law. Why are my colleagues so afraid to trust the American people today?

Given the opportunity to choose between Government by judiciary and Government by the elected representatives, I have no doubt where the American people would come down. Neither do the special interests. That's why they spent millions of dollars creating a monster to scare the American people so that the real issue would not be in focus during this debate.

The American people do not want the most difficult and controversial issues we will face decided by a lawyer in a Federal courthouse or even five lawyers in the marble building across the street from here. The American people want to have a say in shaping their future and the future of their children and grandchildren. The elitist view that several hundred well-intentioned and well-read lawyers ought to be vested with the authority to determine our values and decide our destinies is one that, fortunately, Americans will never accept. Thanks to Judge Bork's courageous decision to stay in the fight, the American people finally are hearing through the din what this debate is really all about.

This is a debate about who will govern America. To whom will we entrust our liberty? We will not in our public careers confront a more fundamental question. And it is time we gave the question the calm and statesmanlike consideration it deserves. It is bad enough to defile the reputation of a fine judge and a good and decent man through an orchestrated campaign of lies and distortions. That is an injustice to one man. But if we let that insidious campaign and the politics of the moment blind us to the fundamental issues at stake here, we commit an injustice for the ages.

Judge Bork's "sin" is that he believes in judicial restraint. So do the American people and so, I believe, do a majority of Senators. We must not be intimidated by interest group pressure into a betrayal of our beliefs on this most fundamental of principles in our system of constitutional government. We must answer Jefferson's question honestly: We have not found angels in the form of kings to govern us. We place our trust in the people.

## 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.

Mr. BYRD. Mr. President, every request that I shall make has been cleared with the distinguished Republican leader. And I am authorized to proceed without at the moment anyone being on the floor on the other side.

## TRANSFER OF SILKWORM MISSILES BY THE PEOPLE'S REPUBLIC OF CHINA TO IRAN

Mr. BYRD. Mr. President, I ask unanimous consent that the Foreign Relations Committee be discharged from further consideration of Senate Concurrent Resolution 84 relating to

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 philososphy, 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 opposing the nomination on what was said or not said in paid commercials of any kind would be abdicating my responsibility as a U.S. Senator.

As a Senator who earlier thought I would support the nominee—no one was more surprised than the Senate's chief vote counter ALAN CRANSTON when I 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 fear-mongering 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 far-fetched as it sounds." Or, as one especially inspired put it, "[S]tates could * * * impose family quotas for population purposes, make abortion a crime, or sterilize anyone they choose."

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

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

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

Wow. If the Senator would step forward, I would like to take a look at those decisions because, if that is correct, I would consider a change of heart on this nomination myself. I 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 be 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 Cicricuit 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, Marttila & 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.

[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.

[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,
*Polyconomics Inc.*

MORRISTOWN, NJ.

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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 short-cut 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

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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.*

[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.

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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 child-bearing, 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).<br>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). |
| 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." | 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) |

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| 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);<br>*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);<br>*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);<br>*Moore* v. *East Cleveland*, 431 U.S. 494 (1977) (freedom from arbitrary interference with family living arrangements).<br>Equally: *Reed* v. *Reed*, 404 U.S. 71 (1971) (legal authority to administer estates);<br>*Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (differential military benefits are unsound);<br>*Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) (differential social security benefits are unsound);<br>*Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981) (states may not grant exclusive authority over community property).<br>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).<br>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). |

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| 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: Basic 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 Supreme 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, anti-trust 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 for 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 Casselia, 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.

Lisa Defusco, Carol Hamburger, Jeff Robinson, Michael Russell, Ann Harkins, John Podesta, Theresa Alberghini, Jody Silverman, Liz Tankersley, Larry Rasky, Leeann Inadomi, Beth Donohue, Ana Gregg, Deborah Leavy, Jennifer Nelson, Jack Suber, Kay Morrell, Nathalie Blackwell, Bill Myers, Carolyn Osolinik, Annie Rossetti, Melinda Nielsen, Mamie Mills, Deborah Walden, Gary Craig, Robert Maagdenberg, Eddie Correia, Margaret Morton, Steve Hilton, Neal Manne, Ellen Lovell, Joe Jamele, Theresa Alberghini, Jill Friedman, Marianne Baker, Meg Murphy, Lori Shinseki, Chris Dunn, Caryl Lazzaro, Cheryl Matcho, John Trasbina, Abby Kuzma, Jean Leavitt, Randy Rader, Dick Day, Jeffrey Blattner, Sandra Walker, Karen Kremer, Monique Abacherli, Gerorge Milner, Jack Foster, and Jerry Ray.

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 hippopotamas 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

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 fail.

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.

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## 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.

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## 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 Parliament 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 experienced 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 co-conspirator Mr. Arthur J. Finkelstein) I ask unanimous consent that the Federal Supplement be printed in the RECORD at this point.

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

FEDERAL ELECTION COMMISSION, PLAINTIFF, v. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, DEFENDANT

(No. 84 Civ. 0866 (GLG))

United States District Court, S.D. New York, 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,[4] 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 dissimilarities 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 distinct 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 tbank 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]

[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 animosities, 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

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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 suporters 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 distinguished witnesses to appear before the committee: Shirley Hufstedler, a former Court of Appeals Judge and the Secretary of Education under President Jimmy Carter. This is what Judge Hufstedler had to say about these terms.

> They are words of passion. They are words of dedication. They are words that cannot be drained of their emotional content. * * * None can be 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.

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## 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.