I am Barbara Matia of Scottsdale, Arizona.

The only thing worse than having rheumatoid arthritis yourself is learning that your daughter has rheumatoid arthritis as well. My daughter's story and mine parallel one another, only I did not learn of Dr. Brown's treatment program, which is based upon the infectious theory of rheumatoid arthritis, until my adult life and until after I was bedridden with arthritis. My arthritis began as a very young child with my first flare beginning in my jaws. I had all the symptoms which Dr. Brown believes are a part of rheumatoid arthritis—pain, weakness, fatigue, anemia, lack of memory, inability to concentrate, irritability and depression. My mental acuity was affected.

I truly lived a half life, yet no doctor was able to diagnose my disease. It was not until my daughter's birth that I was diagnosed as having severe rheumatoid arthritis.

Two years ago I took my daughter to the pediatrician because she had not been feeling well for some time. The doctors thought my daughter might have mononucleosis, valley fever or arthritis, but nothing showed up on her blood test, even after several tests. However, her symptoms persisted and she developed nodules on her wrist. To my pediatrician's credit, he was more than willing to send her blood work to Dr. Brown at the Arthritis Institute in Arlington, Virginia. Dr. Brown called me several days later to tell me that Bethany had active rheumatoid arthritis. If it were not for my having the disease and understanding all of the symptoms, Bethany's arthritis might not be diagnosed today. She was in the hospital at this time last year for her first treatment with intravenous antibiotics, followed by oral antibiotics at home.

All of her symptoms have improved. She is alert and feeling much better rather than just coping with life.

Bethany's and my story are not unique. I cannot begin to tell you how many patients are sent to the Arthritis Institute who could not be diagnosed by their physician or rheumatologist.

There are two significant questions that can no longer be left unanswered because the answers to these questions could bring hope to the 37,000,000 arthritics in our country.

First, what is Dr. Brown doing to detect rheumatoid arthritis that permits him to diagnose it earlier than the diagnoses achieved through the standard blood tests for rheumatoid arthritis? One test he uses that is not used elsewhere is a mycoplasma antibody test. A positive mycoplasma antibody test indicates that appreciable levels of mycoplasma are present. Under Dr. Brown's theory of the disease, appreciable levels of mycoplasma would suggest that rheumatoid arthritis is developing. The fact that these early diagnoses are later confirmed by the more widely used tests for rheumatoid arthritis would in itself suggest a connection between mycoplasma and rheumatoid arthritis. But whether or not this is the case, the test has proven to be a reliable early indicator of rheumatoid arthritis.

The second question that can no longer be left unanswered is why, if the antibiotic treatment program is so significant that it allows the arthritic sustained control and even a reversal of the disease, is the treatment program not spreading across our country like hotcakes? It is because the source of the infection has not been confirmed. And there are very definite reasons why this has not happened.

First, while Dr. Brown isolated the mycoplasma organism in 1937 and has done so intermittently since then, the isolation of the organism on a regular basis is difficult. It is also hard to grow in culture or to demonstrate on a regular basis outside of the body. Therefore, it will take years of further research to fully understand the workings of the infectious agent.

Second, the discovery of cortisone blocked the infectious theory for decades. Everyone thought the cure was at hand. Years of research went into purifying cortisone to try to eliminate its terrible side effects. It has since been discovered that cortisone blocks the body's immune system reaction but does nothing to stop the progress of the disease. But all those years were lost.

Third, while interest in the infectious theory returned in the late 1960's, that interest was snuffed out as a result of the Boston Study of tetracycline as a treatment for rheumatoid arthritis. Although it is acknowledged today that the study was improperly formulated, the study showed no effect from the tetracycline and the medical community has been reluctant to revisit the infectious theory ever since.

Finally, because of lack of funding for research into the infectious theory for the reasons set forth above, Dr. Brown pursued the treatment program for the disease based upon his belief that the cause was an infectious agent.

Therefore, while Dr. Brown has an important lead that an infectious agent is the cause, most rheumatologists refuse to try the antibiotic treatment program where the infectious agent is not confirmed even though they will give cortisone and other "accepted" remedies before any cause is confirmed.

Dr. Brown's fifty years of research and clinical experience make him the most knowledgeable doctor in the country today with respect to the infectious theory of rheumatoid arthritis. Dr. Lawrence Shulman, Director of the new Arthritis Institute of the National Institutes of Health, has said "Dr. Brown has made his mark with the antibiotic treatment program." While that statement represents significant progress, there has still been no action to make the antibiotic treatment program available to the nation's arthritics.

In 1983, when I first testified before this subcommittee, I quoted to you from a 1972 statement of the then head of the NIADDK that "heartening progress was being made in determining the cause of rheumatoid arthritis." Four more years have gone by and from the standpoint of the rheumatoid arthritic, nothing new has been offered them except methatrexate which can have results worse than the disease. Four times this subcommittee has asked the NIADDK to take positive steps to explore the antibiotic treatment program of the Arthritis Institute. Twice during that period the NIADDK turned down a grant application to fund a clinical trial of that program.

After the experience I have had with my daughter, I am convinced now more than ever that the arthritic does not have to live a half life and that a treatment program to return the other half of life to the arthritic is currently available. This subcommitee can make the difference!

Thank you very much.

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Mr. Chairman, Members of Congress and Staff:

I am Bethany Matia and I am 12 years of age.

What is arthritis? Who gets arthritis? How do you know when you have arthritis? Is there a cure for arthritis?

Since my mother was in bed sick with arthritis when I was learning to talk, one of my early questions was will I get arthritis when I grow up?

The question was answered for me last year when I was diagnosed as having active rheumatoid arthritis. I have been hospitalized twice during the year.

When my mother took me out for ice cream and told me I had arthritis, I didn't believe her. The symptoms are hard to understand. No one wants to be different. I always thought I had a headache, the flu and that I was just tired. I slept most days after school and I was not able to handle my school work in fifth grade. I have been treated with nothing but antibiotics this year. My symptoms have all improved and so have blood tests as well as my school grades.

My disease would not be diagnosed if it weren't for my mother and for Dr. Brown. I hope that my visit today will interest you in the infectious theory for arthritis, so that we can help all the children that are in the early stage of arthritis and don't even know they have the disease.

Thank you very much.

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## NOMINATION OF ROBERT BORK

Mr. KENNEDY. Mr. President, I oppose the nomination of Robert Bork to the Supreme Court, and I urge the Senate to reject it.

In the Watergate scandal of 1973, two distinguished Republicans—Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus—put integrity and the Constitution ahead of loyalty to a corrupt President. They refused to do Richard Nixon's dirty work, and they refused to obey his order to fire Special Prosecutor Archibald Cox. The deed devolved on Solicitor General Robert Bork, who executed the unconscionable assignment that has become one of the darkest chapters for the rule of law in American history.

That act—later ruled illegal by a Federal court—is sufficient, by itself, to disqualify Mr. Bork from this new position to which he has been nominated. The man who fired Archibald Cox does not deserve to sit on the Supreme Court of the United States.

Mr. Bork should also be rejected by the Senate because he stands for an extremist view of the Constitution and the role of the Supreme Court that would have placed him outside the mainstream of American constitutional jurisprudence in the 1960's, let alone the 1980's. He opposed the Public Accommodations Civil Rights Act of 1964. He opposed the one-man one-vote decision of the Supreme Court the same year. He has said that the first amendment applies only to political speech, not literature or works of art or scientific expression.

Under the twin pressures of academic rejection and the prospect of Senate rejection, Mr. Bork subsequently re-

tracted the most neanderthal of these views on civil rights and the first amendment. But his mindset is no less ominous today.

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 of 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.

America is a better and freer Nation than Robert Bork thinks. Yet, in the current delicate balance of the Supreme Court, his rigid ideology will tip the scales of justice against the kind of country America is and ought to be.

The damage that President Reagan will do through this nomination, if it is not rejected by the Senate, could live on far beyond the end of his Presidential term. President Reagan is still our President. But he should not be able to reach out from the muck of Irangate, reach into the muck of Watergate, and impose his reactionary vision of the Constitution on the Supreme Court and on the next generation of Americans. No justice would be better than this injustice.

Mr. President, I ask unanimous consent that a statement by Benjamin L. Hooks and Ralph G. Neas of the Leadership Conference on Civil Rights opposing the nomination may be printed in the RECORD.

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

STATEMENT OF BENJAMIN L. HOOKS, CHAIRPERSON, AND RALPH G. NEAS, EXECUTIVE DIRECTOR, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

There is no question that a very substantial majority of the civil rights community will strongly oppose the nomination of Robert Bork to be Associate Justice of the United States Supreme Court.

The confirmation of Robert Bork, an ultra-conservative, would dramatically alter the balance of the Supreme Court, putting in jeopardy the civil rights achievements of the past three decades. Well established law could overnight be substantially eroded or overturned.

This is the most historic moment of the Reagan presidency. Senators will never cast a more important and far-reaching vote. Indeed, this decision will profoundly influence the law of the land well into the 21st century.

## NOMINATION OF ROBERT H. BORK TO THE SUPREME COURT

Mr. DOLE. Mr. President, I heartily support the nomination of Robert H. Bork to the Supreme Court.

It is apparent, already, that Judge Bork's nomination will come under intense scrutiny—as well it should. For a Supreme Court Justice fills a critical, pivotal role in the balance of power between the three branches of Government. And the men and women who serve on the Court must meet the highest standards of judicial competence and integrity. I don't know of anyone who doubts Judge Bork's qualifications.

There are some who will try to turn the confirmation of Robert Bork into a political debate—an ideological debate. But that is not what the Senator's role is. We have a constitutional responsibility to advise and consent, but that should be based on judicial qualifications, not on whether or not a prospective justice tilts the Court one way or the other, philosophically.

Bork, is a former Yale Law School professor, and is widely acknowledged as one of this Nation's foremost legal scholars. Plus, having served 4 years as Solicitor General and 5 years on the Federal court of appeals, he has hands-on experience in the day-to-day workings of the Court.

Mr. President, I hope we will all think carefully before we make a decision about this nomination—it is a very, very significant one. And we should make our judgments on the right grounds—the litmus test should be the correct one—whether this nominee is qualified and could be qualified and serve on the Supreme Court of the United States, and I believe that he is highly qualified, eminently qualified with impeccable credentials.

## THE UNIFORMED SERVICES UNIVERSITY OF THE HEALTH SCIENCES

Mr. WARNER. Mr. President, on May 16, 1987, the Uniformed Services University of the Health Sciences graduated its seventh class since the founding of the school. This class consisted of 155 uniquely trained uniformed medical officers of the Armed Forces, and marked the continued growth of the university as a national resource for quality health care and medical readiness of our armed services.

I wanted to apprise my colleagues of this milestone, as well as the progress being made by the university. In addition, this commencement was an especially meaningful one in light of the fact that President Reagan was the commencement speaker. I would ask unanimous consent that the President's commencement address be included in the RECORD.

For those who are not directly familiar with the outstanding work of the university, the school offers a 4-year medical education program including a full curriculum unique to military medicine encompassing preventive medicine, operational and emergency medicine, and military medical field studies. The university's current enrollment includes 635 medical students and 100 graduate students. In addition to offering the M.D. degree, the university also offers doctoral degrees in the basic sciences and masters degrees in tropical medicine and hygiene and public health.

With the graduation of the class of 1987, the university will have more than 900 alumni serving in active duty assignments throughout the world. Graduates of the university have a 7-year obligation after they have completed their residency training. Currently alumni are serving in staff positions; as general medical officers in locations such as Korea, Turkey, and the Philippines; flight surgeons with the 101st Airborne Division, aboard the U.S.S. *Blue Ridge*, flagship of the 7th Fleet, and in other assignments crucial to readiness. The university's graduates represent a corps of career medical officers trained specifically in military medicine.

The university hopes to make a further contribution to readiness by acting as lead agency with the military services in developing a militarily unique curriculum for implementation of graduate medical education—residency—programs at the request of the Assistant Secretary of Defense for Health Affairs.

It is clear that the promise of this institution, which Congress recognized when it was created, has been fully achieved. The programs of the university in medical, graduate, and continuing education, as well as basic science and clinical research activities underway at the university, combine to produce trained medical personnel who are prepared and eager to serve the Nation.

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

REMARKS BY THE PRESIDENT AT COMMENCEMENT CEREMONY FOR THE UNIFORMED SERVICES UNIVERSITY OF THE HEALTH SCIENCES, THE KENNEDY CENTER CONCERT HALL

THE PRESIDENT. Thank you all very much. And Secretary Weinberger, Chairman Olch, Dean Sanford, members of the graduating class, ladies and gentlemen: I must tell you before I start how relieved I was when Dean Sanford told me that I was going to walk on after the procession. I thought that I was going to come in with the Dean and, with his reputation, I'd been afraid that the good news was that we might perch on the backstage rafters and rappel in—and the bad news—that we'd jump from 10,000 feet.

But it's a pleasure to be here to welcome you, the graduates of this, the West Point, and Annapolis, and Colorado Springs for physicians, into your new profession as military and public health service doctors.

You know, I hope you won't mind if I pause for a minute, but that reminds me of something. At my age, everything reminds you of something. People will be calling you

of finishing the action on the plant closing amendment today.

Mr. METZENBAUM. That is correct.

Mr. BYRD. If we cannot finish action on plant closing today, perhaps we could do that tomorrow, but go forward with 201 today. That is one of the two major amendments that remain to be considered.

Mr. METZENBAUM. We are prepared to proceed on that basis.

Mr. BYRD. So if we could proceed with 201, I say to the distinguished chairman and the Republican leader—Mr. PACKWOOD would be ready in 20 minutes—in the meantime, I would be happy to ask for a little morning business.

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

Mr. BYRD. I yield.

Mr. PRYOR. While one of the managers is on the floor, on the section 201 and the amendment to be proposed by Senator PACKWOOD, are we thinking about completing that amendment and completing that issue and that section this evening with a vote or several votes? I do not quite understand.

Mr. BENTSEN. I would be happy to do so, but I cannot give the Senator any commitment on that, because we do not have a timeframe. We are trying to work that out. I cannot give the Senator something specific.

Mr. BYRD. We will probably come nearer to getting a time agreement once we get it up, and we will probably come nearer to finishing it once we get it up than we will if we wait.

Mr. BENTSEN. I am willing to lay it down and get started.

If we get that out of the way and get plant closing out of the way, those are the two major ones I know of that affect the jurisdiction of the Finance Committee, and we will be a long way down the road toward completing this bill Friday afternoon.

Mr. BYRD. Let us proceed with the understanding that Mr. PACKWOOD will call up 201 within the next 15 or 20 minutes and proceed on that, hoping to complete action on that amendment today.

We might be in not late-late, but into the early evening.

In the meantime, if we could get a time agreement on the plant closing amendment or have an understanding that we would get on it tomorrow as soon as we have disposed of the 201 amendment, we could lay it down tonight.

Mr. President, I ask unanimous consent that the Byrd-Moynihan amendments be laid aside during the rest of the afternoon in order that other amendments may be called up.

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

Mr. DOMENICI. Mr. President, I will communicate this to the distinguished ranking member of the Finance Committee, Senator PACKWOOD. I have two amendments I would offer to section 201. They will not take a lot of time. I understand that they are acceptable to Senator DANFORTH, the principle sponsor of the amendment, and to the chairman of the Finance Committee.

One would change the nature of the plan that industry offers to the commission from a private plan to a public plan, so that the people of the United States understand what is in the competitive enhancement plan rather than it being a secret.

No. 2, that it be made explicit that the commission can turn down a section 201 petition if they do not find that the positive competitive enhancement plan can achieve its goals.

I will do those two amendments, however, in whichever way is most accommodating to the Senate.

If Senator PACKWOOD from Oregon does not object, I would offer them before he starts his amendment. If he desires, I will wait until he is finished. I merely tell the Senate that in the event he failed, I will offer these two amendments to further perfect section 201, and I am amenable to some very short-time agreements on them.

I think they are very clear and forthright and I think they are very important. So I will offer them first. If he desires to go with his first, I will wait until he is finished.

But in all events, I will tender them to the Senate so they will know how I would amend section 201 in the event it is adopted by the Senate rather than amended as requested by Senator PACKWOOD.

## MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent—while we are waiting for Mr. PACKWOOD to arrive on the floor—that there be a period for morning business, not to extend beyond 10 minutes, and that Senators may speak therein for not to exceed 5 minutes each.

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

## TRIBUTE TO ARTHUR BURNS

Mr. DOMENICI. Mr. President, I am going to send a resolution to the desk that is already cosponsored by about 30 Senators. It expresses the deep regret and profound sorrow of the Senate regarding the death of Arthur Burns.

I will send it to the desk and ask unanimous consent that it be held at the desk; I also will ask that it be held open for cosponsors for the remainder of the day.

Mr. President, I have conferred with both the majority leader and the minority leader regarding this resolution. I understand that the distinguished majority leader is going to attempt in the next few days to set aside an hour or thereabout, announced in advance, when this resolution would be taken up, so that any Senators who would like to address the resolution and pay tribute to Arthur Burns would be granted that opportunity.

Mr. President, I send the resolution to the desk. I ask unanimous consent that it be held at the desk until it is called up, pursuant to the majority leader's request, with the understanding that he will arrange as soon as possible for an hour for Senators to address the resolution, and that the resolution be held open for original cosponsors for the remainder of the day.

The PRESIDING OFFICER. Is there objection to the request?

Mr. BYRD. There is no objection.

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

## NOMINATION OF JUDGE ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Mr. THURMOND. Mr. President, I am pleased that today the President has nominated Judge Robert H. Bork to be Associate Justice of the Supreme Court of the United States.

Judge Bork has the qualities I believe are necessary for a member of the Supreme Court: professional competence, judicial temperament and integrity, as well as an understanding of and appreciation for the majesty of our system of government. Judge Bork has served ably as a judge of the U.S. Court of Appeals for the District of Columbia Circuit, and I feel he will be an outstanding addition to the Supreme Court.

I would urge the chairman of the Judiciary Committee to act expeditiously in reporting the Bork nomination to the full Senate. There is no need to unduly delay this nomination when it is clear that the matter should be decided on the floor of the Senate. The entire Senate must be given the opportunity to fulfill its constitutional prerogative of "advise and consent."

The Supreme Court's next session begins on October 5. The Senate must ensure that no vacancies exist on the Court as of that date. The public and the Nation we serve will suffer if we allow the Court to meet without full membership. I hope the Supreme Court is at full strength for the October session, and urge my colleagues to join in this endeavor.

I ask unanimous consent to have printed in the RECORD Judge Bork's résumé.

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

ROBERT H. BORK

Birth: March 1, 1927, Pittsburgh, Pennsylvania.

Legal residence: Washington, D.C.

Marital status: Widower.

Education: 1944, University of Pittsburgh.

1947-1948, University of Chicago, B.A. degree.

1948-1950, University of Chicago.

1952-1953, Law School, J.D. degree.

Bar: 1954, Illinois.

Military Service: 1945-1946, 1950-1952, United States Marine Corps.

Experience: 1953-1954, University of Chicago Law School, Law & Economic Project, Research Associate.

1954-1955, Willkie, Owen, Farr, Gallagher & Walton, Attorney.

1955-1962, Kirkland, Ellis, Hodson, Chaffetz & Masters Associate & Member.

1962-1973, Yale Law School, Associate Professor (1962-1965), Professor of Law (1965-1973).

1973-1977, Solicitor General of the United States, Department of Justice.

1977-1981, Yale Law School, Chancellor Kent Prof. of Law ('77-'79), Alexander Bickel Prof. of Public Law (1979-1981).

1981-1982, Kirkland & Ellis, Partner.

1982-Present, United States Circuit Court Judge, District of Columbia Circuit.

Mr. DOLE. Mr. President, I thank the distinguished ranking member of the Judiciary Committee for his statement.

Before speaking to the nomination of Judge Bork, let me offer my own commendation and heartfelt thanks to retiring Justice Louis Powell, who has served the Supreme Court and the Nation admirably for 15 years.

I hope there will be expeditious disposition of the Bork nomination, in view of the statement made by the distinguished Senator from South Carolina [Mr. THURMOND].

The October term will commence on October 5. It seems to me that all those who wish to closely scrutinize the Bork record should have that opportunity and will have that opportunity. There is no doubt about that.

In the interests of the Supreme Court and in the interests of the country and the President's nominee, I hope we can expedite this process and make certain that we have spoken on the nomination prior to the beginning of the October term.

## EXTENSION OF MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that the period for morning business be extended for an additional 5 minutes under the same conditions.

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

## REBUILDING THE NATION'S UNIVERSITY RESEARCH INFRASTRUCTURE

Mr. WIRTH. Mr. President, I would like to bring to the attention of the body today a set of facts which has not escaped the attention of the Senate in the past, but which becomes increasingly important as we are discussing here competitiveness in international trade, we consider ways to strengthen our educational and technological leadership.

The Nation's universities play a crucial role in support of America's research and development [R&D] enterprise. Universities now perform over half of all federally sponsored basic research, and 13 percent of all federally sponsored R&D. Moreover, they perform this research function while educating our next generation of scientists, engineers, managers, and teachers. In a very real sense, the future of our Nation is linked to its colleges and universities and their role in producing the educated citizens upon which our economic well-being, national security, health and quality of life depends.

At a time when increasing demands are being made on our universities, not only to perform their traditional roles of teaching and research, but to contribute to the economic development of their States and regions, they find themselves forced to perform their work with aging facilities and obsolete equipment. A number of recent reports and news accounts have indicated that the Nation's university research facilities are in such poor condition that they seriously compromise the universities' ability to contribute to critical national goals.

In its 1986 report, the White House Science Council's Panel on the Health of U.S. Colleges and Universities, chaired by David Packard, concluded that if U.S. universities are to bring their infrastructures—research laboratories and equipment—up to an acceptable level in a timely fashion, Federal leadership will be required. The panel recommended an investment of $10 billion over the next 10 years, with $5 billion from Federal and $5 billion in matching funds from non-Federal sources.

Universities have responded to the accumulated facilities deficit by raising as much money as they could from State or private sources to build new facilities or remodel outdated ones. Many have borrowed heavily. Nevertheless, for 20 years the Federal Government has failed to assume its proper share of the responsibility for maintaining this vital national resource. Funding for major Federal programs for construction of university research facilities declined 95 percent in constant dollars between fiscal year 1963 and fiscal year 1984. In spite of a need so large that it can only be addressed on a national level, no significant Federal program now exists in which universities can compete for funds for these critically needed facilities.

A look at the figures for Federal assistance to colleges and universities for facilities will show a slight upturn since 1983. The Congress has appropriated funds for research facilities during this period, but these funds have, by and large, been appropriated either for large special purpose research facilities such as research accelerators or telescopes, or, in some cases as special appropriations to specific colleges and universities, appropriations put into appropriations bills late in the process without benefit of committee hearings of any kind of review of the scientific merit of the project involved. The Congress has a perfectly legitimate right to make such directed appropriations. That has never been the issue. The more important question which we in the Congress must answer is whether such ad hoc action is an adequate response to the problem, or is a comprehensive national policy for investment in research facilities necessary to best serve the current and future needs of this Nation.

Unfortunately, over the last 20 years or so, we have significantly undervalued and underfunded our research facilities in our Nation's colleges and universities, facilities absolutely crucial to our long-term ability to keep in an increasingly difficult international environment, an environment depending more and more on our ability to better train our young people and better focus on the future. As we have underfunded the facilities across the country, the scramble for limited funds has increased and as the scramble for limited funds has increased, many of the decisions that we are making related to who gets what facilities have become politicized rather than focused, as they should have and have in the past, on peer review. The question is, How do we make decisions on what universities receive what facilities?

Unfortunately, we have seen too much of the kind of politics growing into this area and I hope we are able to put a stop to it.

It is our responsibility in the Congress to make decisions about how to spend limited national resources in the pursuit of important national goals. In a time of limited resources, it becomes increasingly important that the Nation get the best value for each dollar spent. Ad hoc decisions to spend the Nation's science dollars on the basis of the committee assignments of Congressmen representing individual universities or on the basis of which institution can afford to hire a well-connected lobbyist are not, I submit, a sufficient or wise way of making these investment decisions.

Given the fact that the need is great and the stakes are high, it is perfectly understandable that more and more universities have in the last few years

cent. But it will be 15 percent of a much higher base.

Mr. President, isn't it clear why what is going on in the radical economic changes in the Soviet Union is of great importance to Americans and to this Congress? It can have a profound effect on what this country and our NATO allies need for defense in the future.

## RESERVATION OF LEADERSHIP TIME

Mr. PROXMIRE. Mr. President, I ask unanimous consent that the remainder of the time of the leader be reserved for his use later in the day.

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

Mr. PROXMIRE. Mr. President, I also ask unanimous consent that the time of the minority leader be reserved for his use later in the day.

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

## MORNING BUSINESS

The ACTING PRESIDENT pro tempore. The Senator from Wisconsin has reserved the time of the majority leader and the time of the Republican leader. Under the previous order, there will be a period for the transaction of morning business not to exceed beyond the hour of 9 a.m., with Senators permitted to speak therein for not to exceed 1 minute.

Mr. PROXMIRE. 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.

## ECONOMIC DISLOCATION AND WORKER ADJUSTMENT ACT

Mr. LEAHY. Mr. President. I rise today to discuss the Economic Dislocation and Worker Adjustment Act. The bill provides adjustment services and demonstration programs for dislocated workers. One provision requires employers to notify workers and communities before they close plants or layoff large numbers of workers. The ultimate goal of this legislation is to cushion the transition for workers and their communities when faced with the often harsh realities of industrial change.

I have heard from many Vermont business men and women who are concerned about the Federal Government's encroachment on private business decisions. I want to teli them that the substitute legislation that was introduced is not an encroachment.

I was very skeptical about S. 538 in its original form. I thought its requirements would have placed undue burdens on employers. I would not have voted for the original bill or the bill reported by the Labor Committee. The bill as originally introduced, required that employers consult with unions over a proposed shutdown. The bill reported by the Labor Committee dropped that intrusion but still required 180 days notice for the layoff or termination of employment of 500 or more workers. There was no distinction between a permanent closing and a temporary layoff in the reported bill. Businesses actively seeking business or capital in order to remain open were treated the same as those that were closing permanently. Senator METZENBAUM has made further changes in the bill resulting in the substitute we consider today.

The current legislation defines employers as having 100 or more workers and requires 60-day notice for a plant closing affecting 50 of them. A distinction is made between a closing and a temporary layoff. For a layoff the notice is required only when the employment loss affects one-third of the workers at a job site. Seasonal and part-time employees are not included in the determination of when advance notice is required. This change is important to Vermont's vital retail industry.

The compromise embodied in the substitute balances the needs of workers and State and local governments with the concerns of the business community. The exemptions in the substitute say that a firm would not be required to give advance notice of a closing if it is caused by the sale of a business, relocation within the community, completion of temporary projects, and strikes or lockouts. There is also an exemption for employers actively seeking capital or business in order to avoid or postpone a closing and who believe that notice would hurt their prospects. This will permit firms to seek new capital to refinance their troubled operations and keep Americans working.

This measure is not perfect. I would have preferred that the bill include a definition for the term "business circumstances that were not reasonably foreseeable." I hope the conferees on the trade bill will work to better define these terms. The process by which we arrived at the substitute demonstrates the need for the conferees to address the concerns of business while showing sufficient sensitivity to the needs of dislocated workers—for notice, training, education, and relocation.

No State is immune to worker dislocation. Vermont has had its share of plant closings. The changes in the substitute bill go a long way in providing a successful worker adjustment program. Hopefully this legislation will help workers and local communities cope with the realities of changing economies. That is why I have decided to support the substitute bill.

## IN PRAISE OF M. DANNY WALL

Mr. HATCH. Mr. President, it is a pleasure to add my name to those who applaud the nomination of Mr. M. Danny Wall to chair the Federal Home Loan Bank Board. Dan Wall has served as staff director of the Senate Committee on Banking, Housing, and Urban Affairs in both a minority and a majority position since 1979, and played a significant role in the regulatory reforms accomplished by this administration. In my judgment, he is superbly qualified to lead the thrift industry through the challenges it faces today.

Today's Bank Board Chairman needs a broad understanding of the legislative, regulatory, and market environment within which the banking industry must operate. He or she must also have the ability to attract a strong and capable staff. Again, Dan Wall meets these qualifications. His service with the Senate has already demonstrated his capacity for mastering new and highly technical information. Furthermore, his understanding of the role of the market is a clear one and one which will allow him to play a key part in the future developments of the financial services industry.

Mr. President, I congratulate President Reagan for this excellent nomination. We in the Senate will miss Dan's advice and counsel, but at the same time we understand the need to place our best people in positions of leadership in the administration. Our best wishes go with Dan and his family.

## THE BORK NOMINATION

Mr. BURDICK. Mr. President, the U.S. Senate will soon be called on to make one of the most important decisions in the last 50 years, a decision that will shape the Supreme Court well into the next century. In the week since the President submitted the nomination of Judge Bork for appointment to the U.S. Supreme Court, I have studied in depth the record of the nominee. I have come to the conclusion that Judge Bork must not be confirmed.

There is no lack of evidence on this nominee's record. He has published, he has spoken out, and he has made his voice heard for the last 25 years. And the evidence is compelling. This nominee is completely out of step with the needs and desires of the American people, as reflected in a long line of cases decided by the Supreme Court. He has been insensitive to the rights of women, to civil rights, and to freedom of speech.

For 200 years, Americans have enjoyed the protection of the first amendment. Judge Bork would introduce severe new restrictions. He has said it very plainly:

There is no basis for judicial intervention to protect scientific or literary expression.

One of the proudest moments in our history was the Supreme Court's endorsement of the principle of one person, one vote. Judge Bork disagrees. Gerrymanders and special districts that allow small groups to dominate Congress, unfairness that was thought to have been banished forever, could now rise again.

Key portions of the Civil Rights Act of 1964 came under Bork's attack at that time, and today he draws the line at affirmative action. It was not so long ago that the curse of segregation and discrimination rules this Nation. Must we win those battles again today?

This man is no conservative, who would respect precedent and practice judicial restraint, as the President has advertised. Judge Bork has never claimed that mantle for himself. Respect for the past? In one short article in 1971, this nominee found no fewer than 18 Supreme Court decisions that he felt were decided wrongly or for the wrong reasons. We can be sure that he will have no hesitancy to overturn our judicial tradition.

My colleagues know that I am not one to speak out of turn. I am normally very hesitant to criticize a nominee, especially when hearings have not yet been held. But the extremism in the record makes it essential that we stand up now, when our need to do so is urgent.

I would like to close with a brief comment for our friends who tell us that ideology is off limits in the confirmation procedures. I would like to remind the American people that even George Washington had a Supreme Court nominee rejected on the grounds of political views. And, I would like to recall for this body the words of the honorable Senator from South Carolina in a similar situation, just two decades ago, and I quote:

Therefore, it is my contention that the power of the Senate to advise and consent to this appointment should be exercised fully. To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent have prescribed.

Mr. President, we know that we are entering into a historic fight. The stakes are enormous for all of us. This nominee must not be confirmed.

## IS CABINET-LEVEL STATUS THE ANSWER?

Mr. THURMOND. Mr. President, the July 1987 issue of the Disabled American Veterans' magazine featured an incisive editorial by Mr. Charles E. Joeckel, Jr., executive director of the DAV, entitled "Is Cabinet-Level Status the Answer?", this article sets forth several reasons why the Veterans' Administration should be elevated to Cabinet-level status. Chief among these reasons is the need for the VA Administrator to be integrally involved in budget decisions with other Cabinet officers. In addition, the size and importance of the Veterans' Administration justifies establishing the Veterans' Administration as a Cabinet-level department.

As a veteran and life member of the DAV, I commend this insightful article to my colleagues.

Mr. President, I ask unanimous consent that this editorial be printed in the RECORD.

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

IS CABINET-LEVEL STATUS THE ANSWER?

Caspar Weinberger, Elizabeth Dole, James Baker, and Edwin Meese. They're familiar names to most of us.

They're all members of the President's Cabinet, of course. But we're familiar with these folks, particularly, for more reasons than the status they enjoy at the White House.

Each is an outspoken advocate for the programs their departments implement, and the policies they adopt. Each, too, enjoys frequent and easy access to the President. And each of them—although clearly members of the President's inner team—have been prompted to publicly oppose White House policy when their departments were adversely affected in the past.

There's long been a question of loyalties among heads of the major federal departments and agencies. Can an agency head be true to the President who put him in the job, while demonstrating equal loyalties to his party and the constituents he serves?

The four Cabinet officers I've cited have publicly resolved that conflict. The White House may send word to Congress that they're prepared to compromise on the Defense Department budget, for example. But you can bet Secretary of Defense Weinberger will still be up on Capitol Hill, scrapping for full funding for defense programs—without compromise or retreat.

Indeed, in Washington—where the careful orchestration of legislation among the White House and Congress is a daily occurrence—such criticism of Administration desires from within the President's Cabinet can help rather than hinder a bill's progress.

Congress is extremely sensitive to a lack of candor on the part of White House officials. If they don't think they're getting both sides of an issue, they'll hold things up until they can dig out that other side on their own.

Simply put, that's how the federal government takes care of business. There are only so many federal dollars to go around. Only so much time to consider only so many issues. And only so many people who have the clout to get the President's ear, while selling their department's programs to both the White House and the Congress.

That's why the VA so often finds itself taking a backseat to other issues before the Congress and the Administration. And that's why the current VA Administrator, Thomas K. Turnage, is boxed out of the decision making process.

In one direction he faces the Office of Management and Budget (OMB) stone wall. OMB is a shop where only money talks, and the less money involved the easier it is for them to hear.

In another direction, Turnage faces a lack of accessibility to the President. He is an agency head and not a member of the President's Cabinet. As such, he is expected to weave his way through a maze of Presidential protectors if he is to gain access.

And finally, and at every turn, he is reminded that the Republican party helped put him in the job he now has, and the party demands fierce loyalties in return.

Last year at our National Convention in Reno, Nev., I described the DAV's expectations of the man who fills the top VA job. And I outlined what America's disabled veterans have the right to expect from the agency. Those comments bear repeating:

"You must realize," I told the Administrator, "the absolute concrete commitment we all share for disabled veterans, and it's a commitment we do not believe is subject to modification by reason of political loyalties or interpretation by reason of fiscal priorities. We expect the VA administrator to be a veterans' advocate. Indeed, our expectations are that the administrator's advocacy exceed even the veterans' organizations.

"He is the veterans, and particularly the service-connected combat disabled veterans, last best hope for a fair chance at a full life. If we find that advocacy wavering, we will respond. If we find that advocacy held hostage by political considerations, we will respond. And if we find that advocacy is anything but unparalleled in its strength of spirit and commitment, we will respond with all the might of a million-member organization."

I mention this, in context of discussing Cabinet-level status for the Administrator of Veterans' Affairs, because of recent troubling events on Capitol Hill.

Earlier in the year, the Administration proposed a VA budget that sought to make deep cuts in VA health care and regional office personnel, reduce the scope of entitlement to burial plot allowances, increase user fees for VA-guaranteed home loans, and remove Congress from its oversight responsibility of the VA through the automatic indexing of benefits—among other provisions.

We anticipated vigorous opposition to these proposals from the VA. After all, each White House notion placed important VA programs in serious jeopardy. Yet, that opposition was not forthcoming.

Instead, disabled veterans had to turn to Congress for the voice of advocacy the programs demanded. And, as the VA budget winds its way to completion in Congress, that advocacy has been strong in both the House and the Senate.

Then we have the issue of improved hearing-loss regulations. As you'll recall, the VA developed improved hearing-loss criteria after some prodding by Congress and the DAV.

The criteria addressed the fact that current hearing-loss criteria did not reflect the full extent of disability by veterans in question.

The VA then sent the criteria to OMB, who first stalled the routine review, then rejected it out of hand because of its $33-40 million price tag. It was returned to OMB, where that agency then sat on the measure

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ioned protectionism. The bill is just plain old-fashioned protectionism, and unfortunately it is likely to have the same old-fashioned effect that protectionism always has, that is to say, the shrinking of world trade or at least the reduction in the growth of world trade and that will have the effect to some degree or other reducing the competitiveness of the United States and the efficiency of our industry and productivity of our industry and ultimately the standard of living of many of our people.

It seems to me that the unstated goal on the part of many in Congress, not just this House but others as well, is to bash our Asian trade partners, Japan, Korea, Hong Kong, and the Republic of China, all of which have trade surpluses with us. Many Members have engaged in outright Japan-bashing while others have been more subtle in their criticism of Japan and other Asian nations.

While it is true that many Asian nations engage in unfair trade practices which contribute to our trade deficit, at least one of those nations is making very great efforts to improve the trade relations with the United States, and that is the Republic of China.

If the fact is that while some, such as Japan, have been dragging their feet, the Republic of China has taken several very important and substantive steps. One of the most important initiatives has been the Republic of China's "buy American campaign." Since this program was instituted in 1978, the Republic of China has dispatched 12 special procurement missions to the United States to purchase more than $8 billion in agricultural and industrial products from United States suppliers.

The ROC is also the seventh largest overseas market for U.S. agricultural products. Just recently, the United States and the Republic of China renewed a long-term grain agreement under which the ROC is committed to purchase more than 18 million tons of American grain over the next 5 years. In addition, the Republic of China has agreed to restrict exports of rice to Third World nations so that American rice markets in the Third World are not affected.

Other major exports from the Republic of China, that include textiles, machine tools, and steel, are the subject of additional agreements between our two nations. For example, the U.S. Trade Representative concluded a new bilateral agreement on textiles last July in which the Republic of China agreed to a low 0.5 percent annual growth rate for exports of textiles into the United States. This growth rate is the lowest among the so-called big three. A voluntary restraint agreement [VRA] has been reached on machine tools, and an agreement limiting monthly exports of steel to only 20,000 short tons precluded the need to enter into a VRA for steel.

Progress on the part of the Republic of China is not limited solely to exports. Several important market-opening initiatives have been advanced as well. Last December, the ROC agreed to break its 50-year monopoly on cigarettes, beer, and wine and to open its market to U.S. products. In the area of services, U.S. banks will now be allowed to join the united debit credit system of the ROC and to issue credit cards there. In addition, several types of insurance business have been opened to U.S. insurance companies, and consultations aimed at securing full access to the insurance market are continuing.

Furthermore, while many nations tie their currency to the dollar, thereby insulating them from the positive trade effects of the falling dollar, the ROC has taken steps to revalue their currency. Since early 1986, the new Taiwan dollars have appreciated by 12.5 percent. And the new Taiwan dollars continue to rise at the rate of a few cents per day.

Mr. President, one of the most important developments in trade relations with the Republic of China occurred in 1971. In that year, the ROC was expelled from the GATT for political reasons. However, in 1979, the ROC reached an agreement with the United States to apply most of the GATT rules to U.S.-ROC trade. Under this agreement, there has been significant reduction in tariffs with an average effective tariff rate of 7.64 percent, which will be reduced to 5 percent by 1990.

It is important to note that these developments have occurred after the United States broke official ties with the Republic of China as a precondition for establishing diplomatic relations with mainland China in 1979. Other progress is also being made in the ROC. Last week, President Chiang Ching-Kuo decreed an end to the martial law which had been imposed by Chiang Kai-Shek in 1949. This is a historic first step toward democracy which was helped along by the ROC's relations especially trade relations with the United States.

Mr. President, at a time when the Republic of China is making such a concerted effort to improve relations both within and without the island nation, we in the U.S. Senate should make a concerted effort to help the ROC along the way. Engaging in generic Asian-bashing on this trade bill can only be counterproductive. I urge my colleagues to keep these thoughts in mind.

## NOMINATION OF ROBERT BORK TO BE SUPREME COURT JUSTICE

Mr. HUMPHREY. Mr. President, there has been, in my view, a wave of hysterical reaction in certain quarters to the President's nomination of Robert Bork to the Supreme Court. I think it is time for this hysteria to give way to reasoned examination of the facts and the issues.

Last year several Senators sharply criticized some of President Reagan's lower court nominations based on challenges to their qualifications. Many of these same Senators stressed that they would have no qualms confirming even highly conservative nominees. The prototypical example of such a clearly qualified conservative was none other than Judge Robert Bork.

For example, the syndicated Evans and Novak column report in May of 1986 that the junior Senator from Illinois referred to Judge Bork in the following vein:

> Disavowing an ideological test, the Senator told us he would confirm Appeals Court Judge Robert Bork for the Supreme Court despite his conservative views.

The words of the junior Senator from Illinois as quoted by Evans and Novak.

Mr. President, the chairman of the Judiciary Committee later echoed this same fair-minded sentiment. Last November he acknowledged that if the President nominated Judge Bork for the Supreme Court and if Bork proved to be similar to Justice Scalia, the chair said, "I'd have to vote for him and if the groups"—speaking of special interest groups—"and if the groups tear me apart, that's the medicine I'll have to take." The statement of the chairman of the Senate Judiciary Committee last November.

These forthright statements are not surprising. They merely acknowledged the judgment the Senate had already made when it confirmed Judge Bork to the powerful D.C. Circuit Court of Appeals without a single dissenting vote in 1982, 5 years ago. Most law authorities regard the Circuit Court for the District of Columbia as being the most powerful court, the most important court, in any event, in the Nation, with the exception of the Supreme Court itself. Is it not striking that with respect to the nomination of a person to that court only 5 years ago, not one Senator, not one either in committee or on the floor, expressed an objection or raised a single negative note in connection with that nomination.

If Mr. Bork were the racist that many Senators seem to suggest; if he were some sort of Neandethal as some Senators seem to suggest; then I believe that one of two things happened in 1982. Either Senators were terribly

negligent in their duties in confirming to the court which is second only to the Supreme Court, Judge Bork, in that year; or there is an awful lot of hypocrisy and double standard in this body in 1987.

One of those two things must obtain. You cannot have it both ways. Senators who are now vitriolic opponents, whose opposition is vitriolic and bitter, in 1987 who, as Members of this body, confirmed Judge Bork to the D.C. Superior Court of Appeals, cannot have it both ways. They cannot be opposed today so bitterly and vehemently and have us believe they were doing an adequate job in 1982 when Judge Bork was confirmed without a single word of objection.

Indeed, his nomination, again, to this important court, D.C. Circuit Court of Appeals was so routine, was regarded by Members as so routine, that not one Senator on that side of the aisle or this, asked for a rollcall vote either in committee or on the floor. That says something about how well regarded Judge Bork, Robert Bork, was in 1982.

But, today, thanks to Presidential politics and other considerations, some Senators are finding they have to flip-flop on this issue and are doing so in a most disgraceful manner.

To cite another Senator who was here in 1982, on the subject of Robert Bork's qualifications to serve on the Federal bench, the Senator who is now the junior Senator from Montana had this to say at the confirmation hearings before the Judiciary Committee:

I want to congratulate the President on his nomination of you. I think there is no doubt that you are eminently qualified to serve in the position to which you have been nominated. There is no doubt in my mind that you will be confirmed, and I hope very quickly and expeditiously.

Given these accolades and endorsements from Senators on the other side of the aisle, one would think that the President's subsequent nomination of Judge Bork to the Supreme Court would have been warmly received on a bipartisan basis. What selection could be more logical than an experienced, highly-qualified member of the second highest court in the land who had received unanimous Senate approval and high bipartisan praise for that lofty post?

Moreover, Judge Bork's performance on the D.C. circuit has been entirely consistent with the principles of conscientious judicial restraint which he expounded before the Judiciary Committee in 1982. He has performed exactly as he said he would when he earned our unanimous confirmation at that time.

How can it be, then, that some Members of this body are now prepared to disavow their prior endorsements of Judge Bork and declare that he is suddenly unfit for appointment to the Supreme Court even in advance of a hearing?

Many Members of this body are lawyers. While to be certain the legislative hearings are not judicial hearings, one would expect that lawyers—at least, lawyers—would remember the canons of ethics and at least give the appearance of objectivity and fair-mindedness and open-mindedness, at least until the defendant, if you will, has had a chance to answer the indictment that has been made against him, irresponsibly, outrageously, in the press in these last few weeks by Members of this body and many in our society, principally from groups that are decidedly to the left of the middle of the political spectrum.

The verbal and rhetorical gymnastics employed to evade that question have been remarkable for their creativity, but rather deficient in their logic.

We are mainly told that this appointment must be treated differently because it will shift something called the "ideological balance" of the Court. And the ideological balance, it turns out, is a state of affairs which preserves all decisions favorable to liberal interest groups as sacred precedent, while leaving decisions favored by conservatives open to "prudent reconsideration."

Of course, all Supreme Court appointments shift the ideological balance of the Court, and rightly so. That is one of the things that Presidential elections are all about—as candidate Walter Mondale and his supporters repeatedly stressed in the 1984 campaign that the election is about who will appoint members of the Supreme Court. Mr. Mondale warned the electorate that President Reagan's reelection would enable him to put his stamp on the Supreme Court. And the voters in 49 States responded by making it clear that that was just what the doctor ordered!

Mr. President, I do not suggest that the election turned exclusively on that issue, but it was a prominent issue made prominent by the Democratic candidate. Now we see some Senators would like to deprive President Reagan and the American people what the President proposed in this realm, namely, to nominate to the Federal bench at all levels persons who would exercise judicial restraint.

But, now that President Reagan is on the verge, so it seems, of adding a judicial conservative who will make a difference, certain Senators are retracting their earlier statements—or hoping the public has forgotten about them. I assure them the public has not forgotten. These erstwhile Bork supporters now insist that only a nominee who satisfies the Mondale litmus tests should be confirmed. They wish to abrogate, for this President, a President's established historical prerogative to appoint nominees who reflect his judicial philosophy. A more crudely anti-democratic policy would be difficult to imagine.

A brief reflection on a strikingly similar precedent reveals the hypocrisy of the anti-Bork hysteria.

At the end of the 1967 Supreme Court term, Justice Tom Clark resigned, just as Justice Powell resigned. President Johnson promptly nominated a replacement, Thurgood Marshall.

It was immediately clear to everyone on both sides of the aisle that Mr. Marshall would decidely, decisively, and extraordinarily shift the Court's philosophical balance toward a more liberal position.

Although a small coalition of Southern Democrats raised their concerns about Marshall's positions on criminal law issues, there was no genuine threat to his confirmation—and certainly not from the Republican Members.

The Senate recognized that Thurgood Marshall's established qualifications and integrity as a court of appeals judge, like that of Judge Bork, and as Solicitor General, likewise the experience of Judge Bork—an interesting parallel, is it not, both in terms of circumstances and the experience and qualifications—were beyond genuine dispute.

Even though many disagreed with his decidedly liberal judicial philosophy, which he has practiced, as expected, they recognized that President Johnson was well within his prerogative in selecting such a nominee. And so before Labor Day arrived, Marshall had been confirmed by a vote of 69 to 11.

Mr. President, with respect to Judge Bork, we are not even going to begin hearings until September 15. This will be the longest elapsed time between the submission of a nomination and the beginning of hearings in the last quarter century.

The harsh and uncompromising ideological standards being used in opposing the Bork nomination stand in marked contrast to the confirmation of Justice Marshall 20 years ago. Unless the Bork opponents wish to introduce an unprecedented element of crass partisan obstructionism into the Supreme Court appointment process, they should follow that historical example and give Judge Bork the fair and reasoned consideration he so clearly deserves.

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## RECESS UNTIL 2 P.M.

The PRESIDING OFFICER. Under the previous order, the hour of 12:45 having arrived, the Senate will stand in recess until 2 p.m. today.

Thereupon, at 12:45 p.m., the Senate recessed until 2 p.m.; whereupon, the Senate reassembled when called to

A joint resolution (H.J. Res. 324) increasing the statutory limit on the public debt.

The Senate proceeded to consider the joint resolution.

## MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that there now be a period for the transaction of morning business and that Senators may speak therein up to 10 minutes each, and that the period not extend beyond 7:30 p.m. today.

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

Mr. MOYNIHAN addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

## FAMILY SECURITY ACT—S. 1511

Mr. MOYNIHAN [subsequently said]. Mr. President, earlier today the Family Security Act was introduced. On that occasion, I asked that the bill be held at the desk and be open for Senators who might wish to be listed as original cosponsors before the end of the day.

I am happy to report that Senator FOWLER of Georgia, Senator GRAHAM of Florida, and Senator SANFORD of North Carolina asked that they be recorded as original cosponsors of the legislation. That is Senators FOWLER of Georgia, GRAHAM of Florida, and SANFORD of North Carolina.

Mr. President, may I just note that on this first day of introduction, although no effort was made to obtain cosponsors other than from members of the Finance Committee, to the very, very pleasant surprise of those who have worked in the Finance Committee on the legislation, there are now 26 cosponsors, and I look for the day, as do the others, when there is a clear majority for this legislation in the body.

Mr. President, Mr. BINGAMAN also asks that he be included as a cosponsor as well. Mr. BINGAMAN will now bring the number to 27.

## ORDER OF PROCEDURE

Mr. HUMPHREY. Mr. President, how much time remains for morning business?

The PRESIDING OFFICER. Morning business may not run beyond 7:30 p.m. Senators may speak for up to 10 minutes each.

Mr. HUMPHREY. I thank the Chair.

## NOMINATION OF JUDGE ROBERT BORK TO BE A JUSTICE OF THE SUPREME COURT

Mr. HUMPHREY. Mr. President, since the nomination by President Reagan of Robert Bork to fill the vacancy on the Supreme Court, there have been a number of emotional statements made, including statements by Members of this body, I regret to say. Some of those statements were so emotional, so utterly devoid of fact, so utterly devoid of responsibility, that they constitute demagoguery, pure and simple.

I cite, as an example, the remarks delivered on the floor on the day of the nomination by a Senator who has been in this body for a good many years and who ought to know better. He said with respect to the nominee—to quote the Senator—that the nominee'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 could be censored at the whim of Government.

It is astonishing to believe that a U.S. Senator—indeed, one who is a lawyer and one of great experience—could utter such contemptible rubbish in public, much less within the confines of this Hall.

This Senator who is speaking is not a lawyer, but it seems to him, nonetheless, that at least in the case of nominations to the Supreme Court, a certain amount of due process and fairness is in order, a certain level of ethical standard, a higher standard than we ordinarily expect in this body. We expect, after all, as realists, that there is going to be a certain amount of hyperbole in our debates; but statements of the kind I have cited go far beyond hyperbole and in fact below the ethical standards, it seems to me, of a Member of this body.

Mr. President, I am not a lawyer, but I have consulted one of the modern law school texts on legal ethics and with respect to due process, I cite some of the passages. This, by the way, is the text called "Modern Legal Ethics," by Charles Wolfram, published by West Publishing Co., 1986.

Chapter 17, section 5.5:

A fundamental principle of due process is that a judge—

I am implying here that we are judges. After all, we will be passing judgment on the suitability of Judge Bork to serve on the Supreme Court.

A fundamental principle of due process is that a judge who is otherwise qualified to preside at a trial or other proceeding must be sufficiently neutral and free of predisposition to be able to render a fair decision.

From page 993 of the same text:

But if the circumstances or contents of a judge's statements indicate that the judge's mind is made up on the factual or legal merits of a reasonably litigated issue and this has occurred before the judge has heard the evidence and arguments of the litigants, then the judge should not sit.

There are a number of like passages in this and, I suspect, many other texts on legal ethics.

With regard to the remarks to which I alluded earlier, I suggest that there is within them a gratuitous insult to black Americans. Irrespective of who is sitting on the Court, no black is going to sit behind a segregated lunch counter or move to the back of a bus or subject himself to segregation. Such a charge on its face is preposterous.

To suggest that any American, a sitting judge on a circuit court of appeals, would advocate a return to discrimination and segregation is just plain preposterous. It is hard to think of words sufficient to censure these kinds of remarks: that rogue police could break down citizens' doors; that writers and artists could be censored at the whim of government.

Mr. President, let us recall, in the context of the remarks I have cited, that in 1982 Robert Bork was nominated to the Circuit Court of Appeals for the District of Columbia, regarded by most legal authorities as the second most important court in the Nation—in the entire Nation—second only in importance to the Supreme Court itself.

When Robert Bork came before the Senate Judiciary Committee 5 years ago, his nomination was carefully considered and was reported out, without dissent, to the floor, where again, I presume, most Senators would agree that it was carefully considered on the floor and regarded as so noncontroversial that not one Senator from this side of the aisle or that side of the aisle—from which, may I observe, many of these caustic remarks are emanating—without one Senator asking for a rollcall vote.

Judge Bork, at the time his nomination was submitted, was rated by the American Bar Association as exceptionally well qualified—the highest rating the ABA gives ever to a judge.

Yet we have remarks that indicate Judge Bork is somehow the world's worst scoundrel. I suggest to this body that either Senators who make such remarks or remarks similar to them were extraordinarily derelict in their duty 5 years ago and confirmed to the second most important court in the Nation a racist, a bigot, a nincompoop, and a scoundrel, either they were grossly deficient in the performance of their duties when they were called upon to pass in judgment of Judge Bork 5 years ago, or else they are today guilty of the most transparent and disgusting hypocrisy.

I think which of those two it is is apparent to everyone, including the Washington Post, may I say, with which newspaper's editorials I do not often agree, but I most certainly do in this case.

Mr. President, on this same score recently a retired judge from the New Hampshire bench wrote about another matter, but in the same vein about the demeanor expected of participants in a hearing. Let me cite the words of Judge George Grinnell, who is a retired district court judge from Derry, and he says, in part, "Specifically, the prime rule for a fair hearing"—fair, that is a word we ought to be hearing a lot about in connection with this nomination, fairness, ethics, decency—"the prime rule for a fair hearing before a judge, referee, investigating board, jury or just a plain political panel is that those conducting the affairs have an open mind, listen to all of the evidence, refrain from expressing opinion before and during the hearing, refrain from characterizing the witnesses as liars, good, bad or otherwise, before and during the hearings, and lastly to bend over backward, so to speak, to conduct a fair and impartial investigation so that justice will be done."

I suggest by these standards, and again recognizing in the political realm we do not expect exactly the same standards as we expect and insist upon in the court of law, but nonetheless we should have a right to expect something approaching these standards when we are dealing with a nomination to the Supreme Court, that by these standards outlined by Judge Grinnell, a number of the Members of this body have fallen far, far short from what can be reasonably expected.

Mr. President, I make one other point. The chairman of the Judiciary Committee has stipulated and stated that the hearings on the Bork nomination will not begin until September 15, some 70 days after the nomination was officially received by the Senate.

Mr. President, in the last quarter century; that is, during the modern times of computers and easy access to information, in the last 25 years, the last quarter century, the lag time between official receipt of the nomination to the beginning of a hearing in the Judiciary Committee for a Supreme Court nominee has been 18 days versus 70 days. The average has been 18 versus 70. If you look at individual cases, the maximum I think was about 40 days. So we will exceed by almost twice the factor of two the previous longest delay between the receipt of the nomination and the beginning of a hearing, once again, in my opinion, further evidence of a lack of fairness and a lack of decency and ethics.

I would hope that Senators, and particularly those on the Judiciary Committee, would reconsider the remarks that some of them have made, some—I emphasize "some"—and see if we cannot muster a sense of fairness about this and fair play, because I would hate to see a bad precedent set.

I can assure the Members on the other side of the aisle if this is the kind of game they want to play with Supreme Court nominations, then turn about is fair play on the next nomination coming from a Democratic President.

Mr. President, if the majority leader will just forbear one moment further, I ask unanimous consent that a report done by the Congressional Research Service showing the number of days that have been consumed in the various segments of the nomination process over the last 25 years be printed in the RECORD.

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

THE SPEED WITH WHICH ACTION HAS BEEN TAKEN ON SUPREME COURT NOMINATIONS IN THE LAST 25 YEARS

SUMMARY

During the past 25 years, the Senate has received 17 Supreme Court nominations. Of these 17 nominations, 12 were confirmed by the Senate, two were rejected, two were withdrawn by the President, and one is pending.

The first public step taken in the process of nominating a Supreme Court Justice is the President's announcement of an intention to nominate a specified person to the Court, with the Senate's last step typically being either a vote confirming or rejecting the nominee. Time intervals between particular steps in the nominating process shed light on how promptly the President, the Senate Judiciary Committee or the full Senate acted at that stage on any given nomination. Examination of these time intervals reveals, among other things, the following:

Typically, in the last 25 years, Presidents have sent Supreme Court nominations to the Senate quickly after announcing them. A deviation from this pattern was the Senate's receipt of the nomination of Sandra Day O'Connor 43 days after President Reagan announced he would nominate Judge O'Connor.

In the majority of instances during the last quarter century the Senate Judiciary Committee has held hearings on Supreme Court nominations within 15 days of their receipt by the Senate. The longest periods of time to elapse between Senate receipt of nomination and start of hearings were for the 1986 nominations of William H. Rehnquist and Antonin Scalia—39 and 42 days respectively.

The time which elapsed between start of confirmation hearings by the Judiciary Committee and the Committee's eventual approval also varied considerably—from a few instances in which the Committee began hearings and voted its approval on the same day, to the 1968 nomination of Abe Fortas to be Chief Justice, which received Committee approval 68 days after the start of hearings.

The Judiciary Committee typically has reported Supreme Court nominations to the Senate almost immediately after approving them. Exceptions to this rule, however, were Committee reports on the nominations of Thurgood Marshall in 1967 and Clement Haynsworth in 1969—which respectively reached the Senate 18 and 34 days after Committee approval.

Senate debate on Supreme Court nominations ordinarily has commenced within ten days of a favorable report by the Judiciary Committee. Most out of the ordinary in this respect were the 1986 Rehnquist and Scalia nominations, on which the Senate began 28 and 34 days respectively after receiving favorable Committee reports.

The time interval between start of Senate debate and final Senate action either approving or rejecting a Court nomination also has differed greatly. At one extreme were seven nominations on which the Senate began debate and voted for confirmation on the same day; at the other extreme was the 26-day period between the start and conclusion of Senate debate over the Carswell nomination in 1970.

During the 1962–87 period, the most expedited of all nominations was the 1962 nomination of Byron R. White, which was confirmed by the Senate 12 days after President Kennedy announced his choice of Mr. White. The most protracted process leading to confirmation involved the 1986 Rehnquist and Scalia nominations, which were confirmed by the Senate 92 days after being announced by President Reagan.

ABSTRACT

This report examines how quickly nominations to the Supreme Court in the last quarter century have moved through various stages in the nomination and confirmation process. It finds that some nominations sped through the entire process, while others took months before finally being confirmed or rejected. In other cases, nominations moved through certain stages of the process quickly, only to be held up at another stage.

THE SPEED WITH WHICH ACTION HAS BEEN TAKEN ON SUPREME COURT NOMINATIONS IN THE LAST 25 YEARS

When President Ronald Reagan on July 1, 1987 announced his intention to nominate U.S. Court of Appeals Judge Robert H. Bork to the Supreme Court, controversy arose immediately over the President's choice as well as over how quickly the Senate should act on the nomination. President Reagan urged the Senate to expedite confirmation hearings so that the recent vacancy created by the retirement of Justice Lewis F. Powell would be filled when the Supreme Court's new term begins on October 5.[1] Although legislative strategists at the White House were said to hope for a Senate vote on the Bork nomination no later than September, some members of the Senate's Democratic majority predicted that the confirmation process would extend well past the opening of the Supreme Court's Fall term.[2]

If past experience were used as a guide, the Judiciary Committee and the Senate would have ample precedent to act either quickly or slowly on the Bork nomination. The history of the last quarter century shows that nominations to the Supreme Court have been reviewed and acted on with widely varying degrees of speed.

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[1] Boyd, Gerald M. Bork Picked for High Court; Reagan Cites His 'Restraint'; Confirmation Fight Looms. New York Times, July 2, 1987. p. A1.

[2] Greenhouse, Linda. Senators' Remarks Portend a Bitter Debate over Bork. New York Times, July 2, 1987. p. A22. One Democratic Member of the Judiciary Committee said the Senate was unlikely to act on the Bork nomination before November, and he predicted the Committee's investigation of the nominee would be "the most complete and exhaustive investigation of anyone ever nominated for the Supreme Court." Ibid.

In the last 25 years, beginning with President Kennedy's nomination of Byron R. White in 1962, the Senate altogether has received 17 Supreme Court nominations. Of those 17 nominations, twelve were confirmed by the Senate, two were rejected, two were withdrawn by the President, and one (the Bork nomination) is pending. A listing of the 17 nominations, and the chronology of actions taken on them, appear below as Table 1. For each nomination, the table shows the dates on which the following steps occurred: the President announced the nomination; the President sent the nomination to the Senate; the Committee on the Judiciary held hearings on the nomination; the Committee voted its approval of the nominee; the Committee submitted its favorable report of the nomination to the Senate; the Senate debated and took final action on the nomination.

The first public step taken in the process of nominating a Supreme Court justice is the President's announcement of an intention to nominate a specified person to the Court, with the Senate's last step being either a vote confirming or rejecting the nominee. Some nominations, one sees from Table 1, sped through the entire confirmation process, while others took months before finally being confirmed or rejected.[3] The process usually was more drawn out when controversy arose over a nomination; conversely, it usually was more expeditious when there was little opposition to the nominee. Some nominations moved through certain stages of the confirmation process quickly, only to be held up at another stage. Time intervals between particular steps in the nominating process shed light on how promptly the Presdient, the Senate Judiciary Committee or the Full Senate acted at that stage on any given nomination.

INTERVAL BETWEEN PRESIDENTIAL ANNOUNCEMENT AND SENATE'S RECEIPT OF NOMINATION

A President officially nominates a person to the Supreme Court when he sends to the Senate a formal communication with his signature declaring the nomination. Typically in the last 25 years Presidents have sent Supreme Court nominations to the Senate quickly after announcing them.

Most prompt in this respect was Lyndon B. Johnson. All four of President Johnson's nominations—those of Abe Fortas in 1965, Thurgood Marshall in 1967, Mr. Fortas again in 1968 (this time to be Chief Justice), and Homer Thornberry in 1968—were sent to the Senate on the day of their announcement. During the 1962—87 period, the only other Court nomination to be sent to the Senate on the same day of its announcement was that of G. Harrold Carswell; it was announced and transmitted by President Richard Nixon on January 19, 1970.

The names of President Nixon's other Supreme Court nominees—Harry A. Blackmun in 1970, Lewis F. Powell in 1971, and William H. Rehnquist in 1971 (to be Associate Justice)—were sent to the Senate the day after their announcement.

For all but one of the other Court nominations during the 1962–87 period, the interval between Presidential announcement and Senate receipt ranged from 2 to 7 days. This was the case with the nominations of Byron R. White and Arthur J. Goldberg in 1962, Warren E. Burger in 1969, Clement Haynsworth in 1969, John Paul Stevens in 1974, William H. Rehnquist (to be Chief Justice) and Antonin Scalia in 1986, and Robert H. Bork in 1987.

The only Supreme Court nomination for this period to have been received by the Senate more than a week after it was announced was that of Sandra Day O'Connor; the interval between announcement and Senate receipt was an out of the ordinary 43 days. In announcing the O'Connor nomination on July 7, 1981, President Reagan said he would send it to the Senate "upon completion of all the necessary checks by the Federal Bureau of Investigation . . ."[4] The nomination was submitted to the Senate on August 19, 1981. The six-week delay was noted in one wire service story, which reported that while President Reagan has announced the nomination July 7, "details making it formal were not completed until this week."[5] Although during this period no Senator expressed opposition to the O'Connor nomination (foreshadowing a 99–0 confirmation vote by the full Senate on September 21), the Reagan Administration was engaged in addressing criticisms of the nominee made by anti-abortion groups.[6]

INTERVAL BETWEEN SENATE RECEIPT OF NOMINATION AND START OF COMMITTEE HEARINGS

During the past 25 years, the Senate Judiciary Committee in the majority of instances has held hearings on Supreme Court nominations within 15 days of their receipt by the Senate. Coming within this 15-day interval were the White, Goldberg, Fortas (1965), Fortas (1968), Thornberry, Burger, Carswell, Blackmun, Powell, Rehnquist (1971) and Stevens nominations. The nomination on which the Judiciary Committee held hearings most promptly was that of John Paul Stevens; committee hearings on Mr. Stevens were held on December 8, 1975, seven days after the nomination had been received by the Senate.

More time elapsed before the start of Judiciary Committee hearings on three Court nominees—O'Conner (21 days), Haynsworth (26), and Marshall (31).

Of all the nominations in the 1962-87 period, however, the Rehnquist and Scalia nominations in 1986 saw the longest periods of time elapse between receipt by the Senate and start of committee hearings—39 and 42 days respectively.[7]

INTERVAL BETWEEN START OF COMMITTEE HEARINGS AND COMMITTEE APPROVAL

A usually reliable indication of whether difficulties or "smooth sailing" lay ahead in the confirmation process for a nomination to the Court was the time which elapsed between the start of Judiciary Committee hearings on the nomination and the Committee's eventual approval.

At one extreme were a few occasions on which the Committee began hearings and approved a Supreme Court nomination on the same day—those involving the White nomination in 1962 and the Burger nomination in 1969. At the other extreme was the nomination of Justice Abe Fortas in 1968 to be Chief Justice, which received Committee approval 68 days after the start of hearings. During this interval, the Committee held 10 days of hearings on the Fortas nomination.

Other nominations for which the interval between start of Committee hearings and Committee approval was relatively short were these: Stevens—3 days, Fortas (1965)—5, Blackmun and O'Connor—6, and Scalia—9. On the other hand, nominations for which this interval was relatively long were: Goldberg—14, Rehnquist (1986)—16, Powell—19, Rehnquist (1971)—20, Carswell—20, Marshall—21, and Haynsworth—23.

In all of the above-noted cases where Committee approval of a nomination came relatively soon after the start of hearings, the eventual vote by the full Senate in favor of confirmation was unanimous or almost unanimous. By contrast, in all but two of the cases where Committee approval came after more protracted hearings, the eventual decisive vote by the full Senate found at least 11 Senators opposed to confirmation.[8]

INTERVAL BETWEEN COMMITTEE APPROVAL AND SUBMISSION OF REPORT TO SENATE

After a Judiciary Committee vote approving a Court nomination, the next step in the confirmation process is the Committee's submission of a favorable report to the Senate. This report is a simple one-page document containing the name of the nominee and the Committee Chairman's signature.

During the 1962-87 period, the Senate Judiciary Committee typically has reported Supreme Court nominations to the Senate almost immediately after approving them. Indeed, in ten instances, the Committee's favorable report of a nomination was submitted in the Senate on the same day of Committee action approving the nominee,[9]

[3] The most expedited of all nominations during this period was the 1962 nomination of Byron R. White, which was confirmed by the Senate 12 days after President Kennedy announced his choice of Mr. White. The most protracted process leading to confirmation involved the 1986 nominations of William H. Rehnquist and Antonin Scalia, which were confirmed by the Senate 92 days after being announced by President Reagan.

[4] U.S. President, 1981- (Reagan). Supreme Court of the United States, July 7, 1981. Weekly Compilation of Presidential Documents, v. 17, July 13, 1981. p. 729.

[5] United Press International. O'Connor Hearings Scheduled. Washington Post, Aug. 21, 1981. p. A12.

[6] See, for example: Peterson, Bill: For Reagan and the New Right, the Honeymoon is Over. Washington Post, July 21, 1981: A2; Hilts, Philip J. White House Sets up "Pipeline" for Disgruntled Conservatives, July 27, 1981. p. A8; Barbash, Fred. "Vindictive" Person Opposing O'Connor, President Asserts. Washington Post, Aug. 15, 1981. p. A2.

[7] Expedited hearings, favored by majority Republicans on the Judiciary Committee, were resisted by some Committee Democrats, who wanted more time to study the records on the two nominees. Kurtz, Howard, Rehnquist, Scalia Hearings Set This Month. Washington Post, July 10, 1986. p. A14.

Eventually, on July 18, 1986, a written agreement was reached between Committee Republicans and Democrats. Under the compromise, the beginning of the Rehnquist and Scalia confirmation hearings was delayed until July 29 and August 5 respectively (to afford Democrats more time to study the nominees' records). In return (in response to Republican concerns that there be no further delay), Committee votes on the two nominations were tentatively set for August 14 and full Senate consideration planned for the first week after the summer recess. Kurtz, Howard. Democrats Get Week's Delay on Hearings for High Court. Washington Post, July 19, 1986. p. A2.

[8] The two exceptions were the Goldberg nomination in 1962 (which the Senate approved by voice vote) and the Powell nomination in 1971 (approved by the Senate in an 89-1 vote). Accounting in part for the length of the hearings on the relatively uncontroversial Powell nomination, it should be noted, was that they were held jointly with hearings on the more controversial Rehnquist nomination.

[9] Receiving Committee approval and reported to the Senate on the same day were the White, Goldberg, Fortas (1965), Burger, Powell, Rehnquist (1971), Stevens, O'Connor, Rehnquist (1986) and Scalia nominations.

and in an eleventh instance, on the day after.[10]

Four nominations, however, were reported less expeditiously. A favorable committee report of the 1968 Fortas nomination came 6 days after committee approval, and in the case of the Carswell, Marshall, and Haynsworth nominations, 11, 18 and 34 days afterwards, respectively. Of these four, only the Marshall nomination eventually received Senate confirmation.[11]

Besides reporting a nomination favorably to the Senate, the Committee on ten occasions filed a longer report—known as a "written report"—explaining in some detail the rationale for the Committee's action.[12] In all but two instances, the "written report" was filed within a week of the Committee's reporting favorably to the Senate. Much more than a week—25 days—elapsed between reporting and filing "written reports" on the 1986 Rehnquist and Scalia nominations.[13]

INTERVAL BETWEEN COMMITTEE REPORT AND START OF SENATE DEBATE

Senate debate on Supreme Court nominations in the last quarter century typically has commenced within ten days of a favorable report by the Judiciary Committee. The shortest such interval involved the Senate's receipt of a favorable report on the 1962 White nomination and its consideration and confirmation of the nomination on the same day. Considered by the Senate almost as promptly—one day after being reported by the Judiciary Committee—were the Goldberg, Fortas (1965) and Haynsworth nominations. The Senate took somewhat longer to begin debate on ten nominations: Fortas (1968), 3 days; Blackmun, 5 days; Berger, Stevens and O'Connnor, each 6 days; Marshall, 8 days; Powell, 10 days.

Four nominations reported from the Judiciary Committee awaited Senate consideration for more than ten days—Rehnquist in 1971 (13), Carswell (14), Rehnquist in 1986 (28), and Scalia (34). In 1986 the Senate's Summer recess of 23 days fell between the Committee's reporting of the Rehnquist and Scalia nominations and the start of Senate debate.

Promptness by the Senate in beginning its dellberations has not always been indicative of future success for the nomination involved. Two nominations which the Senate considered relatively promptly eventually failed of confirmation (the Haynsworth and 1968 Fortas nominations, on which debate began one and three days respectively after being reported). On the other hand, three nominations which took longer than most to reach the Senate floor after being reported (Rehnquist in 1971, and Rehnquist and Scalia in 1986) eventually were confirmed.

INTERVAL BETWEEN START OF SENATE DEBATE AND FINAL SENATE ACTION

The Senate's promptness in determining whether to confirm or reject a Supreme Court nomination also can be measured by the time interval between the start of floor debate and the final Senate action taken on the nomination. In the last 25 years, this interval in some cases has been extremely short—measurable by minutes or hours, not days—where the Senate began debate and confirmed the nominee the same day. At the other extreme were Senate deliberations spanning almost four weeks where the nomination was particularly controversial and the subject of protracted debate.

The shortest intervals involved seven nominations on which the beginning of Senate debate and confirmation occurred the same day. These were the White, Goldberg and Fortas (1965) nominations, each of which the Senate approved by voice vote,[14] and the Burger, Stevens, O'Connor and Scalia nominations. The longest interval was the 26-day period between the start and conclusion of Senate debate over the Carswell nomination.

For other nominations the corresponding interval in days was Marshall—1, Blackmun—1, Powell—3, Rehnquist (1971)—4, Fortas (1968)—5, Rehnquist (1986)—6, and Haynsworth—8. Where this interval was relatively long, it was because the Senate had engaged in extended debate over the nominee in question. The usual pattern was that extended debate was followed by a relatively high number of Senators voting against the nomination.[15]

INTERVAL BETWEEN PRESIDENTIAL ANNOUNCEMENT AND FINAL ACTION

As noted, the nomination process begins with the President's announcement of a Supreme Court nomination and ordinarily ends with the full Senate's confirmation or rejection of the nominee. The time interval between the Presidential announcement and final Senate action is a measure of the over-all speed of a process in which three different entities—the President, the Senate Judiciary Committee and the full Senate—play a part.

During the 1962-87 period, the shortest interval between a President's announcement of a Supreme Court nomination and Senate confirmation was 12 days, for Byron R. White in 1962.[16] The next shortest interval—14 days—was for the 1965 Fortas nomination, followed by 19 days, both for the 1969 Burger and the 1975 Stevens nominations.[17]

Of those nominees confirmed, the longest intervals between the Presidential announcement and Senate confirmation were 76 days for Sandra Day O'Connor in 1981, 78 days for Thurgood Marshall in 1967, and 92 days for William H. Rehnquist and Antonin Scalia in 1986. Preceding Justice Marshall's confirmation was a one-month hiatus between the Senate's receipt of his nomination and the start of Judiciary Committee confirmation hearings.[18] Holding up the O'Connor confirmation process was a six-week walt by the White House before sending the announced nomination to the Senate (discussed above). The O'Connor nomination was further delayed when it reached the Senate on August 19, 1981, just as the Senate was to begin a 19-day recess. (On September 9, 1981, the day of the Senate's reconvening, the Judiciary Committee immediately started hearings on the O'Connor nomination, with a Senate confirmation vote coming 12 days later.)

Noteworthy in contributing to the over-all length of time between announcement and confirmation of the Rehnquist and Scalia nominations were two unusually long time intervals. The first interval was the 39 and 42 days which elapsed between the Senate's receipt of the respective nominations and the start of hearings; the second interval of note was the lapse of a month between the reporting of the nominations and the start of Senate debate, due primarily (as noted above) to the Senate's 1986 recess.

For four other nominees, the time elapsing between nomination announcement and Senate confirmation fell between the relatively long and short intervals noted above. The period of time for these nominees was 28 days for both Arthur J. Goldberg in 1962 and Henry Blackmun in 1970, and 46 and 50 days respectively for Lewis F. Powell and William H. Rehnquist in 1971.

In the four instances in which a nomination failed to be confirmed, the over-all time between the President's announcement and the Senate's final action was prolonged by extended committee hearings and Senate floor debate. Senate rejection of Clement Haynsworth in 1969 and G. Harrold Carswell in 1970 came 79 and 95 days respectively after President Nixon had announced their nominations. The 1968 nomination of Justice Abe Fortas to be Chief Justice was decisively blocked in the Senate on the 97th day after President Johnson's nomination announcement when a cloture motion to cut

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[10] The Committee's report of the nomination of Harry A. Blackmun was submitted to the Senate the day following Committee approval.

[11] Although, as Table 1 shows, hearings were held on the 1968 Thornberry nomination, the Judiciary Committee took no further action on it.

[12] "Written reports" were filed on the Marshall, Portas (1968), Haynsworth, Carswell, Blackmun, Powell, Rehnquist (1971), O'Connor, Rehnquist (1986), and Scalia nominations.

[13] Subsequent to submitting favorable reports on the Rehnquist and Scalia nominations on August 14, 1986, the Judiciary Committee filed "written reports" with the Senate on September 8, 1986. Accounting in large part for the delay in filing was the Senate's being in adjournment, for its Summer recess, from August 16 until September 8.

[14] The 1965 confirmation of Justice Fortas was the last Supreme Court nomination to be confirmed by the Senate by voice vote. Since then every Senate confirmation of a nominee to the Court has been accomplished by roll call vote.

[15] Of the nominations on which Senate debate occurred on at least three days, these, in descending order, were the number of votes against confirmation: Haynsworth—55, Carswell—51, Fortas (1968)—43 (voting against cloture motion), Rehnquist (1986)—33, Rehnquist (1971)—26, and Powell—1.

[16] The expedited nature of the Senate's consideration of the White nomination was not discussed in the brief discussion on the Senate floor leading to Mr. White's confirmation. Noted, however, by Senator John A. Carroll, D-Colo. (a Judiciary Committee member and one of five Senators to make floor remarks on the nomination), was that the hearing earlier that day "was a remarkable one" in that "No one appeared there in opposition to the nomination." Carroll, John A. Associate Justice of U.S. Supreme Court. Remarks in the Senate. Congressional Record, v. 108, April 11, 1962. p. 6331.

[17] The speed with which the Burger nomination came to the Senate floor concerned one Member, Senator Milton R. Young, R-N. Dak. At the start of floor debate on the nomination, Senator Young suggested that the Senate consider deferring the matter "a few days." He noted that the one hearing on the Burger nomination, which had been conducted on June 3, had lasted less than two hours, and he offered the view that another hearing should be held to permit testimony of witnesses opposed to the Burger nomination. Young, Milton R. The Supreme Court of the United States. Remarks in the Senate. Congressional Record, v. 115, June 9, 1969. p. 15174.

The Senate, however, proceeded with the nomination, confirming Chief Justice Burger by a roll call vote of 74-3. The Supreme Court of the United States. Congressional Record, v. 115, June 9, 1969. p. 15195-96.

[18] Reporting on the start of the Judiciary Committee's hearings on the Marshall nomination, one journal noted that in 1961 and 1962, "the Committee held up Marshall's confirmation as judge of the 2nd Circuit Court of Appeals for a year before approving the nomination. In 1965, the Committee approved his confirmation as Solicitor General in less than a month." Marshall Nomination. Congressional Quarterly Weekly Report, v. 25, July 28, 1967. p. 1301.

off debate on the nomination failed; on the 101st day, the President withdrew the Fortas nomination, as well as the nomination of Homer Thornberry, who had been nominated to take Mr. Fortas's place as an Associate Justice. Like the Fortas nomination, the Thornberry nomination had been announced by President Johnson 101 days earlier.

TABLE 1.—CHRONOLOGY OF ACTIONS TAKEN ON SUPREME COURT NOMINATIONS, 1962–87 [1]

| Nominee | Presidential announcement | Senate received nomination | Committee hearings | Committee approval | Report submitted | Senate debate; confirmation or other final action |
|---|---|---|---|---|---|---|
| Byron R. White | Mar. 30, 1962 | Apr. 3, 1962 | Apr. 11, 1962 | Apr. 11, 1962 | Apr. 11, 1962 | Apr. 11, 1962; voice vote. |
| Arthur J. Goldberg | Aug. 29, 1962 | Aug. 31, 1962 | Sept. 11, 13, 19, 1962 | Sept. 25, 1962 | Sept. 25, 1962 | Sept. 26, 1962; voice vote. |
| Abe Fortas | July 28, 1965 | July 28, 1965 | Aug. 5, 1965 | Aug. 10, 1965 | Aug. 10, 1965 | Aug. 11, 1965; voice vote. |
| Thurgood Marshall | June 13, 1967 | June 13, 1967 | July 13, 14, 18, 19, 24, 1967 | Aug. 3, 1967 | Aug. 21, 1967 | Aug. 29, 30, 1967; 69–11 vote. |
| Abe Fortas (to be Chief Justice) | June 26, 1968 | June 26, 1969 | July 11, 12, 16, 18, 19, 20, 22, 23, 1968; Sept. 13, 16, 1968. | Sept. 17, 1968 | Sept. 23, 1968 | Sept. 26, 27, 30, 1968· motion to close debate fails, 45–43 vote, Oct. 1, 1968; nomination withdrawn by President Oct. 4, 1968. |
| Homer Thornberry | June 26, 1968 | June 26, 1968 | July 11, 12, 16, 18, 19, 20, 22, 23, 1968; Sept. 13, 16, 1968. | | | No action; nomination withdrawn by President, Oct. 4, 1968. |
| Warren E. Burger | May 21, 1969 | May 23, 1969 | June 3, 1969 | June 3, 1969 | June 3, 1969 | June 9, 1969; 74–3 vote. |
| Clement Haynsworth | Aug. 18, 1969 | Aug. 21, 1969 | Sept. 16, 17, 18, 19, 23, 24, 25, 26, 1969. | Oct. 9, 1969 | Nov. 12, 1970 | Nov. 13, 14, 17, 18, 19, 20, 21, 1969; rejected, 45–55 vote. |
| G. Harrold Carswell | Jan. 19, 1970 | Jan 19, 1970 | Jan. 27, 28, 29, 1970; Feb. 2, 3, 1970. | Feb. 16, 1970 | Feb. 27, 1970 | Mar. 13, 16, 18, 19, 20, 23, 24, 25, 26, 31, 1970; Apr. 3, 6, 7, 8, 1970; rejected, 45–51 vote. |
| Harry A. Blackmun | Apr. 14, 1970 | Apr. 15, 1970 | Apr. 29, 1970 | May 5, 1970 | May 6, 1970 | May 11, 12, 1970; 94–0 vote. |
| Lewis F. Powell, Jr. | Oct. 21, 1971 | Oct. 22, 1971 | Nov. 4, 8, 9, 10, 1971 | Nov. 23, 1971 | Nov. 23, 1971 | Dec. 3, 4, 6, 1971; 89–1 vote. |
| William H. Rehnquist | Oct. 21, 1971 | Oct. 22, 1971 | Nov. 3, 4, 9, 10, 1971 | Nov. 23, 1971 | Nov. 23, 1971 | Dec. 6, 7, 8, 9, 10, 1971; 68–26 vote. |
| John Paul Stevens | Nov. 28, 1975 | Dec. 1, 1975 | Dec. 8, 9, 10, 1975 | Dec. 11, 1975 | Dec. 11, 1975 | Dec. 17, 19, 1975; 98–0 vote. |
| Sandra Day O'Connor | July 7, 1981 | Aug. 19, 1981 | Sept. 9, 10, 11, 1981 | Sept. 15, 1981 | Sept. 15, 1981 | Sept. 21, 1981; 99–0 vote. |
| William H. Rehnquist (to be Chief Justice). | June 17, 1986 | June 20, 1986 | July 29, 30, 31, 1986; Aug. 1, 1986. | Aug. 14, 1986 | Aug. 14, 1986 | Sept. 11, 15, 1986; motion to close debate passes, 68–31 vote. Sept. 17, 1986; confirmed, 65–33 vote. |
| Antonin Scalia | June 17, 1986 | June 24, 1986 | Aug. 5, 6, 19, 1986 | Aug. 14, 1986 | Aug. 14, 1986 | Sept. 17, 1986; 98–0 vote. |
| Robert H. Bork | July 1, 1987 | July 7, 1987 | | | | |

[1] The actions listed are current as of July 7, 1987.

Sources: Relevant volumes of the Journal of the Executive Proceedings of the Senate, Congressional Record, Legislative and Executive Calendar of Senate Committee on the Judiciary, Weekly Compilation of Presidential Documents, Public Papers of the Presidents, and New York Times annual indices.

TABLE 2.—NUMBER OF DAYS BETWEEN ACTIONS TAKEN ON SUPREME COURT NOMINATIONS, 1962–87

[As of July 7, 1987]

| Nominee | Presidential announcement and Senate receipt of nomination | Senate receipt of nomination and start of hearings | Start of hearings and committee approval | Committee approval and submission of report | Submission of report and start of Senate debate | Start of Senate debate and final Senate action | Presidential announcement and final Senate action |
|---|---|---|---|---|---|---|---|
| Byron R. White | 4 | 8 | 0 | 0 | 0 | 0 | 12 |
| Arthur J. Goldberg | 2 | 11 | 14 | 0 | 1 | 0 | 28 |
| Abe Fortas (1965) | 0 | 8 | 5 | 0 | 1 | 0 | 14 |
| Thurgood Marshall | 0 | 31 | 21 | 18 | 8 | 1 | 78 |
| Abe Fortas (1968) | 0 | 15 | 68 | 6 | 3 | 5 | 97 |
| Homer Thornberry | 0 | 15 | | | | | |
| Warren E. Burger | 2 | 11 | 0 | 0 | 6 | 0 | 19 |
| Clement Haynsworth | 3 | 26 | 23 | 34 | 1 | 8 | 95 |
| G. Harrold Carswell | 0 | 8 | 20 | 11 | 14 | 26 | 79 |
| Henry A. Blackmun | 1 | 14 | 6 | 1 | 5 | 1 | 28 |
| Lewis F. Powell, Jr. | 1 | 13 | 19 | 0 | 10 | 3 | 46 |
| Wm. H. Rehnquist (1971) | 1 | 12 | 20 | 0 | 13 | 4 | 50 |
| John Paul Stevens | 3 | 7 | 3 | 0 | 6 | 0 | 19 |
| Sandra Day O'Connor | 43 | 21 | 6 | 0 | 6 | 0 | 76 |
| Wm. H. Rehnquist (1986) | 3 | 39 | 16 | 0 | 28 | 6 | 92 |
| Antonin Scalia | 7 | 42 | 9 | 0 | 34 | 0 | 92 |
| Robert H. Bork | 6 | | | | | | |

## SEQUENTIAL REFERRAL—S. 887

Mr. BYRD. Mr. President, I ask unanimous consent that when the Labor and Human Resources Committee reports S. 887, it be sequentially referred for not more than 30 days to the Select Committee on Indian Affairs for the purpose of adding language regarding the Native American Programs Act.

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

## THE CALENDAR

Mr. BYRD. Mr. President, I inquire of the distinguished acting Republican leader if the following calendar order numbers have been cleared on his side of the aisle: Calendar Order No. 239, Calendar Order No. 241, and Calendar Order No. 244?

Mr. KARNES. Mr. President, they have been cleared.

Mr. BYRD. Mr. President, I ask unanimous consent that Calendar Order Nos. 239, 241, and 244 be considered en bloc; that the amendments, where shown, be adopted; that where preambles and amendments to the titles are shown; that they be adopted; that the colloquies and statements by Senators be printed in the RECORD at the appropriate places; that the bills be passed, and the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

## EXCELLENCE IN MINORITY HEALTH EDUCATION AND CARE ACT

The Senate proceeded to consider the bill (S. 769) to amend the Public Health Service Act to authorize assistance for centers for minority medical education, minority pharmacy education, minority veterinary medical and education, and minority dentistry education, which had been reported from the Committee on Labor and Human Resources, with an amendment to strike all after the enacting clause and insert in lieu thereof, the following:

That this Act may be cited as the "Excellence in Minority Health Education and Care Act".

### FINDINGS AND PURPOSES

SEC. 2. (a) The Congress makes the following findings:

## CBO WEEKLY SCOREKEEPING REPORT FOR THE U.S. SENATE, 100TH CONGRESS, 1ST SESSION, AS OF JULY 17, 1987—Continued

[Fiscal year 1987—In billions of dollars]

| | Current level [1] | Budget resolution (S. Con. Res. 120) | Current (level +/— resolution) |
|---|---|---|---|
| Debt subject to limit | 2,303.9 | [2] 2,322.8 | −18.9 |
| Direct loan obligations | 42.2 | 34.6 | 7.7 |
| Guaranteed loan commitments | 140.6 | 100.8 | 39.8 |

[1] The current level represents the estimated revenue and direct spending effects (budget authority and outlays) of all legislation that Congress has enacted in this or previous sessions or sent to the President for his approval. In addition, estimates are included of the direct spending effects for all entitlement or other programs requiring annual appropriations under current law even though the appropriations have not been made. The current level of debt subject to limit reflects the latest U.S. Treasury information on public debt transactions.

[2] The current statutory debt limit is $2,320 billion.

## FISCAL YEAR 1987, SUPPORTING DETAIL FOR CBO WEEKLY SCOREKEEPING REPORT, U.S. SENATE, 100TH CONGRESS, 1ST SESSION, AS OF JULY 17, 1987

[In millions of dollars]

| | Budget authority | Outlays | Revenues |
|---|---|---|---|
| I. Enacted in previous sessions: | | | |
| Revenues | | | 833,855 |
| Permanent appropriations and trust funds | 720,451 | 638,771 | |
| Other appropriations | 542,890 | 554,239 | |
| Offsetting receipts | −185,071 | −185,071 | |
| Total enacted in previous sessions | 1,078,269 | 1,007,938 | 833,855 |
| II. Enacted this session: | | | |
| Water Quality Act of 1987 (Public Law 100–4) | −4 | −4 | |
| Emergency Supplemental for the Homeless (Public Law 100–6) | −7 | −1 | |
| Surface Transportation and Relocation Act (Public Law 100–17) | 10,466 | −80 | 2 |
| Technical Corrections to FERS Act (Public Law 100–20) | 1 | 1 | |
| Prohibit entrance fees at the Statue of Liberty Monument (Public Law 100–55) | 1 | 1 | |
| SBA program and authorization amendments (Public Law 100–72) | −43 | | |
| Supplemental appropriations, 1987 (Public Law 100–71) | 4,212 | 3,018 | |
| Total | 14,625 | 2,935 | 2 |
| III. Continuing resolution authority | | | |
| IV. Conference agreements ratified by both Houses | | | |
| V. Entitlement authority and other mandatory items requiring further appropriation action: | | | |
| Special milk | 2 | | |
| Veterans compensation | 93 | | |
| Readjustment benefits | 9 | | |
| Federal unemployment benefits and allowances | 33 | 33 | |
| Advances to the unemployment trust funds [1] | (3) | (3) | |
| Payments to health care trust funds [1] | (224) | (224) | |
| Medical facilities guarantee and loan fund | 5 | 4 | |
| Payment to civil service retirement and disability fund [1] | (33) | (33) | |
| Coast Guard retired pay | 3 | 3 | |
| Total entitlements | 145 | 40 | |
| Total current level as of July 17, 1987 | 1,093,039 | 1,010,913 | 833,857 |
| 1987 budget resolution (S. Con. Res. 120) | 1,093,350 | 995,000 | 852,400 |
| Amount remaining: | | | |
| Over budget resolution | | 15,913 | |
| Under budget resolution | 311 | | 18,543 |

[1] Interfund transactions do not add to budget totals.

Note: Numbers may not add due to rounding.

## LLOYD CUTLER ON ROBERT BORK

● Mr. HUMPHREY. Mr. President, I wish to insert in the RECORD a most interesting article endorsing the nomination of Judge Robert Bork to the Supreme Court. The author, Lloyd Cutler, is, of course, one of the most distinguished members of the bar. He served as counsel to President Carter and was a founder of the Lawyer's Committee for Civil Rights Under Law. And he describes himself as a liberal Democrat.

Here is one such man who has the integrity to stand up and praise Judge Bork's qualifications and endorse his nomination to our High Court.

Given Judge Bork's eminent qualifications, which were praised when the Senate unanimously confirmed him only 5 years ago as a judge of the District of Columbia Circuit Court of Appeals, the record delay in the planned start of the new confirmation hearings is unconscionable. Seventy days will pass from the July 7 official submission of the nomination to the Senate, to Chairman BIDEN's announced starting date of September 15. As documented in a new study by the Congressional Research Service, the average interval in start of confirmation hearings for the previous 16 Supreme Court nominations of the past 25 years has been 17.6 days, and the longest has been 42 days.

This delay is grossly unfair. It likely will force the Court to open its October term one justice short, thus depriving litigants who have fought long and hard to get to the Court of a full panel. As the Washington Post wrote in an editorial on July 10, "If minds are already made up, why wait? * * * If there is a strong, serious case to be argued against Judge Bork, why do so many Democrats seem unwilling to make it and afraid to listen to the other side?"

Why indeed. Elemental fairness demands that the hearings begin as soon as possible.

I ask that the article be printed in the RECORD.

The article follows:

[From the New York Times, July 16, 1987]

### SAVING BORK FROM BOTH FRIENDS AND ENEMIES

(By Lloyd N. Cutler) [1]

WASHINGTON.—The nomination of Judge Robert H. Bork to the United States Supreme Court has drawn predictable reactions from both extremes of the political spectrum. One can fairly say that the confirmation is as much endangered by one extreme as the other.

The liberal left's characterization of Judge Bork as a right-wing ideologue is being reinforced by the enthusiastic embrace of his neo-conservative supporters. His confirmation may well depend on whether he can persuade the Senate that this characterization is a false one.

In my view, Judge Bork is neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues. I base this assessment on a post-nomination review of Judge Bork's published articles and opinions, and on 20 years of personal association as a professional colleague or adversary. I make it as a liberal Democrat and as an advocate of civil rights before the Supreme Court. Let's look at several categories of concern.

Judicial philosophy. The essence of Judge Bork's judicial philosophy is self-restraint. He believes that judges should interpret the Constitution and the laws according to neutral principles, without reference to their personal views as to desirable social or legislative policy, insofar as this is humanly practicable.

All Justices subscribe at least nominally to this philosophy, but few rigorously observe it. Justices Oliver Wendell Holmes, Louis D. Brandeis, Felix Frankfurter, Potter Stewart and Lewis F. Powell Jr. were among those few, and Judge Bork's articles and opinions confirm that he would be another. He has criticized the rightwing activism of the pre-1937 court majorities that struck down social legislation on due process and equal protection grounds. He is likely to be a strong vote against any similar tendencies that might arise during his own tenure.

*Freedom of speech.* As a judge, Judge Bork has supported broad constitutional protection for political speech but has questioned whether the First Amendment also protects literary and scientific speech. However, he has since agreed that these forms of speech are also covered by the amendment. And as a judge, he has voted to extend the constitutional protection of the press against libel judgments well beyond the previous state of the law. In his view, "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." Over Justice (then Judge) Antonin Scalia's objections, he was willing to apply "the First Amendment's guarantee . . . to frame new doctrine to cope with changes in libel law [huge damage awards] that threaten the functions of a free press."

*Civil rights.* While Judge Bork adheres to the "original intent" school of constitutional interpretation, he plainly includes the intent of the Framers of the post-Civil War amendments outlawing slavery and racial discrimination. In this spirit, he welcomed the 1955 decision in *Brown* v. *Board of Education* proclaiming public school segregation unconstitutional as "surely correct," and as one of "the Court's most splendid vindications of human freedom."

In 1963, he did in fact oppose the public accommodations title of the Civil Rights Act as an undesirable legislative interfence with private business behavior. But in his 1973 confirmation hearing as Solicitor General he acknowledged he had been wrong and agreed that the statute "has worked very well." At least when compared to the Reagan Justice Department, Judge Bork as Solicitor General was almost a paragon of civil rights advocacy.

Judge Bork was later a severe critic of Justice Powell's decisive concurring opinion in the *University of California* v. *Bakke* case, leaving state universities free to take racial diversity into account in their admissions policies, so long as they did not employ nu-

[1] Lloyd N. Cutler, a lawyer, who was counsel to President Jimmy Carter, was a founder of the lawyers Committee for Civil Rights Under Law.

merical quotas. But this criticism was limited to the constitutional theory of the opinion. Judge Bork expressly conceded that the limited degree of affirmative action it permitted might well be a desirable social policy.

*Abortion.* Judge Bork has been a leading critic of *Roe* v. *Wade*, particularly its holding that the Bill of Rights implies a constitutional right of privacy that some state abortion laws insure but this does not mean that he is a sure vote to overrule *Roe* v. *Wade;* his writings reflect a respect for precedent that would require him to weigh the cost as well as the benefits of reversing a decision deeply imbedded in our legal and social systems. (Justice Stewart, who had dissented from the 1965 decision in *Griswold* v. *Connecticut*, on which *Roe* v. *Wade* is based, accepted Griswold as binding in 1973 and joined the *Roe* v. *Wade* majority.)

Judge Bork has also testified against legislative efforts to reverse the court by defining life to begin at conception or by removing abortion cases from Federal court jurisdiction. If the extreme right is embracing him as a convinced right-to-lifer who would strike down the many state laws now permitting abortions, it is probably mistaken.

*Presidential powers.* I thought in October 1973 that Judge Bork should have resigned along with Elliot L. Richardson and William S. Ruckelshaus rather than carry out President Richard M. Nixon's instruction to fire Archibald Cox as Watergate special prosecutor.

But, as Mr. Richardson has recently observed, it was inevitable that the President would eventually find someone in the Justice Department to fire Mr. Cox, and, if all three top officers resigned, the department's morale and the pursuit of the Watergate investigation might have been irreparably crippled.

Mr. Bork allowed the Cox staff to carry on and continue pressing for the President's tapes—the very issue over which Mr. Cox had been fired. He appointed Leon Jaworski as the new special prosecutor, and the investigations continued to their successful conclusion. Indeed, it is my understanding that Mr. Nixon later asked, "Why did I go to the trouble of firing Cox?"

I do not share Judge Bork's constitutional and policy doubts about the statute institutionalizing the special prosecutor function. But if the constitutional issue reaches the Supreme Court, he will most likely recuse himself, as he has apparently already done in withdrawing from a motions panel about to consider this issue in the Court of Appeals. Moreover, as he testified in 1973, he accepts the need for independent special prosecutors in cases involving the President and his close associates.

*Balance-the-budget amendment.* While this proposed amendment is not a near-term Supreme Court issue, Judge Bork's position on it is significant because support for that amendment is a litmus test of right-wing ideology. He has publicly opposed the amendment on several grounds, including its unenforceability except by judges who are singularly ill-equipped to weigh the economic policy considerations that judicial enforcement would entail. This reasoning is far from the ritual cant of a right-wing ideologue.

Experience shows that it is risky to pinpoint Supreme Court Justices along the ideological spectrum, and in the great majority of cases that reach the Court ideology has little effect on the outcome.

The conventional wisdom today places two Justices on the liberal side, three in the middle and three on the conservative side. I predict that if Judge Bork is confirmed, the conventional wisdom of 1993 will place him closer to the middle than to the right, and not far from the Justice whose chair he has been nominated to fill.

Every new appointment creates some changes in the "balance" of the Court, but of those on the list the President reportedly considered, Judge Bork is one of the least to create a decisive one.●

## SOUTH AFRICAN POLITICS

● Mr. KERRY. Mr. President, the recent meeting of 61 white Afrikaners from South Africa with members of the African National Congress in Dakar, Senegal was a historic event of major importance. It proved that whites can talk to blacks even in the polarized context of South African politics. It also proved that the Congress, by passing a strong sanctions bill last year, sent the right message, and has had an effect in moving the dialog forward in South Africa.

During the debate on the sanctions bill, there were those who said that the ANC was a terrorist organization, that it engaged in practices such as "necklacing," and that meaningful negotiations with the ANC were impossible. The events of the past week have proven them wrong.

The meeting in Dakar has proven that meaningful negotiations are possible, and that the ANC is willing to enter into discussions with the white Afrikaner power structure in South Africa. Unfortunately, the Botha regime has not shown a comparable willingness to enter into negotiations with the ANC. Such negotiations are the only alternative to increasing violence and an eventual bloodbath in South Africa.

A recent article in the Washington Post of July 20 describes the meetings in Dakar, and subsequent meetings in Burkina Faso and Ghana between the Afrikaners and the ANC. The article quotes one leading member of the Afrikaner group as saying: "It has been an overwhelming experience and I think it is going to take a long time for us to absorb it all. For many, our whole conceptual framework has been shattered."

The article also states that many of the Afrikaners came to accept the fact that the ANC's commitment to multiracialism is genuine, and "at least some began to express an understanding that far from being expedient, the commitment to multiracialism was a political liability held out of conviction in the face of considerable extremist pressure both inside and outside of South Africa."

The meeting of leading Afrikaners with members of the ANC, and the warm reception accorded to the Afrikaner delegation in three black African countries, is a hopeful and positive development for all those who believe that a peaceful solution is still possible in South Africa. For those of us who worked on the sanctions bill last year, it is gratifying to see that at least some of the Afrikaners in South Africa have now accepted the necessity of face-to-face talks with the ANC. I hope that these talks will lead to further talks, and eventually to direct negotiations between the leadership of the ANC and the Botha regime. There is no other way to bring an end to the apartheid system, short of an all-out civil war in South Africa.

I ask that the Washington Post article, entitled "Afrikaners Given Warm Welcome in Black Africa," be printed in the RECORD.

The article follows:

[From the Washington Post, July 20, 1987]

AFRIKANERS GIVEN WARM WELCOME IN BLACK AFRICA—"OUR WHOLE CONCEPTUAL FRAMEWORK HAS BEEN SHATTERED," GROUP MEMBER SAYS

(By Allister Sparks)

ACCRA, GHANA.—For 61 white South Africans, most of them dissident Afrikaners, it was a journey from pariah status to acceptability.

The group of academics and business and professional people who held talks last week with the African National Congress (ANC) in Dakar, Senegal, were accorded the status of visiting dignitaries as they journeyed to two more West African countries, Burkina Faso and Ghana.

Group members said the tour, sharply criticized by the South African government and extreme right-wing whites at home, demonstrated Africa's readiness to accept even that sector of South Africa most closely identified with the apartheid policy of white domination, provided they are prepared to renounce it.

In what for most was their first venture into black Africa, the Afrikaners were first astonished, then delighted at the warmth of their reception in countries that have barred entry to white South Africans and sought to isolate South Africa internationally.

As the 10-day tour progressed, their reserve and skepticism gave way to embraces for their black hosts and the ANC leaders who accompanied them on the tour as they left Ghana on Friday.

It was a personal triumph for the former leader of South Africa's liberal Progressive Federal Party, Frederik van Zyl Slabbert, who resigned from the white-controlled Parliament last year to found an institute for promoting interracial contract.

Slabbert handpicked the group to participate in the sessions, the largest ever between white South Africans and exiled leaders of the outlawed ANC, which opinion polls show has the strongest support of any black movement in the country.

Slabbert chose mainly influential Afrikaners who had reached various stages of doubts about the morality and viability of the apartheid policy, but were uncertain what sort of future they would have under black majority rule.

As the tour drew to its close, most said it has been a profound personal experience that had destroyed many deeply ingrained preconceptions.

As one leading member of the group put it, "It has been an overwhelming experience

identifying and developing viable sites for the placement of NHSC obligors.

In addition to structuring the loan repayment program on the basis of grants to States, we would recommend that the following changes also be made:

Address the unique needs of the Indian Health Service through a separate loan repayment program.

Place emphasis on physicians and other health professionals determined by the Secretary to be of high priority need, rather than the lengthy list of professionals in the current bill.

Revise the priorities for applications to give priority to those programs which focus on serving rural areas, and to those individuals who are immediately available for service.

Require States to report to the Secretary on the number, cost and type of individuals receiving loan repayment under all of their health manpower placement programs.

Repeal existing reports on the NHSC (section 336A of the Public Health Service (PHS) Act); on the NHSC Scholarship Program (section 338A (i) of the PHS Act); and repeal the requirement for a National Advisory Council on the NHSC (section 337 to the PHS Act).

Add an amendment that would prohibit the discharge in bankruptcy, after the expiration of the present five-year bar, of any payback requirement under the NHSC Scholarship Program unless the Bankruptcy Court found that nondischarge would be unconscionable.

Repeal the NHSC Scholarship Program. The mechanism of loan repayments provides a better mechanism for identifying individuals with the type of training needed and who have sufficiently progressed to the point in their training that they are willing to make a commitment to serve in an underserved area.

Focus Federal resources on the physicians who are obligated for NHSC service. A Federal scholarship program would place physicians in areas where there was not necessarily any evidence that local support exists to encourage physicians to remain after their service obligation is completed.

In summary, we think the concept of a State-based loan repayment program could form the foundation for a sound program effort to address the needs of rural underserved populations. We recommended that the bill under consideration be revised in accordance with the foregoing recommendations.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

*Otis Bowen*, M.D.,
*Secretary.*

## ROCK ISLAND ARSENAL 125TH ANNIVERSARY

● Mr. SIMON. Mr. President, during this past weekend, Rock Island Arsenal celebrated its 125th anniversary. It was July 11, 1862, that Congress established the Rock Island Arsenal following the destruction of the Harper's Ferry Federal Arsenal. Rock Island has served us all well since that time.

Rock Island continues to make a vital contribution to our Nation's security and readiness. The arsenal's role in emergencies has always been critical. But the specter of contracting out jobs at Rock Island and other arsenals has cast a pall over the good work done by thousands of men and women, who now must worry about their future after years of dedicated service.

My good friend and colleague Senator TOM HARKIN of Iowa and I introduced legislation prohibiting further contracting out at defense arsenals and manufacturing plants. This is important to all of us, and I sincerely hope we can pass this measure. It would be a fitting tribute in this Rock Island Arsenal anniversary year.

Mr. President, I am grateful for the long years of service rendered by Rock Island. I commend the arsenal community, and I congratulate the hardworking employees who have made the arsenal an Army success story.●

## CHILD CARE IN A HELLER INDUSTRIAL PARK

● Mr. LAUTENBERG. Mr. President, on July 27 the Heller Industrial Park, in Edison, NJ, will be celebrating the official opening of the John F. Kenney Childcare Center. The center is one of the first State licensed day care facilities in this country designed specifically to serve employees of an industrial park.

The owner and developer of the industrial park, Isaac Heller believes that employee day care programs will be the corporate benefit of the late 1980's. Mr. Heller has said that corporate day care facilities are not just good things to have, but rather a real necessity in our rapidly changing society.

Parents who place their children in the industrial park facility will now be assured of adequate supervision for the children, but will be able to visit them during the workday. Parents will be able to spend valuable educational and recreational time with their children.

Employers will also benefit from this onsite day care center. Their employees should experience less tension and fewer distractions if they are relieved of concern about the care and weilbeing of their children. Only about 3,000 employers, out of 6 million nationwide, provide any sort of child care assistance. Even fewer, approximately 150, provide on- or near-site centers. But these pioneering employers have seen improvements in morale, recruitment, reduced employee turnover, declining absenteeism, and increased productivity.

Mr. President, I commend the vision of Isaac Heller in developing this day-care facility. Everyone gains when employers provide day care. Children have a good place to stay while their parents are at work. Employees will know their children are close at hand and well taken care of. Employers will have a less distracted, more involved work force. I hope that other employers will follow the path being blazed in this New Jersey industrial park.●

## NAUM MEIMAN

● Mr. SIMON. Mr. President, the situation regarding Soviet emigration is deplorable, and one which must change immediately. Thousands of Soviet Jews are denied exit visas daily; the reasons given are indefensible.

A common reason given for denial by the Soviet Government is the supposed "possession of state secrets." The authorities claim these refuseniks possess secrets of the Government and thus would be a threat to their state if given permission to leave.

These claims are truly ridiculous. Naum Meiman has been a refusenik for over 10 years. The Soviet Government continually rejects his requests to leave on the grounds that he possesses state secrets. Naum, once a mathematician, was forced to give up his profession upon application of a visa. After 10 years, what pertinent information could Naum possibly still possess? Any knowledge he once may have had would surely be outdated by now.

It is time for the Soviet Government to take action on behalf of Naum Meiman and other refuseniks. Something must be done to relieve the suffering of these individuals. I strongly urge the Soviet officials to grant these exit visas, so that these refuseniks can finally live in peace.●

## ORIGINAL INTENT OF THE CONSTITUTION

● Mr. CRANSTON. Mr. President, Leo Rennert, the veteran Washington bureau chief for the McClatchey chain of newspapers, is a writer acclaimed by his peers for the quality of his news coverage and the acuity of his political insights.

He has written a brilliant analysis of the theory of the Constitution's "original intent," which has once again become a matter of controversial interest with President Reagan's nomination of Judge Robert H. Bork to the U.S. Supreme Court.

Mr. Rennert, in his article in the July 12, 1987, issue of the Sacramento, CA, Bee, puts the issue in realistic perspective when he observes:

When intellectual formulations are stripped away, the court and its judges are seen for what they really are—wielders of tremendous power with a great impact on the lives of all Americans. The office may be judicial, but the game is over high political stakes.

Bork and his chief booster in the Reagan administration, Attorney General Ed Meese, have their own conservative agenda for the court. Having tried other routes and failed, they want to roll back some of the major decisions of the high court going back to Earl Warren's days.

But to give their intentions a more benign appearance, they have tried to cloak them in a high-sounding pop-law doctrine that is out of tune with 200 years of American constitutional law. They're trying to win support with an exercise in illusionism—a hallmark of the Reagan administration.

In giving their "advice and consent" to the Bork nomination, senators properly should focus on what he stands for and what he's apt to do on the court—not on a transparently spurious doctrine that can't stand up to historical analysis.

I ask that the text of the Sacramento Bee article, to which I have referred, be printed in the RECORD in its entirety.

The article follows:

ROBERT BORK: THE ILLUSIONS'S GRAND, THE AGENDA HIDDEN

(By Leo Rennert)

WASHINGTON.—There's a special irony in President Reagan's nomination of Judge Robert H. Bork to the Supreme Court during celebrations marking the 200th anniversary of the U.S. Constitution.

For the White House's basic selling point to obtain confirmation—Bork's supposed adherence to the Constitution's "original intent"—is a fiction that won't stand up to either judicial or historical analysis.

For two centuries, judges of varying ideological persuasions have written their own views in the nation's basic charter. Sometimes, they greatly expanded its reach; at other times, they constricted it.

There have been periods when the high court tilted in favor of property rights—even slavery. There also have been times when it broke new ground in support of racial and individual rights.

Either way, "original intent" was not a key factor for the simple reason that the Constitution was too skimpy to provide definite guidance for changing times and unanticipated problems.

Some judges, while charting a radical new course, pretended their views were entirely in accord with the Constitution's explicit precepts. Others were more candid and acknowledged that the Constitution is a sufficiently small document with broad enough language to permit extensive adaptation to new circumstances.

Legal scholars and constitutional historians long ago concluded that the court, throughout its existence, has been guided by the views and, yes, prejudices of whomever sat on the bench at a particular time. American constitutional history is a drama enacted by a few judges who can command a five-vote majority and by purposeful presidents who seize opportunities at critical moments to make appointments that push the court in a desired direction.

But in selling the Bork nomination, the president brushes aside this basic reality and seeks to convince the Senate and the country that he has picked a judge who finally has a clear, certified notion of what the constitutional framers intended and an ironclad commitment not to stray from this true path.

Similarly, in speeches and lectures, Bork himself has propounded his own judicial theory of "original intent" and argued that judges should not be guided by their own personal views. The framers, not a judge's predilections, should call the shots. "Original intent is the only basis for constitutional decision," Bork declared in a series of speeches in 1985. He repeatedly has accused high-court justices of deviating from true constitutional intent in recent times and gives the impression that he has the necessary insights to rescue the court from its wayward habits. To hear Bork tell it, with self-assurance bordering on arrogance, he has a direct pipeline to the Constitution's undeviating meaning.

The problem with that position is not just that it clashes with liberal precedents and decisions of the court in the last few decades. The real rub is that Bork doesn't reach back far enough in his constant moaning about "corrupters" of the Constitution. His analysis ignores the entire 200-year history of the court and the development of American constitutional law.

Almost from the very beginning, the court charted its own course, greatly exceeding the specific "intent" or provisions of the Constitution. The best refutation of Bork's "original intent" doctrine can be found in the classic formulation delivered by the greatest justice of them all, Chief Justice John Marshall, in the 1819 case of McCulloch v. Maryland.

Marshall was faced with a legal challenge to a congressional decision to set up a national bank. He readily acknowledged that the Constitution makes no mention of a national bank, one way or the other. Although the document was only 32 years old and there were still some framers around whose "intent" presumably could be plumbed, Marshall stepped in and set his own course.

He upheld the establishment of the bank by finding that the Constitution gave Congress not only explicit but all sorts of implied powers that the court, in its wisdom, could deduce. What matters, he argued, is that judges, in filling in the blanks, should be guided by a "fair and just interpretation"—a very convenient and elastic criterion.

But Marshall went a step further in setting rules for judicial interpretation by holding that the Constitution, by its very essence, requires judges to use their full discretion to give new life and meaning to what the framers intended. The Constitution, he declared, is a pithy document; it's up to judges to put flesh on bare bones.

"A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind," Marshall declared. "It would, probably, never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked . . . We must never forget that it is a Constitution we are expounding."

Actually, Marshall did not wait until 1819 to read all sorts of things into the Constitution that weren't there as he aggressively moved to enlarge the court's powers and the authority of the central government. In 1803, he invented the doctrine of judicial review—the right of the Supreme Court to hold legislative measures unconstitutional—in the landmark case of Marbury v. Madison.

That decision still ranks as perhaps the greatest quantum leap in the history of U.S. constitutional interpretation and hardly a model for the Reagan-Bork notion of judicial "restraint." The framers wrote that the Constitution is the "supreme law of the land." But they omitted any authority for the Supreme Court to set itself up as the Constitution's supreme arbiter. Marshall, however, was undeterred and plunged right in. He simply deduced the court's powers to hold congressional acts unconstitutional from "the very essence of judicial duty." As he saw it, naturally.

Marshall fashioned this radical expansion of the court's authority without any evidence of "original intent" and at a time when the framers' views were presumably more ascertainable than they are today. In fact, one can make a good argument that the Constitutional Convention in Philadelphia meant to creat three separate and coequal branches, each obliged to respect the Constitution but none given a monopoly power to have the final word in interpreting its true meaning. One wonders if Bork's "original intent" doctrine is pure enough to forswear the court's power of judicial review—particularly when a liberal statute is under attack.

Since Marbury, the history of American constitutional law has been littered with bold innovations and dramatic reversals of prior decisions by conservative and liberal jurists alike. The 14th Amendment, a product of the Civil War and clearly intended to protect the rights of blacks, was used by conservative-dominated courts in the late 19th and early 20th centuries to invalidate child-labor and other progessive state laws that impinged on property rights.

In 1896, in Plessy v. Ferguson, the court stood in Civil War amendments on their head by sanctioning segregation with the "separate but equal" doctrine. More than a half century later, when the court finally used the 14th Amendment to outlaw public-school segregation and issued landmark rulings to expand individual rights, there was an outcry that Earl Warren had deviated from true constitutional doctrine and turned the court into a haven for "activists." Bork and other critics of the Warren Court never bothered to point out that Plessy was a far greater distortion of constitutional "intent" than Brown v. Board of Education.

In attacking modern justices from Earl Warren to Harry Blackmun for civil rights, one-man, one-vote and pro-abortion rulings, Bork shows a curious intellectual myopia in glossing over a consistent 200-year pattern of creative impulses by those who have sat on the high court.

That's why there are such great, passionate fights over Supreme Court appointments and why a bruising battle looms over the Bork nomination. When intellectual formulations are stripped away, the corut and its judges are seen for what they really are—wielders of tremendous power with a great impact on the lives of all Americans. The office may be judicial, but the game is over high political stakes.

Bork and his chief booster in the Reagan administration, Attorney General Ed Meese, have their own conservative agenda for the court. Having tried other routes and falled, they want to roll back some of the major decisions of the high court going back to Earl Warren's days. But to give their intentions a more benign appearance, they have tried to cloak them in a high-sounding pop-law doctrine that is out of tune with 200 years of American constitutional law. They're trying to win support with an exercise in illusionism—a hallmark of the Reagan administration.

In giving their "advice and consent" to the Bork nomination, senators properly should focus on what he stands for and what he's adt to do on the court—not on a transparently spurious doctrine that can't stand up to historical analysis.●

failed year after year. The administration's Office of Management and Budget [OMB] assured us earlier this year that at last we're on track. They told us the budget they sent the Congress will give us in the coming year a substantial reduction in the deficit.

Here is the record of deficits under Gramm-Rudman since it went into effect in 1986: 1986 target, $172 million; actual deficit, $221 billion; 1987 target, $144 billion; OMB deficit estimate, $180 billion. CBO without nonrecurring asset sale or tax reform deficit estimate, $194 billion; 1988 target, $108 billion; latest, almost certainly too rosy, deficit estimate, $181 billion.

The Congress changed the administration's spending priorities some but ended up with a budget that closely reflected the President's judgment on deficit reduction. Both the Congress and the President turned out to be hugely wrong. Wrong by tens of billions of dollars. This is what happened to the 1986 budget, the 1987 budget. You can count on it. It will happen to the 1988 budget. Each year the administration and the Congress grossly underestimate the deficit. Each year we sink another $200 billion or so more deeply in debt.

This has become a serious international embarrassment. America is still the driving economic force of the free world. Our world's most powerful economy has given us the military strength to serve as leaders of the free world. But we are putting this vital economy in constantly more serious jeopardy. Indeed we have become the despair of our strongest allies. Leaders of country after country have told us that we must bring our huge deficits under control. Our answer has been to tell them to follow our live-it-up, playboy, spend-and-borrow philosophy. We actually tell the Germans and the Japanese to cut their taxes, flood their countries with credit, borrow more and spend more. The administration tells them that kind of extravagant easy living will expand their markets. Then we can sell more to them and improve our trade deficit. And what do they tell us? They tell us another way to improve our trade deficit. They tell us to get serious about reducing our huge $200 billion deficits and our exploding national debt. They tell us if we don't stop this squandermania we're headed for superinflation and a full-scale depression. Who's right?

Mr. President, the remarkable thing about this situation is everyone knows the Germans and Japanese and our other foreign friends and allies are absolutely right. Go into the stores or shops or farms or factories of this country and ask the Americans who are running their enterprise. Ask them if the deficit spending policies of this Federal Government are right or wrong. Ask them if they believe the Government is getting its act in working order. Republican or Democrat will all tell you the same thing. Their answer will be "no way." They tell you as in one voice. Get back to Washington and spend less, much less. Then, if necessary, to bring down the deficit, increase taxes. They consistently believe the President is wrong to call for so much spending for the military. Our constituents also believe the Congress is wrong in insisting on continuing to fund social programs at too high a level. Sure in many cases they have their favorite cause. But if they ask for more spending for instance to help the Contras—ask them if they really want to spend $100 million a year of the taxpayers money for that purpose. Some constituents will say sure. But some will say, on second thought, save that money. Ask them if they are prepared to spend billions to follow up on the Contra expenditure if the Contras can't do the government overthrow job in Nicaragua. If your constituent calls for more money for community development ask her or him if they really want to increase Government spending beyond the $4 billion a year we now spend. If they support the President's call for a 50-percent increase in spending for the National Science Foundation, over the next 5 years, ask them if they're ready to increase their taxes to pay for it.

Mr. President this abysmal failure of the Federal Government—President and the Congress—to reduce the deficit comes during a long period of economic recovery. Indeed this is one of the longest recovery periods in the past 50 years. This is precisely the time we should be running surpluses. We know this situation cannot go on much longer. Next year or the year after—when the next recession hits as it always will in a free economy, the deficits will really explode. The annual deficits will rise to $300 or $400 billion. Before the recession—or depression—runs its course the country could be saddled with a national debt of $4 or $5 trillion. Inflation, low household saving, and huge Federal borrowing spell high interest rates. The interest cost of servicing the national debt would then become larger than any Federal expenditure including national defense. Now let me tell you why that's such a wicked burden. That interest cost would be completely uncontrollable. The Congress with the best will in the world could not reduce it by a penny. This is what our failure, I repeat our failure in this Government to cut spending, cut spending everywhere—military, social programs—right across the board and our failure to raise whatever taxes are necessary to cover our unwillingness to cut spending—is doing to us.

I yield the floor.

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

The ACTING PRESIDENT pro tempore. The absence of a quorum is noted. The clerk will please call the roll.

The legislative clerk proceeded to call the roll.

Mr. BIDEN addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Delaware.

Mr. BIDEN. Mr. President, I would like to take some time this morning.

The ACTING PRESIDENT pro tempore. The Chair will advise the Senator—does he seek unanimous consent that the order for quorum call be rescinded?

Mr. BIDEN. Yes, I do.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. The Chair recognizes the Senator from Delaware.

Mr. BIDEN. I thank the Chair.

Mr. President, I rise this morning to speak on the subject of the role of the U.S. Senate in the confirmation process of Supreme Court Justices.

I will tell my colleague in the chair that I am going to take more time this morning than I usually take on the floor. My speech this morning will be relatively long, but, hopefully, historically and constitutionally accurate.

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## ADVICE AND CONSENT: THE RIGHT AND DUTY OF THE SENATE TO PROTECT THE INTEGRITY OF THE SUPREME COURT

Mr. BIDEN. Mr. President, on July 1, 1987, President Reagan nominated Judge Robert Bork to be an Associate Justice of the Supreme Court. I am delivering today the first of several speeches on questions the Senate will face in considering the nomination.

In future speeches, I will set out my views on the substance of the debate—and there is room for principled disagreement. But in this speech, I want to focus on the terms of the debate—and I hope to put an end to disagreement on the terms of the debate. Arguing from constitutional history and Senate precedent, I want to address one question and one question only: What are the rights and duties of the Senate in considering nominees to the Supreme Court?

Some argue that the Senate should defer to the President in the selection process. They argue that any nominee who meets the narrow standards of legal distinction, high moral character, and judicial temperament is entitled to be confirmed in the Senate without further question. A leading exponent of this view was President Richard Nixon, who declared in 1970 that the President is "the only person entrusted by the Constitution with the power of appointment to the Supreme Court." Apparently, there are some in

this body and outside this body who share that view.

I stand here today to argue the opposite proposition. Article II, section 2, of the Constitution clearly states that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint * * * Judges of the Supreme Court. * * *" I will argue that the framers intended the Senate to take the broadest view of its constitutional responsibility. I will argue that the Senate historically has taken such a view. I will argue that, in case after case, it has scrutinized the political, legal, and constitutional views of nominees. I will argue that, in case after case, it has rejected professionally qualified nominees because of the perceived effect of their views on the Court and the country. And I will argue that, in certain cases, the Senate has performed a constitutional function in attempting to resist the President's efforts to remake the Supreme Court in his own image.

THE INTENT OF THE FRAMERS

How can we be sure of the scope of the Senate's constitutional rights and duties under the "advice and consent" clause? We should begin—but not end—our investigation by considering the intent of the framers. Based on the debates of the Constitutional Convention, it is clear that the delegates intended the Senate to set into play a broad role in the appointment of judges.

In fact, they originally intended even more. At the beginning of the Constitutional Convention, they intended to give the Congress exclusive control over the selection process and to leave the President out entirely. On May 29, 1787, the Constitutional Convention began to deliberate in Philadelphia. It adopted as a working paper the Virginia plan, which provided that "a National Judiciary be established * * * to be chosen by the National Legislature."

A few weeks after debate began, some delegates questioned the wisdom of entrusting the selection of judges to Congress alone. They feared that Congress was large and lumbering and might have some trouble making up its mind. James Wilson of Pennsylvania was an advocate of strong Executive power, so he proposed an obvious alternative: giving the President exclusie power to choose the judges. This proposal found no support whatsoever. If one concern united the delegates from large States and small States, North and South, it was a determination to keep the President from amassing too much power. After all, they had fought a war to rid themselves of tyranny and the royal prerogative in any form. John Rutledge of South Carolina opposed giving the President free rein to appoint the judiciary since "the people will think we are leaning too much toward monarchy."

James Madison, the principal architect of the Constitution, agreed. He shared Wilson's fear that the legislature was too large to choose, but stated that he was "not satisfied with referring the appointment to the Executive." He was "rather inclined to give it to the senatorial branch" of the legislature, which he envisioned as a group "sufficiently stable and independent" to provide "deliberate judgments." Accordingly, on June 13, Madison formally moved that the power of appointment be given exclusively to the Senate. His motion passed without objection.

On July 18, 200 years ago last Saturday, James Wilson again moved "that the Judges be appointed by the Executive." His motion was defeated, by six States to two. It was widely agreed that the Senate "would be composed of men nearly equal to the Executive and would of course have on the whole more wisdom." Moreover, "it would be less easy for candidates to intrigue with them, than with the Executive."

Obviously, we can see here the fear that was growing on the part of those at the Convention was that respective nominees would be able to intrigue with a single individual, the President, but not the Senate as a whole. So Mr. Ghorum of Massachusetts suggested a compromise proposal: to provide for appointment by the Executive "by and with the advice and consent" of the Senate. Without much debate, the "advice and consent" proposal failed on a tie vote.

Up until now, no one, no single vote at the Convention, gave the Executive any role to play in this process.

All told, there were four different attempts to include the President in the selection process, and four times he was excluded. Until the closing days of the Convention, the draft provision stood: "The Senate of the United States shall have power to * * * appoint * * * Judges of the Supreme Court." But the controversy would not die, and between August 25 and September 4, the advice and consent compromise was proposed once again. On September 4, the Special Committee on Postponed Matters reported the compromise, and 3 days later, the Convention adopted it unanimously.

What can explain this 11th hour compromise? Well, historians have debated it for years.

Gouverneur Morris of Pennsylvania offered the following paraphrase. The advice and consent clause, he said, would give the Senate the power "to appoint Judges nominated to them by the President." Was his interpretation correct?

Well, we can never know for sure, but it seems to be the overwhelming point of view among the scholars. But it is difficult to imagine that after four attempts to exclude the President from the selection process, the framers intended anything less than the broadest role for the Senate—in choosing the Court and checking the President in every way.

The ratification debates confirm this conclusion. No one was keener for a strong Executive than Alexander Hamilton. But in Federalist Papers 76 and 77, Hamilton stressed that even the Federalists intended an active and independent role for the Senate.

In Federalist 76, Hamilton wrote that senatorial review would prevent the President from appointing justices to be "the obsequious instruments of his pleasure." And in Federalist 77, he responded to the argument that the Senate's power to refuse confirmation would give it an improper influence over the President by using the following words: "If by influencing the President, be meant restraining him, this is precisely what must have been intended. And it has been shown that the restraint would be salutary. * * *"

Now, this is the fellow, Hamilton, who argued throughout this entire process that we needed a very strong Executive, making the case as to why the Senate was intended to restrain the President and play a very important role.

Most of all, the founders were determined to protect the integrity of the courts. In Federalist 78, Hamilton expressed a common concern: "The complete independence of the courts of justice," he said, "is peculiarly essential in a limited Constitution. * * * Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."

So, in order to preserve an independent Judiciary, the framers devised three important checks: life tenure, prohibition on reduction in salary and, most important, a self-correcting method of selection. As they relied on the Court to check legislative encroachments, so they relied on the Legislature to check Executive encroachments. In dividing responsibility for the appointment of judges, the framers were entrusting the Senate with a solemn task: preventing the President from undermining judicial independence and from remaking the Court in his own image. That in the end is why the framers intended a broad role for the Senate. I think it is beyond dispute from an historical perspective.

THE SENATE PRECEDENTS

The debates and the Federalist Papers are our only keys to the minds of the founders. Confining our investigation to "original intent," you would have to stop there. But there is much more. Two centuries of Senate prece-

dent, always evolving and always changing with the challenges of the moment, point to the same conclusion: The Senate has historically taken seriously its responsibility to restrain the President. Over and over, it has scrutinized the political views and the constitutional philosophy of nominees, in addition to their judicial competence.

I ask unanimous consent to insert in the RECORD a list of all nominations rejected or withdrawn over the last 200 years.

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

I. SUPREME COURT NOMINATIONS REJECTED OR WITHDRAWN, 1795–1970

| Supreme Court nominee | Nominating president | President's party | Senate party | Rejected (R)/postponed (P)/ withdrawn (W) | Vote | Reasons for Senate opposition |
|---|---|---|---|---|---|---|
| John Rutledge (1795) | Washington | Federalist | F | R | 14–10 | Attacked by his fellow Federalists for his opposition to the Jay Treaty of 1794.[1, 2] |
| Alexander Wolcott (1811) | Madison | Dem.-Repub. | DR | R | 24 9 | Unpopular with Federalists for strong enforcement of Embargo and Non-intercourse Act as U.S. Collector of Customs for Connecticut; also questionable legal qualifications.[1, 2] |
| John Crittenden (1829) | J.Q. Adams | DR | DR | P | 23–17 | Adams was a lame duck President (nomination came after his 1828 defeat by Jackson).[1, 2] |
| Roger Brooke Taney (1835) | Jackson | Dem. | Whig | P, Later confirmed as Chief Justice 1836 | | Unpopular with Whigs because, as Secretary of the Treasury, removed government funds from the Bank of the United States in compliance with Jackson anti-Bank policy.[1, 2] |
| John Spener (1844) | Tyler | W/D | W | RD | 26–21 | Tyler was the first to succeed to the presidency as Vice-President and his power was questioned generally; Tyler viewed as only a nominal Whig; Spencer defeated because of his close political association with Tyler.[1, 2] |
| Reuben Walworth (1844) | Tyler | W/D | W | P | 27–20 | Partisan opposition to Walworth by Senate Whigs.[1] |
| Edward King (1844) | Tyler | W/D | W | P | 29–18 | Senate Whigs anticipated that Tyler would not be nominated for President, and was thus effectively a lame duck.[1] |
| Edward King (1845) | Tyler | W/D | W | W | | Tyler became a lame duck in fact after Polk's election (King nomination resubmitted in December 1844).[1] |
| John Read (1845) | Tyler | W/D | W | No action | | Nomination made February 1845, Senate adjourned without taking action.[1] |
| George Woodward (1846) | Polk | D | W | R | 29–20 | Woodward's home state Senator, Simon Cameron, insisted on right to approve appointment ("senatorial courtesy"); Woodward also attacked as extreme "American nativist."[1, 2] |
| Edward Bradford (1852) | Fillmore | W | D | W, No action | | Fillmore effectively a lame duck because not nominated for President in 1852; Senate adjourned without taking action.[1] |
| George Badger (1852) | Fillmor | W | D | P | 26 25 | Fillmore a lame duck in fact after Pierce's election; nomination of Sen. Badger (a Whig) "postponed" by Senate Democratic majority to protect Court seat for Democrat Pierce to fill.[1] |
| William Micou (1853) | Fillmore | W | D | No action | | Same reasons as with Badger nomination, above.[1] |
| Jeremiah Black (1861) | Buchanan | D | Some Dems. had quit Senate after secession. | R | 26–25 | Black was opposed politically by Democratic Sen. Stephen Douglas (loser of 1860 election); Buchanan was a lame duck in fact (nomination made after Lincoln's election); Senate anti-slavery forces opposed because Black had advised Buchanan that force could not be used to prevent secession and maintain in the Union.[1, 2] |
| Henry Stanbury (1866) | A. Johnson | D | R | Court seat eliminated | | Radical Republicans controlling Senate reduced size of Supreme Court by two seats to deny Democratic President Johnson a chance to make any nominations.[1, 2, 3] |
| Ebenezer Hoar (1870) | Grant | R | R | R | 33 24 | Hoar rejected for his stands on policital issues: for merit nominations of lower court judges, for civil service reforms, against impeachment of President Johnson; also desire of some Senators to have a southern nominee.[1, 2, 3] |
| George Williams (1874) | Grant | R | R | W | | Withdrawn because of questions about Williams' capabilities and financial integrity; and his connection, as Attorney General, to the scandal-ridden Grant Administration.[1, 2] |
| Caleb Cushing (1874) | Grant | R | R | W | | Cushing had changed political parties several times; attacked constitutionality of Reconstruction Laws; sent indiscreet letter to Jefferson Davis in 1861 after secession.[1, 2, 3] |
| Stanley Matthews (1881) | Hayes | R | D | No judiciary Comm. action; renominated by Garfield and confirmed by 24–23 vote. | | Matthews opposed for his close ties to Jay Gould and railroad interests; less importantly, he was Hayes' brother-in-law and Hayes' lawyer before the Electoral Count Commission adjudicating the disputed 1876 Hayes-Tilden vote.[1, 2, 3] |
| William Hornblower (1893) | Cleveland | D | D | R | 30–24 | Hornblower's opposition to machine politics in New York led to "senatorial courtesy" veto of nomination by New York Democratic Sen. Hill; also Republican fear of Hornblower's opposition to protective tariffs.[1, 2, 3] |
| Wheeler Peckham (1893) | Cleveland | D | D | R | 41–32 | Same reasons as with Hornblower nomination, above.[1, 2, 3] |
| John J. Parker (1930) | Hoover | R | R | R | 41–39 | Opposed by unions for close adherence to anti-labor precedents; opposed by civil rights groups for racist statements made as candidate for Governor of North Carolina in 1920.[1, 2, 4] |
| Abe Fortas (1968) | L. Johnson | D | D | W | | Senate filibuster from opposition to Warren Court, Fortas' membership on Court; Johnson effectively a lame duck in summer of 1968 (not running for renomination).[1, 2] |
| Homer Thornberry (1968) | L. Johnson | D | D | W | | No Court vacancy after withdrawnal of Justice Fortas' nomination to Chief Justice.[1, 2] |
| Clement Haynsworth (1969) | Nixon | R | D | R | 55–45 | Criticism of civil rights and civil liberties record; questions of financial impropriety.[1, 3, 4] |
| G. Harrold Carswell (1970) | Nixon | R | D | R | 51 45 | Mediocre legal qualifications; criticism that part statements and actions were racist.[1, 3, 4] |

[1] Henry J. Abraham, "Justices and Presidents" (New York: Penguin Books, 1975).
[2] Philip B. Kurland, "The Appointment and Disappointment of Supreme Court Justices," in Law and the Social Order (1972 Arizona State Univ. Law Journal), No. 2, p. 183.
[3] Richard D. Friedman, "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond," 5 Cardozo Law Review 1 (1983).
[4] Donald E. Lively, "The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities," 59 Southern California Law Review 551 (1986).

Mr. BIDEN. In many cases, the Senate rejected technically competent candidates whose views it perceived to clash with the national interest. The chart lists 26 nominations rejected or withdrawn since 1789. In only one case, George Williams—a Grant nominee whose nomination was withdrawn in 1874—does it appear that substantive questions played no role whatsoever. The rest were, in whole or in part, rejected for political or philosophical reasons.

The precedent was set as early as 1795, in the first administration of George Washington. And the precedent setter was none other than poor John Rutledge who I quoted earlier. Remember Rutledge? He was the one who argued at the Constitutional Convention that to give the President complete control over the Supreme Court would be "leaning too much toward monarchy." Well Old John would come to wish he had not uttered those words.

Rutledge was first nominated to the Court in 1790, and he had little trouble being confirmed. As one of the principal authors of the first draft of the Constitution, he was clearly qualified to judge original intent. In 1791, however, he resigned his seat to become chief justice of South Carolina, which—as our two South Carolina Senators probably still think—he considered a far more important post. But then, Chief Justice John Jay resigned from the Supreme Court in 1795, and Washington nominated Rutledge to take his seat. The President was so confident to a speedy confirmation that he had the commission papers drawn up in advance and gave him a recess appointment.

But that was not to be. A few weeks after his nomination, Rutledge attacked the Jay Treaty, which Wash-

ington had negotiated to ease the last tensions of the Revolutionary War and to resolve a host of trade issues. Because of the violent opposition of the anti-British faction, support of the treaty was regarded as the touchstone of true federalism. One newspaper reported that Rutledge had declared "he had rather the President should die (dearly as he loved him) than he should sign that treaty." Another paper reported that Rutledge had insinuated "that Mr. Jay and the Senate were fools or knaves, duped by British sophistry or bribed by British gold * * * prostituting the dearest rights of freemen and laying them at the feet of royalty."

Debate raged for 5 months, and Rutledge was ultimately rejected, 14 to 10. To the minds of many Senators, Rutledge's opposition to the treaty called into question his judgment in taking such a strong position on an issue that polarized the Nation. Some even feared for his mental stability. But make no mistake: the first Supreme Court nominee to be rejected by the Senate—one of the framers, no less—was rejected specifically on political grounds. And the precedent was firmly established that inquiry into a nominee's substantive views is a proper and an essential part of the confirmation process.

Since Washington's time, the precedent has been frequently reinforced and extended—often at turning points in our history. In 1811, Alexander Wolcott, a Madison nominee, was rejected at least in large part because of his vigorous enforcement of embargo legislation and nonintercourse laws. His rejection was fortunate for our legal history, since he later endorsed the view that any Judge deciding a law unconstitutional should be immediately expelled from the Court.

In 1835, Roger Taney, a Jackson nominee, was opposed for much more serious and substantive reasons. I will discuss the historic details of the Taney case later. But, for now, though, a sketch will suffice. Jackson was attempting to undermine the Bank of the United States. Taney had been a crucial ally in his crusade, so Jackson nominated him to the Court. Those favoring confirmation urged the Senate to consider Taney's constitutional philosophy on its own merits. "It would indeed be strange," said a leading paper in the South, "if, in selecting the members of so august a tribunal, no weight should be attached to the views entertained by its members of the Constitution, or their acquirements in the science of politics in its relations to the forms of government under which we live." Those opposing confirmation had no reservation about doing so on the ground that Taney's views did not belong on the Court. In the end, the Whigs succeeded in defeating the nomination by postponement, but Jackson bided his time and resubmitted it the following year—this time for the seat of retiring Chief Justice Marshall.

Between the Jackson and Lincoln Presidencies, no fewer than 10 out of 18 Supreme Court nominees failed to win confirmation. Whigs and Democrats were equally divided in the Senate. While the issue of States rights versus a nationalist philosophy inflamed some of the debates, most of the struggles were strictly partisan. John Tyler set a Presidential record: the Senate refused to confirm five of his six nominees. At one point, after the resignation of Justice Baldwin in 1844, the struggle became so intense that a seat remained vacant for 28 months.

Twentieth century debates have been on the whole more civil but no less political. The last nominee to be rejected on exclusively political or philisophical grounds was John J. Parker, a Herbert Hoover nominee, in 1930. And in Parker's case, debate focused as much on the net impact of adding a conservative to the Court as on the opinions of the nominee himself. Parker's scholarly credentials were beyond reproach. But Republicans, disturbed by the highly conservative direction taken by the Court under President Taft, began to organize the opposition.

Their case rested on three contentions—I have this right, by the way; it is Republicans; and Republicans in those days were much more progressive in these matters, in my perspective—first, that Parker was unfriendly to labor; second, that he was opposed to voting rights and political participation for blacks; and third, that his appointment was dictated by political considerations.

Parker's opinions on the court of appeals drew attention to his stand on labor activism. He had upheld a "yellow dog" contract that set as a condition of employment a worker's pledge never to join a union.

But the case for the opposition was put most eloquently by Senator Borah of Idaho, in a speech that would be quoted for years to come:

> [Our Justices] pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters.

And Senator Norris of Nebraska added, in stirring words that we would do well to remember 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—and I admit that this nominee possesses both of those qualifications—but we ought to know how he approaches these great questions of human liberty.

Parker was denied a seat on the Court by a vote of 41 to 39. Justice Owen Roberts, the man appointed in his place, was less wedded to the wisdom of the past: his was the famous "switch in time" that helped defuse the Court-packing crisis in 1937—more on that later.

But what of our own times? In the past two decades, three nominees have been rejected by the Senate—Abe Fortas, Clement Haynsworth and G. Harrold Carswell—and, although there were other issues at stake, debate in all three cases centered on their constitutional views as well as their professional competence. I am inserting into the CONGRESSIONAL RECORD a list of the statements of Senators during the Fortas and Haynsworth hearings and debates concerning the relevance of a nominee's substantive views.

I ask unanimous consent that they be printed in the RECORD.

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

II. STATEMENTS OF SENATORS CONCERNING RELEVANCE OF NOMINEE'S SUBSTANTIVE VIEWS—FORTAS HEARINGS AND DEBATES

A. SENATORS WHO ARGUED DIRECTLY THAT THE VIEWS OF THE NOMINEE ARE RELEVANT

Senator Baker, 114 Cong. Rec. 28258 (1968).

Senator Byrd (Va.), 114 Cong. Rec. 26142 (1968).

Senator Curtis, 114 Cong. Rec. 26148 (1968).

Senator Ervin, Hearings on the Nomination of Abe Fortas and Homer Thornberry Before the Senate Comm. on the Judiciary, 90th Cong., 2nd Sess., at 107 (1968) [hereinafter cited as 1968 Hearings].

Senator Fannin, 114 Cong. Rec. 26704, 28755 (1968).

Senator Fong, 114 Cong. Rec. 28167 (1968).

Senator Gore, 114 Cong. Rec. 28780 (1968).

Senator Griffin, 1968 Hearings at 44.

Senator Holland, 114 Cong. Rec. 26146 (1968).

Senator Hollings, 114 Cong. Rec. 28153 (1968).

Senator McClellan, 114 Cong. Rec. 26145 (1968).

Senator Miller, 114 Cong. Rec. 23489 (1968).

Senator Thurmond, 1968 Hearings at 180.

B. SENATORS WHO DEBATED THE NOMINEE'S VIEWS

Senator Byrd (W. Va.), 114 Cong. Rec. 28785 (1968).

Senator Eastland, 114 Cong. Rec. 28759 (1968).

Senator Hart, 1968 Hearings at 276.

Senator Javits, 114 Cong. Rec. 28268 (1968).

Senator Lausche, 114 Cong. Rec. 28928 (1968).

Senator Montoya, 114 Cong. Rec. 20143 (1968).

Senator Murphy, 114 Cong. Rec. 28254 (1968).

Senator Smathers, 114 Cong. Rec. 28748 (1968).

Senator Stennis, 114 Cong. Rec. 28748 (1968).

C. SENATORS WHO ARGUED THAT THE NOMINEE'S VIEWS ARE NOT RELEVANT OR ONLY MARGINALLY RELEVANT

Senator Bayh, 114 Cong. Rec. 19902 (1968).

Senator Mansfield, 114 Cong. Rec. 28113 (1968).
Senator McGee, 114 Cong. Rec. 19638 (1968).
Senator McIntyre, 114 Cong. Rec. 20445 (1968).
Senator Proxmire, 114 Cong. Rec. 20142 (1968).
Senator Randolph, 114 Cong. Rec. 19639 (1968).
Senator Tydings, 114 Cong. Rec. 28164 (1968).

III. STATEMENTS OF SENATORS CONCERNING RELEVANCE OF NOMINEE'S SUBSTANTIVE VIEWS—HAYNSWORTH HEARING AND DEBATES

A. SENATORS WHO ARGUED DIRECTLY THAT VIEW OF THE NOMINEE ARE RELEVANT, OR WHO DEBATED THE NOMINEE'S VIEWS

Senator Baker, 115 Cong. Rec. 34432 (1969).
Senator Bayh, 115 Cong. Rec. 35132 (1969).
Senator Byrd (Va.), 115 Cong. Rec. 30155 (1969).
Senator Case, 115 Cong. Rec. 35130 (1969).
Senator Dole, 115 Cong. Rec. 35142 (1969).
Senator Eagleton, 115 Cong. Rec. 28212 (1969).
Senator Ervin, Hearings on the Nomination of Clement Haynsworth Before the Senate Comm. on the Judiciary, 91st Cong. 1st Sess., at 75 (1969) [hereinafter cited as 1969 Hearings].
Senator Fannin, 115 Cong. Rec. 34606 (1969).
Senator Goodell, 115 Cong. Rec. 32672 (1969).
Senator Gurney, 115 Cong. Rec. 34439 (1969).
Senator Harris, 115 Cong. Rec. 35376 (1969).
Senator Hart, 1969 Hearings at 463.
Senator Hollings, 115 Cong. Rec. 28877 (1969).
Senator Javits, 115 Cong. Rec. 34275 (1969).
Senator Kennedy, 1969 Hearings at 327.
Senator McClellan, 1969 Hearings at 167.
Senator Mathias, 1969 Hearings at 307.
Senator Metcalf, 115 Cong. Rec. 34425 (1969).
Senator Mondale, 115 Cong. Rec. 28211 (1969).
Senator Muskie, 115 Cong. Rec. 35368 (1969).
Senator Percy, 115 Cong. Rec. 35375 (1969).
Senator Stennis, 115 Cong. Rec. 34849 (1969).
Senator Young, 115 Cong. Rec. 28895 (1969).

B. SENATORS WHO ARGUED THAT THE NOMINEE'S VIEWS ARE NOT RELEVANT

Senator Allott, 115 Cong. Rec. 35126 (1969).
Senator Bellmon, 115 Cong. Rec. 31787 (1969).
Senator Boggs, 115 Cong. Rec. 34847 (1969).
Senator Cook, 115 Cong. Rec. 29557 (1969).
Senator Fong, 115 Cong. Rec. 34862 (1969).
Senator Hruska, 115 Cong. Rec. 28649 (1969).
Senator Mundt, 115 Cong. Rec. 35371 (1969).
Senator Murphy, 115 Cong. Rec. 35138 (1969).
Senator Prouty, 115 Cong. Rec. 34439 (1969).
Senator Spong, 115 Cong. Rec. 34444 (1969).
Senator Stevens, 115 Cong. Rec. 35129 (1969).
Senator Tower, 115 Cong. Rec. 34843 (1969).
Senator Tydings, 1969 Hearings at 57.

Mr. BIDEN. Mr. President, the list was compiled by three law professors in a memorandum prepared for several members of the Judiciary Committee in 1971 to address the proper scope of the Senate's inquiry into the political and constitutional philosophies of nominees.

The tone of the recent debates was established during the hearings for Justice Thurgood Marshall in 1967. Senator Ervin summarized the viewpoint of several Senators.

> I believe that the duty which that [advice and consent] provision of the Constitution imposes upon a Senator requires him to ascertain as far as he humanly can the constitutional philosophy of any nominee to the Supreme Court.

When Justice Marshall's nomination reached the floor, the Senators who spoke against confirmation rested their case on what they saw as his activist views. Senator STENNIS said: "The nominee must be measured not only by the ordinary standards of merit, training, and experience, but his basic philosophy must be carefully examined." And Senator BYRD of West Virginia emphasized not only the nominee's own views but also the effect they would have in shifting the balance of the Court as a whole. Senator THURMOND emphasized the importance of balance: "This means that it will require the appointment of two additional conservative justices in order to change the tenor of future Supreme Court decisions." Of the numerous Senators who spoke in favor of Marshall's confirmation, many argued that his record of litigation aimed toward expanding the rights of black Americans was a positive factor in their decisions.

President Johnson's nomination of Abe Fortas to be Chief Justice in 1968 provoked the most protracted confirmation fight of recent times. There were personal as well as philosophical issues involved—particularly the propriety of a lameduck nomination and of the nominee's role as confidential adviser to the President—but his substantive positions were central to the debate. Of the 29 Senators who addressed the question, 13 explicitly stated that the nominee's political and constitutional views were relevant and should be discussed. Another nine analyzed his views in explaining their own votes, implying that they regarded this consideration to be relevant. Seven others seemed to argue that a nominee's constitutional philosophy was either not a proper topic of consideration by the Senate or of only marginal relevance.

Passions were high during that debate, but few disputed the terms of debate. Eloquent voices on both sides of the Senate agreed that the nominee's views, philosophy and past decisions were relevant to the question of his confirmation. Senator Fannin of Arizona quoted Senator Borah's stirring words from the Parker debate. He also quoted a letter from William Rehnquist, then a young lawyer in Arizona. As early as 1959, Mr. Rehnquist had called in the Harvard Law Record for restoring the Senate's practice "of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him."

Senator Miller of Iowa endorsed the sentiment:

> For too long, the Senate has rubberstamped nominations * * *. But a time comes when every Senator should search his conscience to see whether the exercise of the confirming power by the Senate is for the good of the country.

Then Senator THURMOND rose again: "It is my contention," he said to the Chamber, "that the Supreme Court has assumed such a powerful role as a policymaker in the Government that the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and the role of the Court in dealing with these issues."

Since Fortas's time, two more nominees have been rejected by the Senate—nominees for the seat that would come to be occupied by Justice Powell. There is no need to review the unhappy circumstances of the nominations of Clement Haynsworth and G. Harrold Carswell. They are as familiar now as they were then. But although both cases involved questions of ethics and competence, judicial philosophy played a central role. In the case of Judge Haynsworth, apparently 23 Senators argued for the relevance of his substantive views on labor law and race relations, while at least 13 Senators took the opposite position. Senator Case of New Jersey once more looked back to Borah: "How he approaches these great questions of human liberty—this for me is the essence of the issue in the pending nomination of Judge Haynsworth."

In the subsequent debate over G. Harrold Carswell, his views about racial equality received no less attention than his ability on the bench. Of particular concern was his always restrained, and often reversed, view of the scope of the 14th amendment. Senator INOUYE took particular exception to the nominee's "philosophy on one of the most critical issues facing our Nation today—civil rights." And Senator Brooke of Massachusetts argued the general proposition: "The Senate," he said, "bears no less re-

sponsibility than the President in the process of selecting members of the Supreme Court * * * (judicial competence) could not be sufficient (qualification) for a man who began his public career with a profound and far-reaching commitment to an anticonstitutional doctrine, a denial of the very pillar of our legal system, that all citizens are equal before the law."

DEVELOPING THE PROPER STANDARDS

This, then, is the history of the Senate debates. It is a rich and fractious history—always entangled with the passions of the moment and the questions of the day. But although the issues under review have changed, the terms of review have not. Until recent times, few have questioned the Senate's right to consider the judicial philosophy, as well as the judicial competence, of nominees. The Founders intended it and the Senate has exercised it. Over and over, the Senate has rejected nominees who possessed otherwise distinguished professional credentials but whose politics clashed with the Senate majority or whose judicial philosophies were out of step with the times or viewed as tipping the balance in the Court.

It is easy to see why the Senate has subjected nominees to the Supreme Court to more exacting standards than nominees to the lower courts, for as the highest court in the land, the Supreme Court dictates the judicial precedents that all lower courts are bound to respect. But as the only court of no appeal, the Supreme Court itself is the only court with unreviewable power to change precedents. Thus, only the Senate can guard the guardians—by attempting to engage and gage the philosophies of Justices before placing them on the Court.

But to say that the Senate has an undisputed right to consider the judicial philosophy of Supreme Court nominees does not mean that it has always been prudent in exercizing that right. After all, some of our most distinguished Justices—such as Harlan Fiske Stone, Charles Evans Hughes, and Louis Brandeis—have been opposed unsuccessfully on philosophical grounds. To say, furthermore, that political philosophy has often played a role in the past does not mean that nominees' views should always play a role in the present. For there are obvious costs to political fights over judicial nominees. There are only costs to political fights over the Supreme Court seat. As history shows, tempers flare, factions mobilize, and the Court, and the country, wait for a truce.

There are costs that all of us would prefer to avoid. And these are costs that I have discussed before. In supporting the nomination of Justice O'Connor, whose views are more conservative than my own, I warned of the dangers of applying political litmus tests to Presidential nominees. I agreed with Justice O'Connor that to answer questions about specific decisions would jeopardize her independence on the Court. I cautioned that if every Supreme Court nomination became a political battle, then we would run the risk of holding the Court hostage to the internecine wars of the President and Congress. And I endorsed a modern convention that has developed in the Senate—a convention designed to keep the peace. In recent times, under normal circumstances, many Members have preferred not to consider questions of judicial philosophy in discharging their duty to advise and to consent. Instead, they have been inclined to restrict their standards for Presidential nominees to questions of character and of competence. These are the three questions we have preferred to ask:

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 conflicts of interest?

Third. Will the nominee faithfully uphold the Constitution of the United States?

These were the questions asked by the Senate when President Eisenhower nominated Justice Brennan, when President Kennedy nominated Justice White, when President Nixon nominated Justice Powell and when President Reagan nominated Justice O'Connor, to name only a few recent examples.

But during what times and under what circumstances can this narrow standard be confidently applied? For obvious reasons, the narrow standard presumes a spirit of bipartisanship between the President and the Senate. It presumes that the President will enlist and heed the advice of the Senate; or it presumes that he will make an honest effort to choose nominees from the mainstream of American legal thought; or it presumes that he will demonstrate his good faith by seeking two qualities, above all, in his nominees—first, detachment and second, statesmanship.

Judge Learned Hand wrote of the necessity for detachment. He said that a Supreme Court Justice:

> * * * must have the historical capacity to reconstruct the whole setting which evoked the law; the contentions which it resolved; the objects which it sought; the events which led up to it. But all this is only the beginning, for he must possess the far more exceptional power of divination which can peer into the purpose beyond its expression, and bring to fruition that which lay only in flower * * * he must approach his problems with as little preconception of what should be the outcome as it is given to men to have; in short, the prime condition of his success will be his capacity for detachment.

And Justice Felix Frankfurter wrote of the necessity for statesmanship:

> Of course a Justice should be an outstanding lawyer in the ordinary professional acceptance of the term, but that is the merest beginning. With the great men of the Court, constitutional adjudication has always been statecraft. The deepest significance of Marshall's magistracy is his recognition of the practical needs of government, to be realized by treating the Constitution as the living framework within which the nation and the States could freely move through the inevitable changes wrought by time and inventions. Those of his successors whose labors history has validated have been men who brought to their task insight into the problems of their generation * * * Not anointed priests, removed from knowledge of the stress of life, but men with proved grasp of affairs who have developed resilience and vigor of mind through seasoned and diversified experience in a work-a-day world—(these) are the judges who have wrought abidingly on the Supreme Court.

Detachment and statesmanship—these are demanding standards. But they were standards admirably met by retiring Justice Lewis Powell—a practicing lawyer before his appointment to the Court. During a farewell interview, Justice Powell sought to express his own vision of the responsibilities of a Justice. "I never think of myself as having a judicial philosophy," he said. "* * * I try to be careful, to do justice to the particular case, rather than try to write principles that will be new, or original * * *." And Justice Powell called for "a consideration of history and the extent to which decisions of this Court reflect an evolving concept of particular provisions of the Constitution."

When the President selects nominees on the basis of their detachment and their statesmanship, with a sensitivity to the balance of the Court and the concerns of the country, then the Senate should be inclined to respond in kind. Individual Senators are bound to have individual objections. But at least since I have been in the Senate, many of us have made an effort to put aside our personal biases and to support even nominees with whom we were inclined to disagree.

But in recent years, it has struck many of us that the ground rules have been changed. Increasingly, nominees have been selected with more attention to their judicial philosophy and less attention to their detachment and statesmanship. When, and how, should a Senator respond when this happens? Constitutional scholars and Senate precedents agree that, under certain circumstances, a Senator has not only the right but the duty to respond by carefully weighing the nominee's judicial philosophy and the consequences for the country. What are those circumstances?

One circumstance is when a President attempts to remake the Court in his own image by selecting nominees for their judicial philosophy. Alone, Charles Black, a liberal scholar then at Yale Law School, wrote in 1970:

If a President should desire, and if chance should give him the opportunity, to change entirely the character of the Supreme Court, shaping it after his own political image, nothing would stand in his way except the United States Senate * * *. A Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court * * *.

I think that is a very important quote.

Another circumstance is when the President and the Senate are deeply divided, demonstrating a lack of consensus on the great issues of the day. Philip B. Kurland of the University of Chicago, a conservative scholar, wrote in 1972:

Obviously, when the President and the Senate are closely aligned in their views, there is not likely to be a conflict over appointees. When their views are essentially disparate, suggesting an absence of consensus in the nation—a situation more likely to occur at the time of greatest constitutional change—it will become the obligation of the contending forces to reach appropriate compromise. It should not satisfy the Senate that the nominee is an able barrister with a record of unimpeachable ethical conduct. He who receives a Supreme Court appointment will engage in the governance of this country.

Let me repeat that. This is not repeated in the quote, but let me repeat that part of the quote.

He who receives a Supreme Court appointment will engage in the governments of this country. The question for the Senate—no less than the President—is whether he is an appropriate person to wield that authority.

A final circumstances is when the balance of the Court itself is at stake. When the country and the Court are divided, then a determined President has the greatest opportunity of remaking the Court in his own image. To protect the independence of the Court and the integrity of the Constitution, the Senate should be vigilant against letting him succeed where they disagree. During the debate over the qualifications of Clement Haynsworth, our former distinguished colleague and my former seatmate, Senator Muskie of Maine spoke movingly of the Senate's duty to consider the impact of a nominee's views on the balance of the Court. He said:

It is the prerogative of the President, of course, to try to shift the direction and the thrust of the Court's opinions in this field by his appointments to the Court. It is my prerogative and my responsibility to disagree with him when I believe, as I do, that such a change would not be in our country's best interests.

These, in sort, are some of the circumstances when the Senate's right to consider judicial philosophy becomes a duty to consider judicial philosophy: When the President attempts to use the Court for political purposes; when the President and Congress are deeply divided; or when the Court is divided and a single nomination can bend it in the direction of the President's political purposes. These are all times when the Senate has a duty to engage the President.

In future speeches, I will attempt to support my belief that all three circumstances obtain today. But in turning to the future we should be guided by the past. Our predecessors have been met with similar challenges. How have they responded under fire?

A COURAGEOUS SENATE VERSUS A DETERMINED PRESIDENT: TWO FAMOUS PRECEDENTS

Fifty years ago, and 150 years ago, popular Presidents committed themselves to controversial political agendas. In both cases, the Supreme Court had ruled parts of the agenda unconstitutional. In both cases, the President attempted to tilt the balance of the Court by politicizing the appointments process. And in both cases, a courageous Senate attempted to block the President's efforts to bend the Court to his personal ends.

The first case is one I have already outlined—the case of Andrew Jackson's relentless efforts to place Roger Taney on the Supreme Court.

At its heart, the story of Andrew Jackson and Roger Taney versus the Senate and the Bank of the United States was a struggle over the broad ideological issues that split the fledgling Republic—a struggle between debtor and creditor, executive and legislative, States' rights and Federal power. Andrew Jackson arrived in Washington resolved to do battle with the the "monster" Bank. "I have it chained," he crowed after vetoing an attempt to recharter the Bank in 1832. "The monster must perish," he said.

To prosecute his vendetta against the Bank, Jackson sought to remove all Federal money from the "monster's" vaults. In late 1833, Jackson summoned his Cabinet and announced his resolve. By law, only Secretary of the Treasury Louis McLane was authorized to withdraw the funds. So Jackson commanded McLane to act. McLane, understanding the law, refused. So Jackson fired the staunch McLane and appointed William Duane to take his place. As a condition of his appointment, Duane promised to withdraw the funds. But, once in office, his conscience got the better of him. So he went to Jackson, who reminded him of his promise. "A Secretary, sir," said Jackson, "is merely an executive agent, a subordinate, and you may say so in self defense." "In this particular case," responded Duane, "Congress confers a discretionary power and requires reasons if I exercise it." Obviously, Duane was right. The law clearly stated that Duane had to report to Congress any decision regarding the deposit, and Congress was in recess. Duane asked for a delay. "Not a day," barked Jackson, "not an hour."

So Jackson fired his second Secretary. Who would carry out the executive order? In Attorney General Roger Taney, Jackson found a Cabinet member with a less scrupulous view of Executive power. Jackson designated Taney to take the Treasury and execute the order. And Taney wasted no time. Though not yet confirmed by the Senate, he immediately ordered the removal of funds. "Executive despotism!" cried the Whigs as soon as the Senate reconvened, and refused to confirm his Cabinet appointment.

But the deed was done, and the Bank was bleeding. The victory would not be complete, however, unless Jackson could tilt the balance of the Supreme Court. At first, the Court had leaned toward the Federalists in the battle of the Bank—John Marshall had upheld the Bank against attack by the States as early as 1819. But, after four Jackson appointments, the Court was rapidly shifting in favor of the States. In 1835, another vacancy arose, and Jackson was quick to reward his loyal henchman, Taney. But the Whigs could not forget Taney's earlier performance under fire. One New York paper said that he was "unworthy of public confidence, a supple, cringing tool of power."

In the minds of the Whigs—many of them giants of the Senate such as Calhoun and Crittenden, Webster and Clay—Taney's detachment and statesmanship were in serious doubt. And they defeated the nomination by postponing consideration until the last day of the Senate's session. Jackson was furious, and in his fury decided to bide his time. In December, with the resignation of Chief Justice Marshall, yet another vacancy arose. To fill the shoes of the great justice, Jackson resubmitted the name of Taney.

Once again, the lions of the Senate roared to the very end. Henry Clay, the "great compromiser," was said to use every "opprobrious epithet" in his vocabulary to fight the Taney nomination. The Whigs had no reservation about opposing him on the ground that they believed his views did not belong on the Court. As Senator Borah put it, in his classic speech against the Parker nomination in 1930:

They opposed [Taney] for the same reason some of us now oppose the present nominee, because they believed his views on certain important matters were unsound. They certainly did not oppose him because of his lack of learning, or because of his incapability as a lawyer, for in no sense was he lacking in fitness except, in their opinion, that he did not give proper construction to certain problems that were then obtaining.

But the Democrats had gained the upper hand in the Senate, and Taney became Chief Justice by a vote of 29 to 15. Unfortunately, the Whig fears

proved only too well justified. It would be hard to imagine a more inappropriate successor to Chief Justice Marshall than Chief Justice Taney. Where Marshall's broad reading of the Constitution was indispensable in strengthening the growing Union, Taney's narrow reading played a significant role in weakening the cohesion of the Union. In 1857, Taney wrote the infamous Dred Scott decision for a divided Court. And in refusing to read into the Constitution the power of Congress to limit slavery in newly admitted States, he nullified the Missouri Compromise and helped to precipitate the greatest constitutional crisis in our history—the Civil War.

I prefer to end on a happier note. It is another story of a powerful and popular President who attempted to bend the Court to suit his own ends. But it is a story of courage crowned with success. It unfolded in the Senate 50 years ago, in the summer of 1937.

America 50 years ago was a nation struggling against economic collapse. Under Franklin Roosevelt's inspiring leadership, Congress and the States enacted by overwhelming majorities a series of laws to stimulate recovery.

But by narrow margins—5 to 4 or 6 to 3—the Supreme Court had struck down a series of enactments, from minimum wage laws to agricultural stabilization acts. Representative government seemed paralyzed by the intransigence of the Court.

Moderates and progressives—Republicans and Democrats—searched for a way to thwart the "nine old men." They proposed a wide range of constitutional amendments and legislative limits on the Court. But Roosevelt was impatient for a quick remedy, and suspicious of indirect methods. In his view, the only way to save the New Deal was to change the composition of the Court itself.

Fresh from his landslide victory over Alf Landon, FDR sprang his Court-packing proposal: For every Justice over the age of 70 who failed to retire, the President would be able to nominate a new Justice, up to a limit of 15 members on the Court. The plan had been veiled in secrecy, and when Roosevelt announced it in February 1937, it was met with a storm of popular criticism.

Let me be clear. I am not for a moment suggesting that President Reagan is attempting to do what President Roosevelt attempted to do—enacting a constitutional change by enlarging the membership of the Court itself. But there are important similarities as well as important differences between the intentions of the two Presidents.

Both had in mind the same result. Both sought to use their power of appointment to shift the balance of Courts that had repeatedly rejected their social agendas. But there is a crucial difference. While President Reagan has used his nominations to shift the balance of the Court, in Roosevelt's case, the Court shifted on its own. Before the Court packing bill reached the Senate floor, before Justice Van Devanter's timely resignation, Justice Owen Roberts had already made his welcome "switch in time that saved nine"—giving Roosevelt the 5 to 4 majority that he sought.

But in May 1937, the outcome in the Senate was anything but certain. The Judiciary Committee was controlled by the Democrats—loyal New Dealers. Although they supported Roosevelt's political ends, they refused to allow him to pursue them through judicial means. In their minds, the integrity of the Court meant more than the agenda of the President. On June 14, they issued a report condemning the Court-packing plan. The President's legislation, they concluded, demonstrated, "the futility and absurdity of the devious." It was an effort to "punish the justices" for their opinions and was "an invasion of judicial power such as has never before been attempted in this country."

But the committee report went further still. Executive attempts to dominate the judiciary lead inevitably to autocratic dominance, "the very thing against which the American Colonies revolted, and to prevent which the Constitution was in every particular framed." The report concluded with a final thundering sentence that, before the day was out, would be quoted in newspapers across the land: "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."

It was a stinging rebuke to a beloved President—all the more remarkable in view of the fact its authors shared his legislative goals. The British Ambassador wrote to the British Prime Minister:

> Seven Democratic Senators have committed the unforgivable sin. They have crossed the Rubicon and have burned their boats; and as they are not men to lead a forlorn hope, one may assume that many others are substantially committed to the same action. One can only assume that the President is beaten.

The formal verdict was delivered on the Senate floor on July 22, 1937. Though a meaningless rollcall vote lay ahead, it was clear that Roosevelt's effort to pack the Court, which for some time appeared destined to succeed, had come to an end. Arms outstretched, his eyes fixed on the galleries, Senator Hiram Johnson cried, "Glory be to God!"

Let me conclude by saying that my case today has been rooted in history, precedent, and common sense. I have argued that the framers entrusted the Senate with the responsibility of "advice and consent" to protect the independence of the judiciary. I have urged that the Senate has historically taken its responsibility seriously. I have argued that, in case after case, it has scrutinized Supreme Court nominees on the basis of their political and judicial philosophies. I have argued that, in case after case, it has rejected qualified nominees, because it perceived those views to clash with the interests of the country.

In future speeches I will make the case that today, 50 years after Roosevelt failed, 150 years after Jackson succeeded, we are once again confronted with a popular President's determined attempt to bend the Supreme Court to his political ends. No one should dispute his right to try. But no one should dispute the Senate's duty to respond.

As we prepare to disagree about the substance of the debate, let no one contest the terms of the debate—let no one deny our right and our duty to consider questions of substance in casting our votes. For the founders themselves intended no less.

I thank the Chair and thank my colleagues for their indulgence.

(The following occurred during the remarks of Mr. BIDEN.)

The ACTING PRESIDENT pro tempore. The Senator will please suspend.

The Chair will note the time of morning business has now expired.

Does the Senator seek consent to extend morning business?

## EXTENSION OF MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that the period for morning business be extended for an additional 30 minutes.

Mr. President, I believe that the Republican leader wants to utilize some morning business period also, and we would not be able to resume consideration of the debt limit extension until 10:30 in any event. I ask unanimous consent, also, that morning business period be under the same restrictions as heretofore ordered and that the statement of the distinguished Senator from Delaware not show an interruption in the RECORD.

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

(Conclusion of earlier proceedings.)

The ACTING PRESIDENT pro tempore. The Senator yields the floor. The Chair recognizes the majority leader.

Mr. BYRD. Mr. President, I have cleared, I believe, with the Republican leader the unanimous-consent action on Calendar No. 238. May I inquire?

Mr. DOLE. Yes.

Mr. BYRD. I thank the leader.

consideration of H.R. 1444, the House companion measure, and that the bill be immediately considered.

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

The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (H.R. 1444) to amend titles XI, XVIII, and XIX of the Social Security Act to protect beneficiaries under the health care programs of that act from unfit health care practitioners, and otherwise to improve the antifraud provisions relating to those programs.

The ACTING PRESIDENT pro tempore. Without objection, the Senate will proceed immediately to the consideration of the bill.

Mr. BYRD. Mr. President, I move to strike all after the enacting clause of H.R. 1444 and to substitute the text of S. 661, as reported and as amended.

The ACTING PRESIDENT pro tempore. The question is on agreeing to the motion of the Senator from West Virginia.

The motion was agreed to.

The ACTING PRESIDENT pro tempore. The question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time.

The ACTING PRESIDENT pro tempore. The bill having been read the third time, the question is, Shall it pass?

The bill (H.R. 1444) was passed.

Mr. BYRD. Mr. President, I ask unanimous consent to postpone indefinitely consideration of S. 661.

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

Mr. BYRD. Mr. President, I move to reconsider the vote by which the bill, as amended, was passed.

Mr. DOLE. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

## S. 490 PLACED UNDER SUBJECTS ON THE TABLE

Mr. BYRD. Mr. President, I have one further unanimous-consent request.

I ask unanimous consent that Calendar No. 167, S. 490, the Finance Committee report on the trade bill, be placed with those bills listed under "Subjects on the Table" in the back of the calendar.

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

Mr. BYRD. Mr. President, the distinguished Republican leader has his time reserved, I believe, under the standing order.

The ACTING PRESIDENT pro tempore. The Senator is correct.

Mr. BYRD. Resumption of the consideration of the debt limit measure will be delayed.

The ACTING PRESIDENT pro tempore. The Chair recognizes the minority leader.

## THE NOMINATION OF ROBERT BORK

### THE TRUE ROLE OF THE SENATE

Mr. DOLE. Mr. President, I thank the distinguished majority leader. I have listened on the floor and in the cloakroom with interest to the distinguished Senator from Delaware, Senator BIDEN, chairman of the Judiciary Committee.

I have watched and listened to the public debate over the Bork nomination evolve over the last few weeks in this body and in the press. I must say I am struck by the amount of handwringing by Judge Bork's opponents over whether a nominee's so-called ideology may be considered by the Senate as part of its constitutional obligation to offer its "advice and consent" to the President.

Much of their debate, I must say, has been quite edifying in the context of our constitutional bicentennial, exploring as it does the various historical precedents.

We have just had an hour of that. I think that is very helpful, if we receive it in a constructive way, as I am certain it was offered.

### IDEOLOGY OFF LIMITS

But let us be honest, candid and right up front about this nomination. In the case of Judge Bork, the issue is not whether a nominee's ideology can ever be considered by the Senate. I am certain that we could all conjure up an imaginary nominee whose ideology was so bizarre, whose thought processes were so alien, that we would feel obliged to vote against him or her.

I am also certain, however, that such an imaginary candidate would never have served as Solicitor General of the United States, having attained a partnership at a prominent law firm, and distinguished himself as a professor at the Yale Law School, and would most certainly never be confirmed by this body to serve on the extraordinarily important U.S. Court of Appeals for the District of Columbia.

### BORK—IN THE MAINSTREAM

The stark—and to his opponents, disconcerting—fact is that Judge Bork's views are well within the acceptable range of legal debate and, if Presidential elections mean anything at all, are probably much closer to the mainstream of American thought than that of most of his political critics. In this regard, it is important to note that not 1 of the 100 majority opinions written by Judge Bork, or even 1 of the 300 or so decisions where he was joined the majority, has been overturned on appeal.

Judge Bork has in large part made his formidable reputation by arguing for a neutral, nonpolitical and nonpersonal kind of judging, for a reaffirmation of the great principle of judicial restraint. His opponents fear only that the application of that traditional principle will not result in judicial decisions that will advance their own political and social agendas.

The real issue, then, is whether our duty to advise and consent to the nomination should include our consideration of a nominee's views on specific political and social issues, as opposed to his fitness and merit.

Such an approach, I suggest, would offend common sense, would be contrary to the intent of the framers, and would, in the end, be horribly shortsighted.

I noted reference in footnotes on the number of Senators who talked about a judge's position, that I was listed in 1969 addressing certain views of Judge Haynsworth who was rejected by the Senate. I have since taken another look at that. I think that may have been true in the broad context, but only in the broad context trying to respond to some of the arguments made against Judge Haynsworth. I will say again, as I have said in the past, that is one time this Senator made a mistake. We rejected an outstanding judge, in my view, but that is history.

### NO CHECK LISTS

It is universally acknowledged that judicial nominees should not be asked to commit themselves on particular points of law in order to satisfy a Senator as to how he or she will decide an issue that might come before the Court. Yet there is little discernible difference between a Senator demanding such an explicit quid pro quo during the confirmation process and one who decides beforehand that he will only support nominees that satisfy a check list concerning specific issues or cases.

As Prof. Richard Friedman has put it: "Extended debates, both within and without the Senate, concerning the political philosophy of a nominee cannot help but diminish the Court's reputation as an independent institution and impress upon the public—and, indeed, the Court itself—a political perception of its role." In short, the independent judiciary should not be caught up in campaign promises designed to curry favor with politicians and their constituent groups.

### FOUNDING FATHERS ON THE MARK

Similarly, had the framers intended that the Senate should consider views on political or social issues as a criterion for confirmation, the constitutional convention would have adopted a proposal that would have exclusively lodged the appointment power in

either the Senate or the entire Congress. They did not do that. The framers, however, expressly rejected giving the Senate such a role, primarily out of fear that cronyism would prevail or that the process would be tainted by "[I]ntrigue, partiality and concealment."

Rather, as Alexander Hamilton explained in Federalist No. 76, the President was to be "the principal agent" in the judicial process. The Senate's role in the confirmation process was limited to weighing the qualifications, rather than the politics, of each candidate. According to Hamilton, the Senate's 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."

Having rejected congressional selection of judges because of concerns about "[I]ntrigue, partiality and concealment," the framers could hardly have envisioned that the Senate would politicize the Court through the exercise of its advice and consent functions.

BIDEN, KENNEDY AGREE: NO LITMUS TEST

Framed in this manner, the issues for debate are more limited. As my distinguished colleague the Senator from Delaware [Mr. BIDEN] put it some years back:

This hearing is not to be a referendum on any single issue or the significant opposition that comes from a specific quarter * * * as long as I am chairing this hearing, that will not be the relevant issue. 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.

And the distinguished Senator from Massachusetts [Mr. KENNEDY] has also expressed what I believe to be the traditional understanding of the Senate's role in the confirmation process:

I believe that it is recognized by most Senators that we are not charged with the responsibility of approving a man to be an Associate Justice of the Supreme Court only if his views 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.

STAYING WITH THE CONSTITUTION

In my view, our inquiry should focus on the nominees's ability and integrity, and upon whether the nominee would faithfully and neutrally apply the Constitution in a manner that upholds the prerogatives of the three coordinate branches. If we go beyond this and require that judicial candidates pledge allegiance to the political and ideological views of particular Senators or interest groups, we will do grave and irreparable violence to basic separation of powers principles that act as the ultimate safeguard against the tyranny of the majority. We would threaten all three branches of government. We would undermine the President's constitutionally mandated power of appointment by paralyzing the Senate in a gridlock of competing interests groups, each hawking its own agenda—and I am afraid that the extremely long, almost unprecedented delay in hearings on this nomination is only a foretaste of what we can expect if we politicize this process. And, more important, we will deny the Court that insulation from the political process which the Constitution so wisely attempted to insure.

So finally I would just say that for these reasons this is going to be a long, drawn-out process. Judge Bork should be closely scrutinized. He will be closely scrutinized. There are already a number of Members on both sides of the aisle, both ends of the political spectrum, who have announced their positions long before the hearings will begin. In fact, somebody was already saying yesterday there are 45 for, 45 against and 10 undecided on the nomination. I do not know anything about that, but that is one of the rumors floating around. But the hearings will happen and there will be extended debate, I would assume, I hope, since the Constitution says the Senate shall act on the nomination, it will come to the Senate floor, notwithstanding what the vote could be or might be in the Judiciary Committee, I hope we could have an opportunity to vote up or down on the nomination when it reaches the Senate floor.

And so there will be a long struggle over this very important nomination, the most important nomination in my view that Ronald Reagan has made since he became President, if you look at what impact it could have after he leaves the Presidency in January 1989.

Mr. BIDEN. Will the Senator yield for just a second? I do not want to engage in debate, just to make one clarification, if I may.

Mr. DOLE. Sure.

Mr. BIDEN. The Senator accurately quoted me. I just want to make a point that the quote regarding "that is not about a single issue" was for Abe Mikva to be on the court of appeals, and I hope in my speech I laid out the distinction between the role of the lower courts and the Supreme Court. That is the only point.

Mr. DOLE. I thank the Senator from Delaware. I indicated earlier that I think his presentation will be very helpful and I appreciate his remarks this morning.

Mr. BIDEN. I thank the Senator.

The ACTING PRESIDENT pro tempore. The Chair will state that all time for morning business has now come to an end. Is there further morning business?

## EXTENSION OF MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that the period for morning business be extended no more than 10 minutes and under the same restrictions as heretofore ordered.

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

Who seeks recognition?

Mr. BYRD. Mr. President, I ask unanimous consent that the period be extended no more than 20 minutes and that if I am not in the Chamber, the Chair then put the Senate into recess until I get back into the Chamber.

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

Mr. BYRD. And I want that 20 minutes to be 10 minutes to Mr. SIMPSON and 10 minutes to Mr. HATCH.

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

## THE NOMINATION OF ROBERT BORK TO BE SUPREME COURT JUSTICE

Mr. SIMPSON. Mr. President, I thank the majority leader for providing time so that those of us who embrace the other side of the Bork issue could have equal time to express our views. That is most helpful and appreciated by this Senator.

Well, Mr. President, 10 minutes, I will take 10 today and I will probably take 10 another time because I intend to get fully involved in this one with a series of vignettes and small addresses on Robert Bork because I think it is so very important.

I would relate to you that going on in Wyoming right now is a great event called Cheyenne Frontier Days. You have heard me review this event before. Some know that, and as I thought of what we are going to go through on this one it reminded me of the cry from the rodeo announcer, "Here we come out of chute No. 4," because it really is going to be like riding Brahma bulls around here on this one.

We can see what awaits Robert Bork. And I guess, Mr. President, if the Democratic majority—it is not my intent to slip into partisanship for I think partisanship for simply partisanship sake is a feckless operation. I do not only say that; I try to live by that legislatively, but if we are going to object and oppose the Bork nomination simply because Judge Bork has been nominated by a conservative Republican President, why not just come right out and say so and kind of clean

up the whole operation at once? They are in the majority here, and it is within their power to reject the nomination. Let him have it and stop the posturing, but let us be honest about it. Let them admit they do not like Judge Bork and they do not like some of his previous decisions. There are comments about his utterings of 1962 about civil rights, when there are three Members sitting now in this body who voted against the civil rights bill of 1964.

How long do you keep score around here? How long do you hang a guy by his thumbs? Three Members of this present body voted against the civil rights bill of 1964. Are they any lesser in our eyes? Not one whit. They are all remarkable participating Members of this body.

Now, that is an extraordinary bit of argument to trot up when many people were concerned in 1962 as to what would happen with their business under this proposed new law. What was your right as a restaurant owner, as a shopkeeper? Go read the remarks of our remarkable friend, Senator Hubert Humphrey, at the time. Do not worry about that; that is not what is involved here.

So let us just admit that we do not like him and that will help to clarify the debate instead of somehow trying to shroud the political, partisan, and special interest opposition in some type of vapid rationalization or some ponderous historical perspective.

In raising concerns about the nomination of this extraordinary man, with a record that is beyond objection, really beyond commentary if you are a lawyer or a judge or any thoughtful person, we now find that among all of the other qualifications that he might have it is important for us to oppose Judge Bork's nomination on the grounds that it would affect the "balance" of the Supreme Court. Balance.

We are informed that the major issue upon which this nomination should turn is whether the nominee would alter significantly the balance of the Court. That is stated by the Senator from Delaware. That is paraphrasing a theme by Prof. Laurence Tribe of the Harvard Law School.

I think if we are going to review credentials throughout this long and what will be a tedious and ponderous debate, we should also examine the credentials of Laurence Tribe. He has at least in my review of his writings never really quite embraced anything much that Ronald Reagan has done in 6½ years, not one whit, unless I am missing something. And now he will become the oracle for the proponents of the decline of Robert Bork. How fascinating.

I do not see anything in the Constitution that says anything about balance. I must have missed something. It is not there. Altering the balance is really only a rather crudely veiled way of saying that one disagrees with the philosophical direction in which the nominee would move the Court. And whatever the propriety of a Senator opposing a nominee because of philosophical differences, that should not be confused with an objection of some imbalancing of the Court.

Nothing I find in the historical practice surrounding the Senate confirmation of Supreme Court nominees requires or even suggests anything about balance between liberals and conservatives when a new nominee is presented for a vacancy. Certainly, no such standard was employed when Franklin Delano Roosevelt had eight nominations to the Court, even though, as Prof. Laurence Tribe has written, Justice Black's appointment in 1937 "took a delicately balanced Court * * * and turned it into a Court willing to give solid support of FDR's initiatives. So, too, Arthur Goldberg's appointment to the Court in 1962 shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism * * *." We can almost see the delight in that statement, if one can picture the sayer at the time of the saying.

We are now hearing about the pendulum swinging from one extreme to the other. My friend Senator PAUL SIMON describes that. But the Supreme Court is a collegial body of remarkable Americans. It has been my privilege to come to know them personally. I have the same respect and regard and admiration for Justice William Brennan as I have for Chief Justice William Rehnquist. They are superb people and do a magnificent job for this country, and so will Robert Bork, and he will serve with great distinction.

The advocacy of the balance theory in the 1960's, when Justice Goldberg and Justice Fortas and Justice Marshall were being placed on the Supreme Court, resulted in a body that consisted of two judicial conservatives, I think. Was the balance theory then discussed?

If either Senator BIDEN or Senator SIMON—and they both have remarked on this nomination—were fortunate enough, and America would not be badly served, to be elected President of the United States, and be faced with appointing a successor, say, to Chief Justice Rehnquist or Justice Scalia, would they feel constrained then in upsetting the Court's balance? I think not. More likely, the underlying theory of the balance proponents is that the judicial philosophy espoused by the Court can be allowed to evolve properly but only in the concept of their own single and more liberal direction. That is not balance in any sense.

I commend to my colleagues a piece by Lloyd Cutler, former counsel to President Carter—another man I have come to know personally, and who I have the richest admiration and respect for—in the New York Times, of Thursday, July 16, 1987, "Saving Bork From Both Friends And Enemies," which I ask unanimous consent to have printed in the RECORD. Here is a truly thoughtful commentary. He says it superbly.

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

[From the New York Times, July 16, 1987]

SAVING BORK FROM BOTH FRIENDS AND ENEMIES

(By Lloyd N. Cutler)

WASHINGTON.—The nomination of Judge Robert H. Bork to the United States Supreme Court has drawn predictable reactions from both extremes of the political spectrum. One can fairly say that the confirmation is as much endangered by one extreme as the other.

The liberal left's characterization of Judge Bork as a right-wing ideologue is being reinforced by the enthusiastic embrace of his neo-conservative supporters. His confirmation may well depend on whether he can persuade the Senate that this characterization is a false one.

In my view, Judge Bork is neither an ideologue nor an extreme rightwinger, either in his judicial philosophy or in his personal position on current social issues. I base this assessment on a post-nomination review of Judge Bork's published articles and opinions, and on 20 years of personal association as a professional colleague or adversary. I make it as a liberal Democrat and as an advocate of civil rights before the Supreme Court. Let's look at several categories of concern.

*Judicial philosophy.* The essence of Judge Bork's judicial philosophy is self-restraint. He believes that judges should interpret the Constitution and the laws according to neutral principles, without reference to their personal views as to desirable social or legislative policy, insofar as this is humanly practicable.

All Justices subscribe at least nominally to this philosophy, but few rigorously observe it. Justices Oliver Wendell Holmes, Louis D. Brandeis, Felix Frankfurter, Potter Stewart and Lewis F. Powell, Jr. were among those few, and Judge Bork's articles and opinions confirm that he would be another. He has criticized the rightwing activism of the pre-1937 court majorities that struck down social legislation on due process and equal protection grounds. He is likely to be a strong vote against any similar tendencies that might arise during his own tenure.

*Freedom of speech.* As a judge, Judge Bork has supported broad constitutional protection for political speech but has questioned whether the First Amendment also protects literary and scientific speech. However, he has since agreed that these forms of speech are also covered by the amendment. And as a judge, he has voted to extend the constitutional protection of the press against libel judgments well beyond the previous state of the law. In his view, "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." Over Justice (then Judge) Antonin Scalia's objections, he was willing to apply "the First Amendment's guarantee . . . to frame new doctrine to cope with changes in

libel law [huge damage awards] that threaten the functions of a free press."

*Civil Rights.* While Judge Bork adheres to the "original intent" school of constitutional interpretation, he plainly includes the intent of the Framers of the post-Civil War amendments outlawing slavery and racial discrimination. In this spirit, he welcomed the 1955 decision in Brown v. Board of Education proclaiming public school segregation unconstitutional as "surely correct," and as one of "the Court's most splendid vindications of human freedom."

In 1963, he did in fact oppose the public accommodations title of the Civil Rights Act as an undesirable legislative interference with private business behavior. But in his 1973 confirmation hearing as Solicitor General he acknowledged he has been wrong and agreed that the statute "has worked very well." At least when compared to the Reagan Justice Department, Judge Bork as Solicitor General was almost a paragon of civil rights advocacy.

Judge Bork was later a severe critic of Justice Powell's decisive concurring opinion in the University of California v. Bakke case, leaving state universities free to take racial diversity into account in their admissions policies, so long as they did not employ numerical quotas. But this criticism was limited to the constitutional theory of the opinion. Judge Bork expressly conceded that the limited degree of affirmative action it permitted might well be a desirable social policy.

*Abortion.* Judge Bork has been a leading critic of Roe v. Wade, particularly its holding that the Bill of Rights implies a constitutional right of privacy that some state abortion laws invade. But this does not mean that he is a sure vote to overrule Roe v. Wade; his writings reflect a respect for precedent that would require him to weigh the cost as well as the benefits of reversing a decision deeply imbedded in our legal and social systems. (Justice Stewart, who had dissented from the 1965 decision in Griswold v. Connecticut, on which Roe v. Wade is based, accepted Griswold as binding in 1973 and jointed the Roe v. Wade majority.).

Judge Bork has also testified against legislative efforts to reverse the court by definite life to begin at conception or by removing abortion cases from Federal court jurisdiction. If the extreme right is embracing him as a convinced right-to-lifer who would strike down the many state laws now permitting abortions, it is probably mistaken.

*Presidential powers.* I thought in October 1973 that Judge Bork should have resigned along with Elliot L. Richardson and William S. Ruckelshaus rather than carry out President Richard M. Nixon's instruction to fire Archibald Cox as Watergate special prosecutor.

But, as Mr. Richardson has recently observed, it was inevitable that the President would eventually find someone in the Justice Department to fire Mr. Cox, and, if all three top officers resigned, the department's morale and the pursuit of the Watergate investigation might have been irreparably crippled.

Mr. Bork allowed the Cox staff to carry on and continue pressing for the President's tapes—the very issue over which Mr. Cox had been fired. He appointed Leon Jaworski as the new special prosecutor, and the investigations continued to their succesful conclusion. Indeed, it is my understanding that Mr. Nixon later asked, "Why did I go to the trouble of firing Cox?"

I do not share Judge Bork's constitutional and policy doubts about the statute institutionalizing the special prosecutor function. But if the constitutional issue reaches the Supreme Court, he will most likely recuse himself, as he has apparently aready done in withdrawing from a motions panel about to consider this issue in the Court of Appeals. Moreover, as he testified in 1973, he accepts the need for independent special prosecutors in cases involving the President and his close associates.

Balance-the-budget amendment. While this proposed amendment is not a near-term Supreme Court issue, Judge Bork's position on it is significant because support for that amendment is a litmus test of right-wing ideology. He has publicly opposed the amendment on several grounds, including its unenforceability except by judges who are singularly ill-equipped to weigh the economic policy considerations that judicial enforcement would entail. This reasoning is far from the ritual cant of a right-wing ideologue.

Experience shows that it is risky to pinpoint Supreme Court Justices along the ideological spectrum, and in the great majority of cases that reach the Court ideology has little effect on the outcome.

The conventional wisdom today places two Justices on the liberal side, three in the middle and three on the conservative side. I predict that if Judge Bork is confirmed, the conventional wisdom of 1993 will place him closer to the middle than to the right, and not far from the Justice whose chair he has been nominated to fill.

Every new appointment created some change in the "balance" of the Court, but of those on the list the President reportedly considered, Judge Bork is one of the least to create a decisive one.

Mr. SIMPSON. Mr. President, what is the time remaining?

The ACTING PRESIDENT pro tempore. Nine minutes and 25 seconds.

Mr. SIMPSON. The Senator from Utah wishes to speak and I shall yield.

Mr. President, the issue of balance is an extraordinary red herring. It is also quite remarkable to me that almost in simultaneous fashion, Justice Bork is being accused of being "outside the mainstream," yet apparently and fearsomely becoming somehow capable of moving the Court in a variety of unsatisfactory directions. Are the four judges he will take with him on decisions also outside of the mainstream? How can that be? What an ironic statement!

This is a man of remarkable competency, and we are going to get down into the trenches and see that he is confirmed as a member of the U.S. Supreme Court. We will have to do it with the use of hard work and common sense, because it will not be done any other way. The American public will see through the partisan opposition to Judge Bork.

The ACTING PRESIDENT pro tempore. The Senator from Utah is recognized for 10 minutes.

Mr. HATCH. Mr. President, does the Senator from Wyoming have any time remaining?

The ACTING PRESIDENT pro tempore. The Senator from Wyoming has consumed all his time.

Mr. HATCH. Mr. President, I am happy to be here this morning. I come from the famous—or infamous—Iran-Contra hearings, during which, I think many judgments are being made before the end of the hearing process. As a matter of fact, some people formed opinions long before Colonel North testified; but once he did testify, those people were amazed to find that some of the things they thought were wrong did not appear quite as wrong in light of his explanations.

I find the same problem here. It is a difficult problem for me to understand how Members of this body, before the first day of hearing, before listening to this individual, or even reading the better than 100 decisions he has made as a member of the District of Columbia Circuit Court of Appeals, can make the decision that he is unfit or unworthy to be on the Supreme Court. I find something really wrong with that.

I think that is one of the things we do around here: We jump to conclusions just a little too fast.

Mr. President, July 1, 1987, was a historic day. On that day President Reagan chose Judge Robert Bork to be the 107th Associate Justice of the U.S. Supreme Court. This is the most important appointment a President can make, and nominees should be the very best the legal community has to offer. That is what we have in Judge Bork. Robert H. Bork is a law professor and scholar whose teachings and writings have greatly influenced the development of our laws; a practitioner who has himself argued—and won—numerous cases before the Supreme Court; and a judge whose searching, thoughtful, and moderate opinions serve as models of experienced judicial reasoning.

President Regan has sent us a nominee solidly in the mainstream of American jurisprudence. The facts speak for themselves. Of the more than 100 majority opinions authored by Judge Bork, not one has been reversed by the Supreme Court. No appellate judge in the United States has a finer record.

Nonetheless, we have heard some shrill critics of Judge Bork fault him for being out of the mainstream. Many of those thus faulting Bork are themselves circling in eddies somewhere in the back waters of the Nile. They would not know a judicial mainstream from a judicial jet stream.

It should come as no surprise that Judge Bork has never been reversed. Judge Bork's opinions on the court of appeals have won the agreement of his colleagues on both sides of the spectrum. The U.S. Court of Appeals for the District of Columbia Circuit, the court on which he sits, is not a con-

servative court. When Judge Bork assumed his seat on that court in 1982, fully 8 of the 10 judges with whom he sat had been appointed by Lyndon Johnson or Jimmy Carter. Even today, 5 of the 10 are Democratic appointees. And yet in his 5 years on the bench, years in which Judge Bork heard argument in literally hundreds of cases, he has written in those cases only nine dissenting opinions, and only seven partially dissenting opinions. Moreover, the reasoning of several of those dissents was adopted by the U.S. Supreme Court when it reversed the opinions with which he expressed disagreement.

I have been surprised, Mr. President, to hear some of those who oppose Judge Bork's nomination refer to him as an ideologue. It has been said that an ideologue is "someone who disagrees with me," and I fear that definition must be the operative one here. Judge Bork has served for years on the Federal bench, and his record provides this body with an accurate measure by which to predict his future performance. He has won the respect of his colleagues on the court of appeals and of the Justices who review his work. This is not simply my opinion, it is a hard fact, one supported by the numbers, and one which no amount of rhetoric can obscure.

In connection with the charge that Judge Bork is an ideologue, we have also heard opinions that the President is obliged to preserve the ideological balance of the Court. This is a ludicrous notion. If past Presidents has striven to preserve the Court's ideological balance, the vile separate but equal doctrine of Plessy versus Ferguson would still be the law of the land. Moreover, the abuses of the Court's Lochner era would still rule today.

This ideological balance notion is a smokescreen for those who fear their own narrow preferences might not prevail with different judges on the Court. This fear betrays too much. It betrays that critics of Judge Bork also understand that much of the law they prefer is judge-made and is susceptible to change by other judges. Their protestations only underscore that the doctrines they like are not found in the Constitution. If their preferences were stated in the Constitution, they would not have any reason to fear a new judge because that judge would be bound to uphold the Constitution. These vociferous attacks however, betray that many of the attacker's favorite legal doctrines are, in fact, judge-made. And what judges have wrought, other judges can set aside in light of the Constitution itself.

Mr. President, there is always room for diversity, and people are perfectly entitled to disagree with the views of Judge Bork, his colleagues on the D.C. Circuit, and the Justices who currently sit on our highest court. But those who do so have a responsibility to be straightforward in what they say, and ought to admit that it is they who stand outside the mainstream. It is they who fear for the fate of past judge-made law. For years, Robert Bork has said that it is the responsibility of a judge to decide cases on the basis of the facts and the law before him and not on the basis of his own individual views on questions of policy. It is Judge Bork's capacity to practice that element of restraint that has won him the respect and admiration of so many other judges of varying judicial philosophies and the respect and admiration of this Senator as well.

Senator BIDEN has argued articulately today that the Senate should scrutinize nominees to the Supreme Court and only approve those whose ideology this body approves. This overlooks the danger of politicizing the appointment process. The historical record shows that political involvement in the selection of Justices is a two-edged sword whose backswing has the potential to injure the prestige and independence of the Supreme Court more than its thrusts have the chance to reshape its jurisprudential directions.

I would like to take more time on another occasion to respond point by point to Senator BIDEN, but today I would like to raise only a few points.

Senator BIDEN's two major points are, first, that the framers of the Constitution intended the Senate to undertake an ideological inquisition of nominees and, second, that the Senate has regularly undertaken that inquisition.

On the first point, I would note two important points. First, article 2 section 2 grants the President and only the President the nomination power. In fact, despite some earlier votes to the contrary, the 1787 Convention rejected, I repeat, rejected the notion that the Senate should appoint Justices.

Alexander Hamilton, who Senator BIDEN quoted often, explained what the Convention really intended the Senate's role to be in the nomination process. He stated:

"But might not [the president's] nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. . . . 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 [subsequently nominated] . . . and as their dissent might cast a kind of stigma upon the individual rejected, . . . 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? . . . [Senate concurrence] 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."

As Hamilton and other framers of the Constitution intended, rejection of a nominee does not prevent the president from selecting another qualified candidate to his own liking. If the Senate were to insist on exercising its veto authority repeatedly, it would precipitate an interbranch confrontation clearly not contemplated by the framers, whose primary objectives for the advice and consent function were to "check" presidential favoritism and nomination of "unfit characters." Moreover, if the Senate insisted on confirming only justices likely to vote in accordance with a majority of the Senate on judicial issues, it would deny the President his constitutional prerogative and assert a power to select nominees that the Senate was not intended to possess. In the long run, the Senate must concede that it is not entitled to control the decisions of the Supreme Court by choosing justices. Thus, prudence as well as the apparent purpose of article II would counsel against the Senate's using its veto to assert a virtual appointment authority.

On Senator BIDEN's second point—that the Senate has often engaged in ideological inquisitions—I would note only a few points. First, Franklin Delano 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 appointees and nominees. 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 ultraliberal Goldberg. Not a single vote was cast against either of these 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 51 Justices in recent history, while considering nominees from Presidents Franklin Delano Roosevelt and John F. Kennedy and Lyndon Baines Johnson to Eisenhower, Ford, and Reagan.

Thus, for the last 50 years or more, the Senate has eschewed ideological inquisitions. The Senate has refused to inject politics into the "advice and consent process." The Senate has acknowledged that the President nominates, not the Senate. After all the President, as was stated in the 1787 Convention, is the only officer elected by all the people. This is the reason that the 1787 Convention vested appointment power in the President—because he is elected by all the people.

One final point.

Another problem with a partisan approach to the advice and consent process is that such an approach engenders political reprisals. The few rejections in the last nine decades amply illustrate this problem. In 1968, President Johnson's appointment of Justice Abe Fortas to preside as Chief Justice was defeated by Republicans who ob-

jected to the Justice's apparent willingness to depart from the language and intent of the authors of the Constitution. A year later, President Nixon's appointments to Clement Haynsworth and Harrold Carswell ran into similar intransigent opposition from Democrats. In the parlance of several of my colleagues, this incident illustrates the age-old observation that "what goes around comes around." If blocking a nomination on ideological grounds is fair game for one president and party, it is fair game for the other as well. Such an atmosphere holds the potential for touching off a cycle of revenge and retribution which can only damage the institutional integrity of both the Senate and the judiciary. Thus, the Senate has learned that the probability of long-term gain for one set of ideological views from partisan combat over judicial nominees is slim, while the casualties caused by that combat are many and certain.

Mr. HATCH. In conclusion, the casualty of politicizing the advice and consent process may well be the independence and prestige of the Supreme Court itself. We cannot afford to pay that kind of price for political gamesmanship.

I come back to my original comments and they are these: I think that it is incredible that anybody in this body would prejudge this confirmation before the first day of hearing, given the sterling reputation of Judge Robert Bork as a teacher, as an author, as a judge, as an attorney.

I think that such prejudice has to be criticized more than the criticisms that are made against Judge Bork.

Thank you, Mr. President.

## CONSERVATION INTERNATIONAL BREAKS NEW GROUND FOR CONSERVATION

Mr. KASTEN. Mr. President, Monday, a new environmental organization, Conservation International, took a precedent setting step to protect environmentally important lands in a developing nation. Conservation International entered into an agreement with the Bolivian Government to accept the responsibility for a portion of Bolivia's foreign debt in exchange for major conservation measures.

With this agreement, the Bolivians agreed to reserve 4 million acres for environmental management in exchange for Conservation International assuming the responsibility for $650,000 of foreign debt.

Conservation International was able to purchase this debt at a tremendous discount. Because of Bolivia's foreign credit difficulties, this debt was purchased at the discount rate of 15 cents on the dollar. For just $100,000 this organization protected an area which supports more species of birds than all of the United States.

I would like to complement Conservation International for its innovative use of the unique resource it has identified in foreign debt. This organization was able to find a golden lining to protect tropical forests, biological diversity and a tremendous acreage of tropical lands in the dark cloud of overwhelming foreign debt problems.

This technique is being pursued by several other environmental groups. In the coming months, I hope these organizations will continue to target the protection of carefully selected lands through this innovative technique.

## SCHOOL OF PROFESSIONAL PSYCHOLOGY AT WRIGHT STATE UNIVERSITY

Mr. INOUYE. Mr. President, on May 30, 1987, the School of Professional Psychology at Wright State University held its first annual alumni reunion.

Nearly a decade ago, in September 1979, I had the honor and privilege of serving as the founding convocation speaker at the inauguration of this new school, and even at that time, was impressed by the dedication and support demonstrated by the entire university administration for this new program, as well as by the high quality of its faculty.

I wish to take this opporunity to commend the accomplishment of the faculty of the school and in particular, Dean Ronald E. Fox; his associate deans and assistants, Allan G. Barclay, Russell J. Bent, W. Rodney Hammon, Jr., and James T. Webb.

I understand that this program has had an ongoing commitment to recruiting and training minorities, and I am confident that the citizens of Ohio are being well served by this fine institution. I look forward to the next decade of their graduates.

## THE DELAYED PROMOTION OF GENERAL ABRAHAMSON

Mr. SYMMS. Mr. President, 2 weeks ago, while the eyes of the Nation were focused on a military man, Lt. Col. Oliver North, testifying before a congressional committee, another military man, Lt. Gen. James Abrahamson, was being denied a hearing by another congressional committee, here in the Senate.

Gen. James Abrahamson was nominated for a fourth star, December 18, 1986, by the President. That nomination expires September 30. But the Senate Armed Services Committee has not held a hearing on this nomination, and there is no evidence the committee intends to. At this time, the Senate Armed Services Committee has no hearings scheduled. Something must be done, and done soon, or there will be no promotion for General Abrahamson.

What has the general done to receive this kind of treatment by the Senate? His record shows that he flew 49 combat missions in Southeast Asia, and was selected to be an astronaut with the Air Force's Manned Orbiting Laboratory Program before serving as director for the TV-guided, air-to-ground Maverick Missile Program and director for the F-16 Air Combat Fighter Program. I should note that this program was an outstanding success. The plane came in under cost and on schedule. It is still recognized as a significant achievement in most of the free world.

In 1981, the general was made assistant administrator for the NASA Space Shuttle Program, and guided that program until 1984.

Among the honors the general has been given are: The Distinguished Service Medal, the Legion of Merit with two oak leaf clusters, three meritorius service medals, the Air Medal with oak leaf cluster, the NASA Commendation Medal, the National Defense Medal, and three foreign awards: The Order of King Olaf of Norway, the Order of the Orange from the Netherlands, and the Order of King Leopold of Belguim.

Mr. President, the promotion of this distinguished officer of the U.S. Air Force is being delayed, perhaps denied. And it's being delayed because General Abrahamson's present position is director of the strategic defense initiative. Quite simply, the general is being punished for serving his Commander in Chief as best he can, as he has served seven other Commanders in Chief—Democrats and Republicans—for the past 32 years.

There is a great deal of controversy and disagreement surrounding the SDI program, and we've seen some of that on the floor of this Senate. But there is no controversy about General Abrahamson. He is managing, and managing well, a highly technical, complex program of awesome scope, dealing with the highest level of Government in the United States and with our allies.

So I am asking my distinguished colleagues, Senator NUNN and Senator WARNER, as well as all the other members of the Senate Armed Services Committee, to rise above the current arguments and political issues relating to the SDI. There are other ways to demonstrate disagreement with the program, but don't penalize an honorable man with petty politics. Senators, I am asking you to schedule a hearing on this nomination now, before the August recess.

Give this good soldier his star.

## CYPRUS

Mr. PRESSLER. Mr. President, July 20, 1987, was the 13th anniversary of the brutal invasion of the Republic of Cyprus by Turkey. Today, Cyprus remains occupied by more than 35,000 heavily armed Turkish troops, maintaining an artificial division of that

sovereign nation. As a major source of foreign military assistance to Turkey, the United States has an obligation to encourage the immediate withdrawal of Turkish troops from Cyprus as a first step toward the settlement of that dispute.

Unfortunately, Ankara has displayed a total unwillingness to act responsibly on the Cyprus issue. President Evren of Turkey has now indicated that, in light of recent actions by the House Foreign Affairs Committee and the Senate Foreign Relations Committee, Turkey is reconsidering whether it will ratify our base rights renewal. In particular, Turkey is opposed to a measure I cosponsored with Senator PELL in the Senate Foreign Relations Committee to prohibit the use of United States military equipment by Turkish forces on Cyprus. We did not introduce this legislation to taunt Turkey or weaken our alliance with that unquestionably important United States ally. Instead, we did so because we feel strongly that the United States should not support, either directly or indirectly, Turkey's illegal occupation of Cyprus.

Even the strongest supporters of Turkey have great difficulty articulating why today, 13 years after that invasion, 35,000 heavily armed Turkish troops remain on Cyprus. Nevertheless, efforts by Secretary General Javier Perez de Cuellar to bring a peaceful resolution to the Cyprus dispute have stalled primarily because Turkey will not consider any settlement that includes the withdrawal of its troops. Our legislation is designed to ensure that U.S. foreign assistance is not used to maintain this illegal occupation. At the same time, we hope the prohibition will send a clear message of congressional disapproval of Turkey's continued intransigence on this issue.

Supporters of Ankara in Washington argue that even the most subtle United States pressure to encourage Turkey to be more forthcoming on the Cyprus issue is counterproductive and thereby undermines our security interests. The failure of the partial embargo on United States military assistance to Turkey, imposed by Congress after the 1974 invasion, is cited as proof that Turkey will not be strong-armed into acting like a more responsible member of the world community.

However, the fact that the Turkish arms embargo did not result in progress on the Cyprus issue can be traced directly to the two distinct voices Ankara heard on the subject. While the Congress was talking tough on the Turkish invasion, the Ford, and later, the Carter administration was assuring Ankara that Congress would soon lose its resolve and resume the arms shipments. When Congress lifted the embargo, we did so with the understanding that Turkey would be more forthcoming on the Cyprus issue. The fact that Ankara has been anything but cooperative can again be traced to assurances by the Carter, and now the Reagan administration that Congress will not take actions that could jeopardize our close friendship with Turkey.

U.S. influence is much greater when the administration security blanket is taken from Turkey and the United States speaks with one voice. A good example of this was the successful, unified voice of U.S. support for the January 17, 1985 high level meeting between Cypriot President Spyros Kyprianou and Turkish Cypriot leader Rauf Denktash in New York. The fierce 1984 congressional debate on the Cyprus issue sent leaders in Ankara looking desperately for comfort from the Reagan administration. Instead they got a November 22, 1984 letter from President Reagan warning Turkey that the administration would have no control over future congressional actions unless Turkey were more forthcoming on the Cyprus issue. Soon thereafter, Mr. Denktash did an about-face and agreed to participate in the high-level meeting long sought by President Kyprianou and the Secretary-General.

Critics of congressional efforts to promote peace in Cyprus dismiss measures like the Pell legislation as "Turkey bashing." But how does the call for the removal of the 35,000 illegal troops "bash" anyone? Even if Ankara did have cause for concern for the security of the Turkish Cypriots, the close geographic proximity of its bases enables Turkey to airlift troops to Cyprus on 15 minutes notice. Recent indications are that even the Turkish Cypriots are growing restless with the continued presence of Turkish troops and want an end to Turkey's colonization policy, which is designed to turn the occupied area into a de facto colony of Turkey.

Turkey could again significantly by removing its troops as a first step toward the permanent settlement of the Cyprus dispute. First and foremost, removal of the troops would be a constructive step toward normalizing relations with Greece. This could allow Turkey to utilize the resources now used to defend its common border with Greece for more constructive purposes, including the discharge of its NATO obligations. This action also would alleviate security fears on the part of the Greek Cypriot majority population on Cyprus and thereby allow its political leaders to be more trusting of the Turkish side during negotiations on the remaining issues. Removal of the troops would also strengthen Turkey's standing in the world community. This in turn would assist Turkey in realizing some of its economic and political goals, including entry into the European Economic Community.

President Evren and Prime Minister Ozal are once again begging the Reagan administration for comfort from those "bullies" on Capitol Hill. At the same time, they are augmenting and modernizing their troops on Cyprus with United States arms, expanding their colonization program, and refusing to promote U.N. sponsored talks to resolve the crisis. Witness for example the unnecessarily defiant attitude of the Turkish Foreign Minister toward the latest appeal by U.N. Secretary Gen. Javier Perez de Cuellar for the reduction of the occupation troops. On June 6 the Turkish official reportedly told journalists that Turkey does not have to answer to anyone on the number of troops and military equipment it has in Cyprus. This kind of attitude is anything but constructive. It undermines the U.N. efforts and will certainly not help Turkey in Congress.

Mr. de Cuellar underlined the importance of the troops issue in his May 29, 1987 report to the Security Council and has renewed his appeal to Turkey to "make a start by reducing its forces on the island."

Instead of holding Ankara's hand, the administration would be well advised to support efforts by Congress to promote a Cyprus settlement and join the U.N. Secretary-General in urging Turkey to help the peace process by the withdrawal of its occupation forces from Cyprus. Ankara will not be able to turn a deaf ear on such a clear and unified U.S. message.

## THE BORK NOMINATION

Mr. DANFORTH. Mr. President, barring wholly unforeseen revelations, debate on the nomination of Robert Bork will not concern his ability or character. Those qualifications have not been questioned. The debate will be about basic philosophy, whether we in the Senate want an activist Supreme Court or one which practices judicial restraint. Because the Supreme Court has become so important to our people and our communities, I look forward to a vigorous debate on the philosophical question. Because Judge Bork has been a strong advocate of judicial restraint, I intend to support his nomination with enthusiasm.

How one feels about the power and reach of the Supreme Court is, of course, a political issue. Walter Mondale correctly stressed this in 1984 when he insisted that Presidential campaigns are about who will appoint Justices to the Supreme Court. It should also be said that Senate campaigns are about who will confirm Justices to the Supreme Court. Clearly, judicial philosophy is on the mind of a President when he sends a name to

the Senate, and judicial philosophy is on the mind of each Senator when he votes on a Supreme Court nominee.

Of the eight remaining Justices of the Supreme Court, three will be over the age of 80 during the next Presidential term. In all probability, the next President and the next Senate will determine the makeup of the Court for decades to come. Few Presidential decisions are more important to the daily lives of citizens than Supreme Court nominations. Few Senate votes are more important to local communities than Supreme Court confirmations. Ultimately the issue of judicial philosophy is one for the people to consider and for the people to decide at the polls. The hearings and the debate on the Bork nomination will put the question squarely to the American people: What do you think about the power and reach of the Supreme Court?

It is fitting that the debate on basic judicial philosophy should coincide with the bicentennial of our Constitution, for the great constitutional issue was the limitations and locus of governmental power. Precisely the same issue will be before the Senate when we vote on the nomination of Judge Bork. The question will be the extent to which legislatures can define and enforce community values versus the readiness of the Court to set aside legislative action as unconstitutional.

Since the early years of our Republic, the Congress and State legislatures have been the implementors of community values, but they have been limited in their exercise of power by the Constitution. The question is whether the Supreme Court strictly construes constitutional language, thereby allowing broad discretion to legislatures, or gives the Constitution an expansive interpretation, thereby contracting legislative discretion.

As Judge Bork puts the problem:

> The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority's legitimate right to govern.

For example, the Court must continue to safeguard important individual rights such as the right to racial equality protected by cases like Brown versus Board of Education; however, the Court should not engage in broad social engineering which encroaches upon the domain of the legislature.

Judge Bork forcefully comes down on the side of strict construction. He believes that the Supreme Court should heed the plain meaning of constitutional language and that it should not invent novel or strained interpretations of clear language in order to replace the policies of elected legislatures with its own. In Judge Bork's words:

> When the judiciary imposes upon democracy limits not to be 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.

Some believe that a nominee's personal opinions on a range of social issues should be ascertained before he is placed on the Supreme Court. My own view is that a judge's personal opinions on questions such as abortion should be irrelevant. Supreme Court Justices should not be in the business of supplanting the policies of Congress or of State legislatures with their own political or social views. Public policy should be made by those who are elected by the people, report to the people, and who can be removed by the people. It should not be made by men and women who have been elected by no one, who are isolated in courthouses and who serve for life. The Supreme Court should be in the business of interpreting the law written by elected representatives. It should not be in the business of creating new law out of whole cloth.

Since 1981, I have had the privilege of recommending seven persons to President Reagan for nomination to the U.S. district court. I have never asked any candidate's personal opinion on any political or social issue. I have asked each person I have recommended to state a position on the relative roles of the judicial and legislative branches of government. I do not want a judge who sees his role as an opportunity to impose his own personal opinions on the public, even when I agree with those opinions. The personal opinions of any individual should have no bearing on the person's duties on the bench.

To ideologues of the left or right, it is tempting to select an activist judiciary which will be ready to shove unpopular social policies down the throats of an unwilling public. That is an elitist position which is repugnant to the democratic tradition of our country. The Bork nomination is about democracy versus elitism. It is about philosophy of the judiciary and about philosophy of government. It is about fundamental questions which will be debated before the Nation in this bicentennial year of our Constitution. Those fundamental questions will be voted on first in the U.S. Senate, and then by the people themselves.

## PROGRESS ON INF AGREEMENT

Mr. PELL. Mr. President, I welcome Secretary Gorbachev's statement that the Soviet Union is prepared to eliminate all medium- and short-range nuclear missiles. It is a first big step forward.

As chairman of the Senate Foreign Relations Committee and cochairman of the Senate Arms Control Observer Group, I have followed these negotiations closely here and in Geneva and believe there is now a basis for greater optimism. At the same time, it is important to understand that there are still some fundamental disagreements to be resolved, as well as numerous lesser issues.

On the positive side, it has been clear that the retention of 100 or more intermediate-range nuclear warheads on each side would compound verification problems without offering any military benefit. The Gorbachev decision should mean that that particular verification issue could be handled easily and expeditiously.

With regard to the shorter range system, total elimination will remove the possibility of an arms race in that particular type of weapon. That is of positive value.

I see significant benefits from the emerging accord—because it will get the process started. It will get the military bureaucracies on both sides involved in a program of mutual reductions. And, even more important, it will get President Reagan and Secretary Gorbachev themselves involved in the arms control process, after 7 years of stalemate. This would be the first time that specific categories of deployed weapons will have been eliminated through an arms control agreement.

Nonetheless, it is important to place an INF agreement in perspective. Because INF missiles constitute only 3 percent of the superpower arsenals, their elimination would, in itself, have only limited impact on the nuclear competition. Indeed, the administration will deploy more nuclear warheads in the next 9 months than the United States would dismantle in total under a zero-zero accord.

Moreover, an INF accord would eliminate only a small portion of the United States and Soviet theater nuclear forces at a time when the administration's break out from the SALT limits last fall has eliminated all existing constraints on strategic systems. Without a followup agreement on strategic systems, no great progress will have been accomplished except for the fact that this is a first big step.

## BICENTENNIAL MINUTE

### JULY 23, 1793: DEATH OF ROGER SHERMAN

Mr. DOLE. Mr. President, on July 23, 1793, 194 years ago today, Senator Roger Sherman of Connecticut died in office. Although he served in the First and Second Congresses, Sherman was better known for his achievements in the Continental Congress and the Constitutional Convention. Born in Massachusetts in 1721, Sherman moved to Connecticut at the age of 22. He began his political career 2 years later as surveyor for New Haven

Mr. BYRD. Mr. President, I ask unanimous consent that the Intelligence Committee be discharged from further consideration of H.R. 2112, which is the companion measure, and that the Senate proceed to its immediate consideration; that all after the enacting clause be stricken, and that S. 1243, as amended, be inserted in lieu thereof; that the bill be advanced to third reading, passed, and a motion to reconsider be laid on the table.

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

Mr. BOREN. Mr. President, I move that the Senate insist on its amendments and requests a conference with the House of Representatives on the disagreeing votes of the two Houses, and that the Chair be authorized to appoint conferees on the part of the Senate.

The motion was agreed to and the Presiding Officer [Mr. ROCKEFELLER] appointed Mr. BOREN, Mr. COHEN, Mr. BENTSEN, Mr. NUNN, Mr. HOLLINGS, Mr. BRADLEY, Mr. CRANSTON, Mr. DECONCINI, Mr. METZENBAUM, Mr. ROTH, Mr. HATCH, Mr. MURKOWSKI, Mr. SPECTER, Mr. HECHT, Mr. WARNER; and, for matters within the jurisdiction of the Committee on Armed Services, Mr. EXON, and Mr. THURMOND conferees on the part of the Senate.

Mr. BOREN. Mr. President, I ask unanimous consent that S. 1243 be indefinitely postponed.

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

Mr. BOREN. Mr. President, I thank my colleagues and all who have labored so hard on this piece of legislation. I think it is moving us in the direction of a more effective intelligence capability for this country, and I appreciate the hard work of all those involved.

## MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that there now be a period for morning business, that Senators be permitted to speak therein for not to exceed 5 minutes each, and that the period for morning business not extend beyond 15 minutes.

Mr. HUMPHREY. Mr. President, reserving the right to object, I want to speak for 20 minutes at the most.

Mr. BYRD. Very well. I ask that the time not extend beyond 9 p.m. and that Senators may speak therein up to 10 minutes each.

The PRESIDING OFFICER. Is there objection?

Mr. HUMPHREY. Reserving the right to object, the Senator from New Hampshire would desire to speak for 20 minutes.

Mr. BYRD. If the Senator will yield, I am trying to help him get his 20 minutes.

Mr. HUMPHREY. I beg the Senator's pardon.

Mr. BYRD. I put a limitation of 10 minutes, but the Senator only has to ask to speak for an additional 10 minutes under this order. I hope he will not object because otherwise he would not have the 20 minutes.

The PRESIDING OFFICER. Is there objection?

Mr. EXON. Mr. President, reserving the right to object, I might add that those of us who would like to live within the original time constraints suggested by the majority leader ask that we might be recognized for the purpose of introducing a bill and then allow the Senator to work his will in whatever timeframe he wants thereafter. But I would not object. I simply ask consideration for those of us who want to use a limited amount of the Senate's time for the purpose of introducing a bill.

The PRESIDING OFFICER. Is there objection? Without objection, the request is granted.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. EXON. Mr. President, I will take a very brief period of time for the purpose of introducing a bill.

Mr. President, if I could accommodate all my friends, including my friend from New Hampshire, I would need about 3 minutes for the purpose of introducing a bill. Then I will be glad to yield him the remainder of the 10 minutes that I would otherwise have. That would give him the approximate time that I believe he has stated he needs.

(The remarks of Mr. EXON pertaining to the introduction of legislation appear in today's RECORD under Statements of Introduced Bills and Joint Resolutions.)

Mr. EXON. Mr. President, I reserve the remainder of my time and yield it to my friend from New Hampshire.

Mr. HUMPHREY. Mr. President, I thank the Senator from Nebraska and likewise the majority leader for his helpfulness.

## NOMINATION OF ROBERT BORK TO BE SUPREME COURT JUSTICE

Mr. HUMPHREY. Mr. President, the opponents of the nomination of Robert Bork to the Supreme Court seem to have an extraordinarily short span of memory.

Only last year there was much hue and cry in this body concerning certain nominees to the Federal bench. Some said that President Reagan was placing too much stress on ideology and too little on professional excellence in his nominations to the Federal bench. The same cry was heard from the outside lobbying groups which are now orchestrating special interest opposition to Judge Bork.

If only President Reagan would nominate judges of high professional qualifications, they said, then, then the fact that they were conservative would not be used to block their confirmation. This line was most repeatedly stressed during the bitter opposition to the nomination of Judge Daniel Manion to the Seventh Circuit Court of Appeals. But it was a common refrain during the opposition campaigns against other Reagan nominees as well.

Curiously, Mr. President, this refrain is no longer heard from those now arrayed in bitter opposition to the Bork nomination. In fact, they are saying just the opposite thing. Suddenly, qualifications, experience, and general professional excellence have become inconsequential or superfluous. All that seems to matter now to the Bork detractors is whether the nominee can satisfy them that he will vote to their satisfaction on certain litmus test issues and whether he is prepared to ignore the constraints of the plain text of the Constitution.

But it should surprise no one, Mr. President, that these forces now seek to lightly skip over the question of judicial excellence and legal scholarship. The obvious reason is that, in Robert Bork, they are confronted with a genuine giant of the law. The Bork inquisitors will look very small, indeed, if their partisan brickbats are measured against the breadth and excellence of Judge Bork's career as a judge, scholar, and public servant.

If one were to design the hypothetical background of a person ideally qualified for the Supreme Court, it would closely match the actual career of Robert Bork.

He received his law degree from the University of Chicago law school, one of the most prestigious in the Nation. He served with the highest distinction as a professor of law at Yale Law School, where he held two of the most distinguised chairs at that institution. His scholarly legal writings have been both prolific and profound, reflecting an appreciation and respect for our written Constitution that is exactly what we need in our judges.

Judge Bork served as Solicitor General of the United States from 1973 to 1977, the third highest post in the Justice Department. He served as the Justice Department's chief litigator before the U.S. Supreme Court. His performance in that capacity was exemplary in every respect, and it provides him with invaluable knowledge, understanding and respect for the high court as an institution.

Those who may now choose to distort Judge Bork's actions while Solicitor General in connection with the Watergate firing of Special Prosecutor Archibald Cox would do well to review the record and the facts before they

embarrass themselves. The Senate Judiciary Committee carefully inquired into that matter in Bork's confirmation hearings for the D.C. Circuit Court in 1982. Bork candidly explained how his actions scrupulously maintained the integrity of the Watergate Special Prosecutor, with the selection of Leon Jaworksi to replace Cox, and how the contrary course of refusing the President's order and resigning would have left the Justice Department leaderless and in disarray.

Elliot Richardson, whose knowledge and sensitivity to these events is second to none, has publicly endorsed the integrity of Bork's actions. And so did this body when it confirmed Judge Bork for the second highest court in the land in 1982, without a single objection based on the Cox incident or otherwise. When Senators voted then unanimously to confirm Robert Bork, they did so only after the conduct of Mr. Bork in the Cox firing had been closely scrutinized.

Indeed, the Senate's unanimous approval of Bork for the D.C. Circuit Court of Appeals is further testimony to the excellence and integrity which commends him for the Supreme Court. Members of this body have not been reluctant to vigorously oppose nominees for the Federal appeals courts and district courts when they harbor concerns such as insensitivity to civil rights and similar issues. Rightly or wrongly, it was such professed concerns which resulted in the rejection of Jefferson Sessions to the Federal district court just last year. But no such concerns were raised to oppose Judge Bork when we confirmed him 5 years ago to the powerful D.C. circuit—and for good reason. After a full hearing before the Judiciary Committee, there was simply no basis for them. Today, some Senators would have us believe that 100 Senators in 1982 were grossly derelict in our duty when we confirmed Robert Bork unanimously to the D.C. Circuit Court of Appeals. Either the Senate acted as a fool in 1982, or some Senators are acting as fools in 1987.

Judge Bork's performance on the D.C. circuit has been truly outstanding, and fully compatible with the sound principles of judging which he expressed in his confirmation hearings. Judge Bork has authored or joined in over 100 majority opinions on the D.C. circuit and not one, not one of those 100 opinions has been reversed by the Supreme Court. Such a record would be inconceivable if, as alleged by his more rabid opponents, Judge Bork was an ideological extremist on the fringes of the judicial mainstream.

The reality is that Judge Bork's exemplary record in this regard demonstrates the utter illegitimacy of the calumnies now raised against him. The charge that Judge Bork is a judicial extremist simply proves too much. If Bork is an extremist, then so must be a majority of the Supreme Court itself. Indeed, the four more conservative members of the current Court would all be doomed to rejection under the various litmus tests being applied to Bork. And the other four would likewise be subject to rejection if the same ideological standard were imposed from the right instead of from the left.

Saner and more responsible voices from the liberal side have recognized Judge Bork's excellence and refuted these charges of ideological rigidity.

Judge Abner Mikva, a liberal and Judge Bork's colleague on the D.C. circuit, has openly expressed his admiration for his conservative colleague. Mikva has stated that:

I think Abraham Lincoln would have liked Judge Bork, and not just because they both spent their formative years in Illinois.

Geoffrey Stone, dean of the University of Chicago Law School, stated that:

If it were a person of lesser ability, I would vote against confirmation, but my own view is that Bork's capabilities are so unquestionable that he would make significant contributions.

Dean Stone added:

Bork is a four-star appointment. You usually don't get anyone with anywhere near his credentials.

And Lloyd Cutler, former White House counsel to President Carter, a man who calls himself a liberal Democrat, one of the most respected and knowledgeable lawyers in the Nation, one of the most well known, has directly refuted charges from fellow liberals that Judge Bork is an ideological extremist. Cutler stated in a July 16 article in the New York Times:

Judge Bork is neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues. I base this assessment on a post-nomination review of Judge Bork's published articles and opinions, and on 20 years of personal association as a professional colleague or adversary. I make it as a liberal Democrat and as an advocate of civil rights before the Supreme Court.

Mr. President, just recently, Justice Stevens spoke in Colorado Springs; and according to the Omaha World Herald, dated July 18, Justice Stevens said that Robert H. Bork will be a "welcome addition" to the U.S. Supreme Court. "I think Judge Bork is very well qualified," Stevens said. "He will be a welcome addition to the Court."

Mr. President, I ask unanimous consent that this news clipping be printed in the RECORD.

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

JUSTICE STEVENS BACKS BORK

(By David Thompson)

COLORADO SPRINGS, COLO.—Robert H. Bork will be a "welcome addition" to the U.S. Supreme Court, a member of the court told a group of lawyers and judges meeting here Friday.

Supreme Court Justice John Paul Stevens, appointed to the court in 1975 by Republican President Ford, made what legal observers said was the first public appraisal of Bork by a sitting member of the court.

President Reagan's selection of the 60-year-old Bork, now a federal appeals court judge in Washington, D C., has drawn strong criticism from liberals, women's groups and others.

The chairman of the U.S. Senate Judiciary Committee, Sen. Joseph Biden, D-Del., has scheduled hearings for September on the Bork nomination.

Stevens said he gave his recommendations on Bork to the chairman of the American Bar Association committee that has been asked to evaluate the president's selection.

"I think Judge Bork is very well qualified," Stevens told those attending the 8th U.S. Circuit Court Judicial Conference.

"He will be a welcome addition to the court."

Stevens—a moderate on what court observers and scholars have characterized as an increasingly conservative court—followed his endorsement by reading extensively from an opinion that Bork wrote earlier this year in a libel case.

The justice quoted Bork as decrying "mechanical jurisprudence," trying to force certain kinds of cases to meet a specified number of legal requirements.

Stevens quoted Bork as saying that there has to be "a continuing evolution" of judicial doctrine.

Stevens, like Bork, was a federal appeals court judge when he was appointed.

Stevens also offered observations about the newest member of the court, Justice Antonin Scalia, and the new chief justice, William Rehnquist.

Stevens said Scalia, regarded as a strong conservative before he stepped up to the Supreme Court last October, keeps an open mind on cases while they are being discussed by the judges.

Stevens said Scalia has been known to change his views on a case between the time the justices begin their discussion and the time a final decision is rendered.

Scalia also has persuaded others on the court to change their minds during the same process, Stevens said.

The associate justice said a year's experience has shown Rehnquist to be "a fine chief justice."

Stevens also said the surprise retirement of Justice Lewis Powell—whom Bork has been selected to succeed—"was an emotional experience" for all members of the Supreme Court.

Stevens described Powell as "a gentleman and a friend to all members of the court."

The associate justice was one of a series of speakers at the annual conference conducted for federal judges and lawyers who practice in the seven states of the 8th Circuit, Nebraska, Iowa, the Dakotas, Missouri, Minnesota and Arkansas.

Approximately 60 lawyers and judges from Nebraska are attending.

Mr. HUMPHREY. Mr. President, these statements show that responsible liberals and civil rights advocates

recognize that Judge Bork is a conscientious and principled jurist who will serve honorably on the Supreme Court.

As Lloyd Cutler stressed, "The essence of Judge Bork's judicial philosophy is self-restraint."

Self-restraint. That is an extremely crucial virtue for those appointed for life to so powerful position as the Supreme Court. It is the only thing that stands between conscientious adherence to our great written Constitution and presumptuous, anti-democratic policymaking by an imperial judiciary.

Judge Robert Bork has the kind of principled judicial restrain which makes him a trutworthy guardian of our Constitution. And he has the experience and scholarly capacity to cope with the complex and divisive disputes which the Supreme Court must ultimately decide.

So, Mr. President, I think it is time for Judge Bork's attackers to put aside their knives, put aside their strident, exaggerated, bitter rhetoric and reflect a bit on the responsibilities we must finally confront.

They should reflect on the breadth and the caliber of Judge Bork's career and consider very carefully the precedent they would destroy if they reject such a nominee.

Let them also reflect on the precedent they will set: the confirmation process for Supreme Court nominees is now to become bitterly partisan.

They should reflect on the Senate's unanimous approval of Bork's confirmation to the District of Columbia Circuit Court 5 years ago and consider why the accolades of 1982 should suddenly be transformed into the calumnies of 1987.

Finally, they should reflect on the value of our great Constitution and consider the damage we will do to it if we reject a nominee for the Supreme Court because he insists on adhering, to that Constitution.

Mr. President, it distresses me greatly that a number of Senators in this body have already announced their opposition to this nominee before the nominee has even had an opportunity to speak one word before the committee that will consider his nomination in September. Senators are entitled to their opinions. We all have them. We all have our inclinations.

The PRESIDING OFFICER. The time of the Senator under morning business has expired.

Mr. HUMPHREY. I ask unanimous consent that I may continue another 5 minutes.

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

Mr. HUMPHREY. Senators have their inclinations. I have mine. I am inclined to support Judge Bork, but I have not cast my feet in concrete. I want to hear what he has to say. I want to see how he responds to questions. We may be sure that there will be tough questions, put to him in the Judiciary Committee.

I hope that other Senators, likewise, will refrain from taking a position for or against this nominee until they have had a chance to hear all the evidence. Can we not wait until the evidence comes in before we render a verdict?

It is especially distressing and really disturbing and disappointing to find that the chairman of the Judiciary Committee, the man who will preside over these hearings, which will form a means of our passing judgment on the nominee, will not only be this man's judge but also is already today, in the press, this man's prosecutor. The chairman has already made up his mind and has already announced that he is going to lead the opposition to the nominee, notwithstanding the fact that the same Senator 5 years ago was among the 100 who voted unanimously to confirm Robert Bork to the second highest court in the land.

Is it asking too much that we have fairness in this proceeding? Is it too much to ask that we have a higher level of ethics than ordinarily obtains around here on more mundane nominations? I think it is not asking too much, and I ask it. I ask it of my chairman, as a member of the Judiciary Committee.

Mr. President, those Senators present in this body now who likewise were present 5 years ago and who supported him as they all did 5 years ago and who now bitterly attack the man ask us to believe something that leaves us incredulous. They ask us to believe that in 1982 in confirming a man to the second most important court in this country that they discharged their responsibilities carelessly.

Is that not what they are asking us? They say now Robert Bork is a rightwing ideolog and an extremist, an ogre. Why did they not say that 5 years ago? What further evidence do they have today that they did not have 5 years ago except 100 opinions all of which have been upheld by the Supreme Court?

So if Robert Bork, since his appointment to the Circuit Court for the District of Columbia, in the space of 5 years has become a rightwing extremist, an ideolog, an ogre and devil incarnate, and the Supreme Court upheld every one of his decisions, I think we have to assume also that the Supreme Court over the past 5 years has become peopled by disciples of the devil, if you believe the opponents. They leave us incredulous. They leave us aghast. Either they were extraordinarily careless in the discharge of their responsibility 5 years ago, or there is a great deal of hypocrisy about today.

It is grossly unfair. It is grossly and shamefully unethical.

I object further not only to the prejudgment of the case by the very man who will chair the hearing, if he wants to be not only the prosecutor as he is in the press, he wants to be the judge, perhaps the jailer as well. How much more undemocratic can a man be?

I hope the chairman will stop and think and back up and reintroduce fairness and decency into this process.

Before I close, Mr. President, I want to complain further about the inordinate, the unfair, the unreasonable, the unconscionable delay in beginning hearings on this nomination. The Congressional Research Service which, as my colleagues know, is a nonpartisan entity of function of the Library of Congress conducted a survey which encompassed the last 25 years, which is to say the modern age of telecommunications and computers when we can obtain all kinds of information on nominees with great ease, of which advantage our forebears did not have at the turn of the century or earlier. But in the last 25 years in the modern era, the average length of time between the submission of a nomination by a President and the beginning of hearings by the Senate Judiciary Committee has been 18 days, actually 17.6, round it up to 18 days, when the Bork hearings begin if they begin on the date stipulated by the chairman, 70 days will have elapsed—7 oh. What just cause is served by this inordinate delay?

Some will say that figures lie, that I am distorting the record. That is not so. Anyone may look at this study. It is quite straightforward.

Some make the excuse, well, there is a recess intervening in this instance——

The PRESIDING OFFICER. The Chair will point out the additional 5 minutes granted to the Senator from New Hampshire have expired.

Mr. HUMPHREY. Mr. President, I ask unanimous consent that I might have an additional 5 minutes.

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

Mr. HUMPHREY. Mr. President, some may claim excuse that in this instance there is an intervening recess. I have news for those critics as well because in no less than eight cases in the last 25 years, likewise an August recess intervened, and in no case did the time from submission of the nomination to the beginning of the hearings exceed 42 days. In this case it will be 70 days.

What is the point? I suspect the point is delay for the sake of delay. The point is to delay this nomination until the Senate does not have time to deal with it. We are, after all, supposed to adjourn sine die in early October. That carries it over to January. Filibuster in the Judiciary Committee. Filibuster on the floor. Drag it out. Bottle it up and you present the Presi-

dent with a case where he has a very difficult time making good on his campaign promise.

I suggest to you the purpose of the delay is nothing less than the retroactive stealing of the election of 1984.

Mr. President, I ask unanimous consent that this table from which I have extracted figures about recesses be printed in the RECORD at this point.

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

TOTAL DAYS OF RECESS DURING INTERVAL BETWEEN SENATE RECEIPT OF NOMINATION AND START OF COMMITTEE HEARINGS FOR THE FOLLOWING SUPREME COURT NOMINEES

| | No. of recess days | Total days, receipt of nomin. until hearing | Difference |
|---|---|---|---|
| Thurgood Marshall (1967) | 12 | 31 | 19 |
| Abe Fortas (1968) | 13 | 15 | 2 |
| Homer Thornberry (1968) | 13 | 15 | 2 |
| Clement Haynsworth (1969) | 14 | 26 | 12 |
| Sandra Day O'Connor (1981) | 21 | 21 | 0 |
| William H. Rehnquist (1986) | 12 | 39 | 27 |
| Antonin Scalia | 12 | 42 | 30 |
| Robert H. Bork (F1987) | ? | 70 | |

Above data based on official recess records as published in the "1987 88 Official Congressional Directory—100th Congress".

Mr. HUMPHREY. Mr. President, today a public interest group held a press conference to suggest that in view of the prejudice, the prejudging by the chairman, that the chairman ought to recuse himself from chairing the hearing on this nomination. I do not find that an unreasonable suggestion under the extraordinary circumstance which the chairman himself has created. I join that plea that for the sake of fairness the chairman recuse himself from this hearing.

Mr. President, I yield the floor

If I might have the attention of the majority leader, does he wish me to suggest the absence of a quorum?

Mr. BYRD. Mr. President, I thank the distinguished Senator. No. He has completed his statement.

## MESSAGE FROM THE HOUSE RECEIVED DURING RECESS

### ENROLLED JOINT RESOLUTIONS SIGNED

Under the authority of the order of the Senate of February 3, 1987, the Secretary of the Senate on today, July 23, 1987, received a message from the House of Representatives announcing that the Speaker has signed the following enrolled joint resolutions:

S.J. Res. 76. Joint resolution to designate the week of October 4, 1987, through October 10, 1987, as "Mental Illness Awareness Week"; and

S.J. Res. 160. Joint resolution to designate July 25, 1987, as "Clean Water Day."

Under the authority of the order of the Senate of February 3, 1987, the enrolled joint resolutions were signed on today, July 23, 1987, during the recess of the Senate, by the Deputy President pro tempore (Mr. Mitchell).

## MEASURES REFERRED

The following joint resolution, previously received from the House of Representatives for concurrence, was read the first and second times by unanimous consent, and referred as indicated:

H.J. Res. 309. Joint resolution to establish the Speaker's Civic Achievement Awards Program to be administered under the Librarian of Congress to recognize achievement in civic literacy by students, classes, and schools throughout the Nation on grades 5 through 8, and for other purposes; to the Committee on Rules and Administration.

## ENROLLED JOINT RESOLUTIONS PRESENTED

The Secretary of the Senate reported that on today, July 23, 1987, he had presented to the President of the United States the following enrolled joint resolutions:

S.J. Res. 76. Joint resolution to designate the week of October 4, 1987, through October 10, 1987, as "Mental Illness Awareness Week"; and

S.J. Res. 160. Joint resolution to designate July 25, 1987, as "Clean Water Day."

## PETITIONS AND MEMORIALS

The following petitions and memorials were laid before the Senate and were referred or ordered to lie on the table as indicated:

POM-262. Joint resolution adopted by the Legislature of the State of California; to the Committee on Agriculture, Nutrition, and Forestry.

"A RESOLUTION

"Whereas, A portion of the receipts from timber sales on lands within the National Forest System are provided to the states and counties of origin; and

"Whereas, The federal law governing the sharing of receipts from the National Forest System needs to be clarified by Congress; now, therefore, be it

*"Resolved by the Assembly and Senate of the State of California, jointly,* That the Legislature of the State of California respectfully memorializes the Congress of the United States to enact appropriate legislation to clarify that receipts from the National Forest System shared with the state and counties are to be based on the gross moneys received; and be it further

*"Resolved,* that the Chief Clerk of the Assembly transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, and to each Senator and Representative from California in the Congress of the United States."

POM-263. A concurrent resolution adopted by the Legislature of the State of Louisiana; to the Committee on Banking, Housing, and Urban Affairs:

"A CONCURRENT RESOLUTION

"Whereas, the Housing Authority of New Orleans maintains and operates, with financial assistance from the Department of Housing and Urban Development, ten housing projects and several scattered site developments in the city of New Orleans; and

"Whereas, the authority bears the responsibility of providing decent, safe, and sanitary housing for over fifty-five thousand residents, a number equivalent to the population of a city the size of Alexandria, Louisiana; and

"Whereas, this task has become increasingly difficult wihin the last few years due to many reasons, including a lack of funds, which has been made more serious by the rise in liability costs for the authority, and the inability to employ sufficient, adequate, and skilled workers to make repairs; and

"Whereas, within the last few years there has been an alarming increase in the number of insurance claims and lawsuits filed against the authority by residents and their visitors; and

"Whereas, between the years of 1982 and 1985, bodily injury and property damage claims increased sixty percent, while settlements increased a staggering eighty-one percent, in other words, a one million dollar financial drain on the authority; and

"Whereas, this problem has placed the authority in a vicious cycle, in that the monies that could be used for maintenance and repairs must be used for high insurance and liability costs, which are themselves the effect of inadequate maintenance and upkeep; and

"Whereas, by providing the funding that this Resolution requests, the result would be to put an end to this vicious cycle within which the authority has been forced to operate; and

"Whereas, the economic, social, and political state of affairs of housing developments in the city of New Orleans now call for examination of alternatives to the existing management, ownership, and physical structures; and

"Whereas, the objectives of these alternative models may be to provide physical, economic, social, and political relief for a very depressed sector of the greater New Orleans community; and

"Whereas, through the renovation of substandard units, reduction of density, conversion of units to ownership, and innovative financing and subsidy programs, the quality of life can be improved in the housing developments of New Orleans; and

"Whereas, further objectives of alternative structures should be those of creating job skills, creating management skills, creating diversity in the physical environment, improving community facilities and community security, and instilling a sense of pride in self and community; and

"Whereas, accomplishing these objectives will involve the work of individuals and groups as well as sufficient resources, in order that there may be a full understanding of goals and ideas and gathering of necessary information; and

"Whereas, if the above objectives are to be attained, tenant involvement in the process is essential through the planning, design, construction, and management phases.

*"Therefore, be it resolved* that the Legislature of Louisiana does hereby memorialize the Congress of the United States to provide funding, through the Department of Housing and Urban Development, for the maintenance and repairs of the Desire housing development, the C.J.P. Homes (Magnolia Housing Project), and all other housing developments in the city of New Orleans, so that the Housing Authority of New Orleans will be in a position to maintain its facilities.

who now is vice president of Cameron University. I would like to share part of that story that tells about the fine citizens of Comanche County:

It is these people, educated in fine public schools, vo-tech and through Cameron University, who are the blessing and future of Lawton. They come from warrior, pioneer and immigrant stock but are bonded in a team dedicated to the hard work that brings progress and prosperity.

About the area, it said:

Six hundred million years ago hot lava spewed Meers Quartzite through the earth's crust. A hundred million years later, granite lava erupted. After three hundred million years of cooling, titanic geological collisions formed giant peaks that became The Wichita Mountains. Through the ages—seas, winds and rain cut and wore the majesty * * *.

In recent centuries, Noble Comanche Indians hunted buffalo on the rich plains south of the mountains. Although whittled by time, the mountains still blunted the cold north winds. The mystical, eroded rocks were reverred, worshipped and respected by the Indians. The land was good. Along clear streams gushing from rocky slopes, nomads camped and tribes prospered. Papoose waxed into bold warrior. Aged chief passed into the ages like dust blown on unwritten history * * *.

The article swept into creation 118 years ago of a frontier post, Fort Sill, and its transformation into the free world's field artillery training center along with the birth and swirling progress of Lawton—both nestled on the plains south of the Wichita Mountains.

Lawton's people are cosmopolitan, born of an Indian heritage but infused with people of the world who arrived as pioneer settlers or on military missions. Together, there is harmony and a peaceful life * * *.

Quality education was a top priority of frontier settlers. Crude homes, churches and schools shared building priority in the mind of pioneers who envisioned rich and wholesome civilizations. The legacy lives today in Lawton.

From the tree-lined campus of Cameron University to bustling Great Plains Area Vocational-Technical School to the 42 public schools that dot neighborhoods across the dynamic city, Lawton strongly supports education. The institutions repay the investment with superior instructions * * *.

Rugged and unhorizoned, the 59,00 acres of the Wichita Mountains Wildlife Refuge is a geological spectacular and mecca of buffalo, longhorn cattle, antelope, deer, prairie dogs, elk and colorful fowl.

The refuge is a mixture of fertile prairie, boulder upon boulder, the jagged Wichita Mountains, bubbling streams and glistening lakes. After hunting in the area, President Theodore Roosevelt in 1905 declared the expanse a federal sanctuary for wildlife as part of his staunch conservationist's movement * * *.

In a section written by Gary Hearn, the story of how Goodyear Tire & Rubber Co., world's largest tire manufacturer, opened a plant in the city a decade ago and gained "a record as Goodyear's safest tire manufacturing facility in the world for 5 consecutive years" and that the firm had recognized the Lawton workers with its first World-Class Competitor Award last January.

The article explains reasons for the successes:

Basking in a sunny and temperate climate * * * the four seasons environment nurtures healthy living, the city * * * commands a growing reputation as a health care mecca with the finest state-of-the-art facilities * * *.

Today's progress, prosperity and prognosis for Lawton rests on abundance of water resources: perhaps twice the growth needs for the next half century.

Prolific oil fields are west of Lawton. The expansive Anadarko Basin with uncharted natural gas resources is north of the Wichita Mountains. Energy is abundant.

The stability of the Lawton economy coupled with an elite work force, vast resources, ideal building conditions and a pro-business attitude have led to extensive diversity in industry.

The article concluded:

Lawton, a city built with people from around the world, enjoys the cultural opportunities of a world class city in a mecca of outdoor recration and relaxing splendor.●

## CONSERVATIVE JUDGES AND LIBERAL: JUDGE BORK AND JUDGE MIKVA

● Mr. ARMSTRONG. Mr. President, the Constitution of the United States empowers the President, "by and with the Advice and Consent of the Senate [to] appoint * * * Judges of the Supreme Court." President Reagan, who won the presidency by a nearly unanimous vote of the electoral college—525 to 13—has nominated to the Supreme Court Judge Robert H. Bork, who won a seat on the U.S. Court of Appeals for the District of Columbia by a unanimous vote of the Senate. Liberal politicians and liberal special interest groups think the President has gone too far, and that Judge Bork has gone far enough. They have vowed to stop the Bork nomination.

The implications of this anti-Bork position are considered in a cleverly written article by Robert Steigmann, an Illinois judge. Judge Steigmann asks us to consider a hypothetical Supreme Court nomination 2 years from now after a liberal Democrat has captured the White House and the Republicans have recaptured the Senate. Readers of the RECORD will find the Steigmann article most interesting, and I ask unanimous consent that it be inserted at the end of my remarks.

Mr. President, Robert Bork is eminently qualified to sit on the highest court of this land. He has a distinguished record as a lawyer, scholar, and public servant. The American Bar Association judged him "exceptionally well qualified" to sit on the Nation's second highest court and this body concurred, unanimously confirming him to the court of appeals. We should confirm him again.

The article follows:

[From the Chicago Tribune, July 22, 1987]

WHAT IF PRESIDENT SIMON NOMINATED A LIBERAL JUDGE?

(By Robert J. Steigmann)

Consider this scenario: In November, 1988, Sen. Paul Simon is elected president, but the Republicans recapture the Senate and Strom Thurmond re-assumes the chairmanship of the Senate Judiciary Committee.

In June, 1989, Justice Byron "Whizzer" White resigns from the Supreme Court for health reasons. President Simon's White House staff then conducts what it describes as "an intensive evaluation" of potential appointees to find the best-qualified individual who shares President Simon's liberal philosophy and his abiding conviction that the Constitution "is a living document capable of evolving over time to ensure that the least of our citizens enjoy those rights and privileges deemed fundamental in a free society."

In July, 1989, President Simon announces his choice: Judge Abner Mikva of the United States Court of Appeals for the District of Columbia Circuit. In explaining Judge Mikva's selection, President Simon states that he has known Judge Mikva since the days they served together in the Illinois General Assembly, and he knows Judge Mikva to be a brilliant legal scholar and a man of the highest integrity. The President denies that he used any litmus test in the selection process, such as approval of the 1973 Roe v. Wade decisions that legalized abortion.

Later in July, 1989, the President calls for quick Senate hearings on the nomination of Judge Mikva so that the court can be at full strength when it begins its October term. The President and the Senate Democratic leaders point out that Judge Mikva was confirmed by the Senate just 10 years earlier for his appellate judgeship, that he since has served with distinction on the court reputed to be the nation's second highest and that he has received the American Bar Association's rating of "exceptionally well-qualified" for the Supreme Court.

Upon learning of Judge Mikva's nomination, Sen. Orrin Hatch, the second most senior Republican on the Judiciary Committee, says: "Abner Mikva's America is a land in which the police are shackled in their efforts to control dangerous criminals, yet the frightened citizenry may not own guns to protect themselves; where the death penalty may not be imposed no matter how vile the murder, where no restraints may be placed upon the purveyors and peddlers of filth, even when children are involved; and where 13-year-olds may get abortions on demand without their parents even being notified."

In August, 1989, Judiciary Committee Chairman Thurmond expresses "grave concern" over Judge Mikva's nomination, explaining that he fears the nominee is an "ideologue, not a man with an open mind." Sen. Thurmond predicts that scrutinizing the nominee's record and legal philosophy may take months.

"Justice White has occupied the conservative center of the court with regard to his legal philosophy," Sen. Thurmond explains. "The careful balance of the court might be jeopardized by this nominee's decidedly leftward tilt and his possible unwillingness to follow the court's recent precedents holding, for instance, that the death penalty is constitutional despite statistical studies showing a disparity in its utilization based upon the race of the victim, or the holding

that states may constitutionally criminalize consensual homosexual activities between adults."

Meanwhile, Jerry Falw ll, Phyllis Schlafly and some far-right and anti-abortion groups announce a nationwide effort to block Judge Mikva's conf'rma ion "to preserve recent gains in the Supreme Court and to protect the lives of m l ions of the innocent unborn."

Does any of this sound amiliar?

The public and the sen ors who soon will be passing judgment on President Reagan's nomination to the Supreme Court of Judge Robert Bork should consider what their attitudes would be in this scenario.

Both judges are men of the highest repute who are held in the highest esteem by their peers. Both are distinguished legal scholars who have for years demonstrated their judicial skills on the same appeals court in the District of Columbia. Both have received or would receive the ABA's "exceptionally well-qualified" rating.

In fact, the only notable difference between the two is that one is a liberal and the other is a conservative. This is not, and cannot be, a legitimate hasis for the Senate to confirm one and reject the other.

The President has the right to select a person of his liking to serve on the Supreme Court. The Senate's opportunity to advise and consent is not grounds for rejecting a nominee, otherwise qualified, because he or she is not a person of the Senate's liking. Instead, it gives the Senate the right to satisfy itself completely that the nominee is a person of the highest integrity, with demonstrated legal ability, who is held in the highest esteem hy the legal community.

Raw political power might defeat Judge Bork's confirmation, just as it might the hypothetical nomination of Judge Mikva. But the opposition to Judge Bork is no more principled than would be the opposition to Judge Mikva.●

## COMPETITIVENESS IMPACTS OF S. 1384

● Mr. HEFLIN. Mr. President, the Senate has just passed trade legislation designed to insure the continued competitiveness of U.S. industry in world markets. During this debate, this body consistently sought to maintain a strong manufacturing sector for this country and to sustain the important technological advances our industries have made.

One of the most important considerations, in my opinion, was to protect the technology advantages many of our industries have in competing worldwide. The productivity of agriculture and of many important manufacturing sectors and the edge in technology which often offsets higher energy, material or other manufacturing costs are the basis for this strength. To provide enhanced protection for intellectual property rights, the Omnibus Trade and Competitiveness Act of 1987 incorporates numerous provisions to enhance the protections afforded U.S. patents, copyrights, and other forms of confidential business information. The bill enhances these protections under the terms of the Tariff Acts, improves the protection for process patents under U.S. patent law, and even specifically provides assistance to foreign countries for the development of programs to protect intellectual property rights.

In light of all of these legislative efforts, I am troubled to see the Committee on Environment and Public Works currently debating legislation which seems to go in a radically different direction.

The committee currently has under consideration a bill, S. 1384, which would amend the Clean Air Act to address some of the problems raised by the current program to regulate hazardous air pollutants. The bill contemplates bringing the Federal Government into the fundamental operation of our Nation's manufacturing economy. This would come under the banner of protecting us from releases of hazardous chemicals.

This bill calls for hazard assessments, a new investigation board, audit and inspection programs programs and penalties to deal with both planned and unplanned releases of toxic materials.

The proposed new board would have investigatory powers. It could investigate manufacturing and production processes, controls and related matters anywhere that any of a large number of chemical substances is produced, processed, handled, or stored. Many of these substances are likely to be very common in our society as fuels, cleaning solvents, dyes, catalysts, and so on. The board's findings would then be broadly available to the public, and the competition. The only limitation—the protection of trade secrets has broad exclusions in the name of overriding public health and safety concerns so as to make the limitations meaningless. The EPA would likely have similar broad powers in developing regulatory programs regarding manufacturing and distribution operations.

In addition to raising fundamental questions on the role of the Federal Government in the normal operation of our manufacturing economy, this concept seems to leave the door open to competitive mischief. A foreign competitor could use this bill and the fear of toxic chemicals to pry into one of industry's most valuable assets—its technology. All the competitor need do would be to have some questions raised before the board about a U.S. business activity or process they want to know more about.

The board could then investigate and would be compelled to make available to the public just about anything anyone would want to know—process designs, operating parameters, technologies, information on planned investments or other new improvements, and sensitive research and development information. All in the name of public health and safety.

In view of its broad nature and of its potential implications for our agricultural and manufacturing economy, it will be essential for the Senate to look closely at this legislation if and when it comes before us. We should not only look at its merits in terms of its environmental benefits. We will need to look at this bill's implications on the competitiveness of some of the technically critical sectors of our national economy. If we fail to do so, we may end up forfeiting, or undermining, the trade competitiveness we sought to enhance in the Omnibus Trade and Competitiveness Act of 1987 ●

## THE PERSIAN GULF

● Mr. HATFIELD. Mr. President, Senator MOYNIHAN and I introduced a resolution yesterday urging the President to direct the U.S. Permanent Representative to the United Nations to propose the reflagging of nonbelligerent shipping in the gulf with the United Nations flag. We introduced that resolution, Mr. President, because this country has now embarked on a policy born of fear.

Fear that the Persian Gulf, from which almost half of the Western world's oil supply comes, will close, throwing the United States and her allies into a state of economic havoc.

Fear that Iran, the country to which we were selling arms 12 short months ago, will use its radical theocracy to destabilize moderate regimes in the Middle East.

And fear that the Soviets, who have leased Kuwait three oil tankers, will chip away at United States preeminence in the Persian Gulf.

It is clearly in our interest to keep the Persian Gulf open, to isolate Iran and to prevent the Soviets from becoming a more dominant force in the region.

But are we so myopic that we can see only the threats? What about the potential, the opportunities, the alternatives?

Instead of asking only what we can prevent, we ought also to ask what we can produce.

It seems mind-boggling that this country sold arms to Iran less than a year ago, but we have a compelling interest in isolating Iran.

It is not just the United States that is threatened by that expanding influence—the Ayatollah and his Revolutionary Guard pose a threat to the United States and the Soviet Union.

As George Ball pointed out recently: "Iranian Shiite fundamentalism is already creating unrest in the Moslem-inhabited Central Asian Republics of the Soviet Union, and Iran's assistance to the Afghan rebels is particularly galling."

about it seriously, so I said "No." But if I had said yes, I'm sure she would have checked another little box and it would have been done. Just as easy as that.

Senator, I hope this can help you in some way. At the time I was embarrassed and wanted nobody to know. I still don't. Women need to be well informed about abortions and its risks. Please help.

P.J.

## THE BORK NOMINATION

● Mr. SIMON. Mr. President, the senior Senator from New Hampshire [Mr. HUMPHREY] on July 21 introduced into the RECORD an excerpt from a syndicated column written in May 1986 in which the writer incompletely described my views on the factors the Senate should consider in weighting judicial nominations. I would like the record to be clear on this subject.

I was not a member of this body in 1982 when the President nominated and the Senate confirmed Judge Robert H. Bork to the circuit court of appeals. In addition, I have preferred not to predict how I would vote on any hypothetical nomination to the Supreme Court or on this nomination. But I have described some of the factors the Senate should consider, which I will restate here.

As many observers noted last year, Judge Bork is poles apart from Judge Manion on the quality scale. That is significant. But the Senate must also weigh other significant factors, and it is clear that the framers of the Constitution intended for the Senate to take an active role in this process.

Obviously, any of this administration's nominees will be conservative. That is the President's prerogative. In weighing factors like a candidate's philosophy, I have said a guiding principle is that the Senate should weigh the same factors the President did in making his choice. A nominee should show openmindedness, sensitivity to civil rights and civil liberties, understanding of our tradition of separation of church and State, and other issues of basic fairness that will come before the Court. The American people should be able to look at a member of the Nation's highest Court and believe that person would be fair and is not a judge on a mission. I have voted for dozens of the President's nominees after deciding they would be fair and openminded.

When there are indications that a nominee would limit constitutional rights by applying a rigid ideology, that gives me serious reservations. At this point I have such concerns about Judge Bork's nomination, but I won't make my final decision until the hearings when we can weigh the evidence.●

## TROPICAL FOREST PROTECTION ACT OF 1987

● Mr. KASTEN. Mr. President, the Tropical Forest Protection Act of 1987 calls for two Treasury studies and two World Bank pilot programs to assess the viability of linking debt forgiveness to tropical forest and wetlands preservation.

If implemented on a large scale by the World Bank and other multilateral development banks similar in structure, this legislation offers the hope of reversing the current trend of deforestation and environmental neglect that is becoming more prevalent given the economic status of most tropical nations.

The first major element of the bill is a study by the Secretary of the Treasury. It will assess tropical forest and wetlands damage to date and future prospects for conservation without outside assistance; what essentially is the timetable for irreprable damage. Treasury will also evaluate the ability of in-country organizations—both governmental and nongovernmental—to protect and manage their forests and wetlands and search for methods and means to increase their effectiveness. In completing the study, Treasury will consult with members of the environmental community and those in tropical nations that are knowledgeable on the subject. Findings will be reported to three different committees in the House and Senate respectively.

The World Bank initiatives will consist of two 3-year pilot programs meant to divert efforts away from the forests and channel economic development toward long-term sustainable uses of the forests and their surroundings. The first program is a structural adjustment loan which will induce sustainable use of the tropical forests. Financial support will be given to countries to deter short-term, capital-intense forest and wetland degredation.

The second World Bank program calls for the creation of land reserves (conservation easements). In exchange for setting aside tracts of land, the World Bank will negotiate suspension of some debt service payments. Specific agreements will pend negotiations between host country and the bank, but the contract will be a minimum of 3 years to ensure successful completion of the study.

If the program is implemented on a large scale by the bank, countries will have the option of terminating easement agreements at any point and resume debt payments. Similarly, banks may force resumption of debt service payments of countries who fail to meet the terms of their contract.

Results of both pilot programs will be reported to Congress and disseminated to private and multilateral development banks, and serve as the basis for determining the potential full scale implementation of these policies by the World Bank. The final component of the legislation calls for a Treasury study of the International Monetary Fund's ability to implement similar programs.

It is our hope that through this legislative act we will reverse this disastrous trend of tropical forest and wetlands destruction and foster a new global ethic that will elevate environmental conservation into the forefront of global economic planning.●

## PUERTO RICAN DAY PARADE

● Mr. LAUTENBERG. Mr. President, I would like to call attention to the 25th annual New Jersey Puerto Rican Day Parade which will take place this Sunday, July 26. This parade caps more than a week of events that testify to the many and varied achievements of the Puerto Rican community of New Jersey. And, it celebrates the 35th anniversary of the establishment of the Commonwealth of Puerto Rico.

Over the past 25 years, this parade has grown from a small local event in Newark, NJ, to one of the most significant statewide Puerto Rican events. It is estimated that this year's parade will attract more than 50,000 onlookers along the parade route in Newark.

As in the past, the majority of the parade participants will be from the Puerto Rican community. However, many other ethnic groups will be represneted as participants and spectators. Diverse ethnic cooperation is what makes New Jersey and our Nation a living witness to the spirit of the Statue of Liberty.

Traditionally, this parade is the culmination of a year of activities for its sponsor, the Puerto Rican Statewide Parade of New Jersey, Inc. One of this nonprofit organization's major functions is the granting of numerous scholarships to needy Puerto Rican students throughout our State. Most of the financial resources for the parade and the scholarhsips are the result of the Miss Puerto Rico of New Jersey pageant.

Mr. President, those responsible for organizing and conducting these cultural events deserve our congratulations. While their names are too numerous to cite, each one knows that their efforts are what made this event possible.

Once again, my sincerest congratulations to my many friends in the New Jersey Puerto Rican community during their days of celebration, and especially to Frank Melendez, president of the parade committee and the other members of the parade committee.

I ask that an article describing the parade be included in the RECORD.

The article follows:

creased vacation benefits only to postmasters and told all of the other employees to join a union if they want the same benefits? Of course we would not think of doing that; at least this Senator would not. Yet, I think we would be making a far more egregious error in this case because we are dealing not simply with a benefit but with a fundamental right, a fundamental right of each employee.

Mr. R. Fain Hambright, former president of the National League of Postmasters, testified last year before the House Subcommittee on Postal Personnel and Modernization. He stated that the current internal review system has often been unfair. He said, "We believe that a system must be fair in every respect, and administered equitably to all of its employees." Not a Member of this Senate will challenge that statement. Mr. Hambright went on to challenge the Postal Service: "If the Postal Service is as interested in protecting employee rights and the fair appeal system available to employees as it says it is, how can the Postal Service then object to providing equal routes of appeal to all nonbargaining unit employees?"

Mr. President, that is precisely what the amendment I shall call up momentarily will do. It will extend the Merit Systems Protection Board appeal rights to all nonbargaining unit employees.

AMENDMENT NO. 637

(Purpose: To amend title 39, United States Code, to extend to certain officers and employees of the Postal Service the same procedural and appeal rights with respect to certain adverse personnel actions as are afforded to Federal employees under title 5, United States Code)

Mr. HELMS. Madam President, I now ask that the amendment be stated. I call it up, and I ask that Senator THURMOND be identified as a cosponsor of the amendment and be added as a cosponsor of S. 523.

The PRESIDING OFFICER (Ms. MIKULSKI). Without objection, it is so ordered.

The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from North Carolina [Mr. HELMS], for himself and Mr. THURMOND, proposes an amendment numbered 637.

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

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

The amendment is as follows:

In lieu of the language proposed to be substituted, insert the following:

That (a) section 1005(a) of title 39, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(4) Notwithstanding paragraph (1)(B) of this subsection, and subject to paragraph (2) of this subsection regarding preference eligibles, subchapter II of chapter 75 of title 5 shall apply to all officers and employees of the Postal Service who have completed 1 year of current continuous service in the same or similar positions, other than those persons excluded under either paragraph (1)(A) of this section (regarding collective bargaining agreements) or paragraph (3) of this subsection (regarding certain executive positions).

"(5) In the administration of this subsection, the Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if—

"(A) the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive; or

"(B) the Postal Service determines, in its discretion, that the Board erred in interpreting a law, rule, or regulation affecting postal personnel management and that the Board's decision will have a substantial impact on a postal law, rule, regulation, or policy directive.

In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.".

(b)(1) The amendments made by subsection (a) shall be effective after the expiration of the thirty-day period beginning on the date of the enactment of this Act.

(2) An action which is commenced under section 1005(a)(1)(B) of title 39, United States Code, before the effective date of the amendments made by subsection (a) shall not abate by reason of the enactment of this Act. Determinations with respect to any such action shall be made as if this Act had not been enacted.

Mr. HELMS. Thank you, Madam President. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. DOLE. Madam President, I ask unanimous consent that I may speak out of order for a period of 5 minutes.

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

## AMERICA DESERVES FULL SUPREME COURT BENCH: LET'S EXPEDITE BORK HEARINGS

Mr. DOLE. Madam President, yesterday I had the pleasure of speaking to the National Conference of State Legislators in Indianapolis. During my remarks on budget deficits, welfare reform, and catastrophic health legislation, I spent some time focusing on what I believe will be the main event of the 100th Congress—the nomination of Robert H. Bork to the Supreme Court.

THE PEOPLE EXPECT ACTION

In my view, the American people deserve—and expect—a full and open debate on this very important issue. They also deserve—and expect—a speedy resolution of the nomination. And come October 5, when the Supreme Court begins its next term, the American people deserve—and expect—a full bench on the Nation's highest Court.

Yet, what we have seen so far is an unprecedented delay before committee hearings even start; a delay of 72 days from the time the President sent the Bork nomination to the Hill on July 7, to the time Senator BIDEN, the distinguished chairman of the committee, scheduled hearings to begin on September 15.

We are not talking about confirming a bureaucrat—even a Cabinet Secretary; any department in this Government can function without a leader for at least a while.

SERIOUS BUSINESS

But this is serious business. Nothing coming before the Senate in the next few months should have a higher priority. We are talking about the very precarious balance of the highest Court in the land. The balance of justice is a fragile thing, and is ill-served by a court with a vacant seat.

POTENTIAL FOR A RECESS APPOINTMENT

Yesterday, I made the observation that the President has full authority to make a "recess appointment" to the Court. This procedure, backed by the Constitution, has been used 15 times in the past. Again I would say as I did yesterday, while I am not promoting that such a procedure be used, in the absence of timely action, it is an option the President, any President, should consider seriously.

The chairman of the Judiciary Committee has suggested that politics are being played with the Bork nomination.

I do not believe that is the case, and I certainly do not suggest that is the case. But it does seem to me that we can go back into the history of the Presidents and we can ask ourselves: Was George Washington playing politics when he made two recess appointments to the Supreme Court? Was Dwight Eisenhower playing politics when he made three such appointments, including that of Chief Justice Earl Warren? The American people can judge whether it is political to assure an eight member court in October, with the great potential for evenly split decisions; or whether it is political to assure a full complement on the Supreme Court for the first Monday in October?

Madam President, I will just say this: The Bork nomination is very im-

portant. I do not believe Ronald Reagan will make a more important decision in the second term of his Presidency. There is no doubt about it, this nomination will be fully aired. We should have full hearings. We should have a full debate. We ought to have an up or down vote.

I know many of my colleagues on both sides, at least some of my colleagues on both sides, are still undecided. That is probably as it should be. But I would just indicate again, as I was asked this morning about the question about a recess appointment, this is an important decision.

Madam President, Ronald Reagan was elected in 1984. It should come as no surprise to anyone that Ronald Reagan would choose somebody who would exercise judicial restraint, somebody who had a conservative philosophy, someone who felt that the Supreme Court should not be a legislative body, that Congress should be the legislative body or the State legislatures.

The Supreme Court's role would be to interpret the Constitution or things that may have been passed, enacted, and signed by the President. In other words, review what the Congress or State legislatures may have done.

So I will say as I have said many, many times this is an important judgment that must be made. I am suggesting that it be made in a timely fashion. If there is any way that the matter can be expedited, I think that is in the interest of this country.

Mr. BYRD. Madam President, I will have more to say on the Bork nomination. I intend to withhold my judgment on that nomination until I have had an opportunity to study the Senate committee hearings, and the opinions, rulings, and statements by Judge Bork during his tenure on the circuit court of appeals.

I am not going to rush judgment in this matter. I am not going to be stampeded into judgment. I am not going to be pressured into judgment. It is my understanding that the September 15 date for hearings had been agreed upon between Mr. BIDEN and Mr. THURMOND in discussions.

As to a recess appointment, it seems to me that that does not add up, may I say to my distinguished friend, the Republican leader. If we are talking about a recess appointment, are we talking about an appointment in August? Are we talking about an appointment in October? The Senate may not go out until November or even December. What kind of a recess appointment do we have in mind?

I should think also that the President would be more serious about this matter than to make a recess appointment.

Before this Senate goes into recess I am going to inquire of the President, as to whether or not he intends to make any recess appointments. If he indicates that he does, then we will decide what to do. If he says that he does not, we will take him at his word.

In the first place, I do not know when the Senate is going to recess at the pace it is going, and with the amount of work that still remains. It would also seem to me that the President would not accomplish what I should think his objective would be. If I were in his stead, I would want to—perish the thought that I should imagine that I would be in his position, but nevertheless if I were, I think I would want to appoint someone to serve in that position for many years—and in this case it would be many years—after the remaining 18 months that Mr. Reagan would have as of this juncture.

Even if a recess appointment were to be made, that commission would expire at the close of the next session, and the next session might be a special session. I assume that what is meant by the Constitution is, in this instance, the close of the second session. In this instance, it would be the session that would adjourn sine die at the end of the 100th Congress, which could conceivably be as late as the morning of January 3, 1989.

I have seen, I believe, during my service in the Senate the Senate adjourn sine die as late as January 2.

But I hope the President would not be playing games. It would be a circumvention of the people's branch to make a recess appointment, certainly of this nature.

I think there has been too much of that already in the last several months. There has been an excess of circumvention of the people's branch. I do not think that is what the distinguished Republican leader wants to see happen.

But with this President, I should think he is more serious about this nomination than simply to engage in an exercise in which he appoints a Supreme Court Justice who would serve only to the end of the next session.

Mr. President, I would be happy to hear from the distinguished Republican leader. If there is something I am overlooking in what I am saying, if there is something I have missed, I would be happy if he would point it out.

Mr. DOLE. I may not be able to point it out, but as I have indicated, it is an option. As I understand, it happened 15 times. And it would not happen during the August recess. I do not think the President has even considered it. In fact, I know the President has not. I have not discussed it with anybody at the White House. But there are options the President has, Democrats or Republican.

What I am suggesting is that we get on with the Bork nomination. Again, I am not suggesting that is even an option that may be under consideration, but it is an option. It is provided in the Constitution. It was used first, as I understand, by George Washington who made a recess appointment I think of John Rutledge. He was later not confirmed but I think for another reason—I think over some treaty dispute. Some of those who have been recessed have been confirmed.

So it is an option any President has. It could be interpreted the other way. Let us say that the Senate, through no fault of the leadership on either side never completed, one way or the other, action on the disposition of Judge Bork. Then the President has a question that must be resolved.

I think there are other questions in the Bork nomination that must be resolved. I know the majority leader has indicated that he hopes to have the matter on the Senate floor, and we hope we have the matter on the Senate floor. And I guess the other question may be—and there is some precedent for that. I guess in the Fortas nomination where cloture was not obtained, he asked that his name be withdrawn. I was not in the Senate at the time. President Johnson withdrew the name. That is another question.

How many votes do we need for the Bork confirmation? 60 or a majority?

I suggest there is going to be a lot of discussion. This is a very, very important nomination, one that I think deserves serious and prompt consideration.

Has the President looked at a recess appointment? I do not think so. But it is provided in the Constitution. The President is very serious about this nomination. He is going to be working with Republicans and Democrats trying to secure enough votes for confirmation, as is Judge Bork.

But my view is, and my only view is—as I have said, I am not suggesting it to the President—this is an optlon available to any President.

Mr. BYRD. Mr. President, as a member of the Judiciary Committee, I hope to see this nomination have its day in this court right here. As a member of the Judiciary Committee, I voted some years ago to report Mr. Kleindienst who was nominated for an important office. Yet, I voted against Mr. Kleindienst here on the floor. I believe that Mr. Bork is entitled to a judgment by this full court—right here.

As of this day—and I say before God and man, and I measure my words—I have not made any decision as to how I will vote on this nomination except I will vote to report it out of the committee. I think a nomination of this kind is entitled to have the judgment of the full Senate, where I may end up voting for Mr. Bork or I may end up voting against him.

I regret to see this very important nomination become a strictly politically partisan matter. I do not want to make my judgment on that basis on such a nomination.

I think it would be in the interest of Mr. Bork if a good many of us on both sides were to quit talking about it so much and let us see what this nominee is all about. I hope we will not become so polarized that some will feel that, because they are of one party or the other, this is a litmus test of party affiliation and loyalty. That is not going to be my attitude. So whatever we can do, myself included, to bring this nomination a little away from its becoming a lightning rod and party litmus test, I want to do that. I intend to reflect on this nomination carefully. I want to carry out my role under the Constitution of the United States in a fair and unbiased manner.

I have read and heard that there are various vote counts going around—45 to 45, 40 to 40, and all that. I do not know how they are counting my vote. But I hope that all Senators will slow down just a little bit here, cool it, and give us all a chance to exercise the "freedom of will" about which Milton wrote in "Paradise Lost." I yield the floor.

## POSTAL EMPLOYEE APPEAL RIGHTS

The Senate continued with consideration of the bill.

Mr. BYRD. Madam President, are we about to complete action on the bill that is before the Senate?

The PRESIDING OFFICER. Pending before the Senate is an amendment by the Senator from North Carolina. The amendment has been received and read.

The Senator from North Carolina.

Mr. HELMS. Madam President, I thank the Chair very much.

The Chamber is not exactly packed with Senators at the moment, but for the benefit of Senators or their aides who may be listening in their offices, let me make it clear that my amendment to H.R. 348 simply emphasizes that no postal employee may be required to join a union in order to appeal adverse personnel actions to an outside, independent agency.

Now, there are about 10,000 Postal Service Employees who are left out under the pending bill. I can see it now—these 10,000, including postal inspectors, clerical personal, and many others, will get the message that they have to join a union to enjoy the same rights that all of the other postal employees have. Or to put it another way, Madam President, H.R. 348, if unamended by the Helms amendment, will cover only supervisors and management personnel in the Postal Service. It excludes, I say again for emphasis, about 10,000 employees who are not supervisors or managers and who are not members of a collective bargaining unit, that is, a labor union.

Madam President, I ask for the yeas and nays on the amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. HELMS. I thank the Chair.

Mr. PRYOR. Madam President, so other Senators will know a little about when we might dispose of this bill—and I see the Senator from Alaska, who may be desirous of speaking for or against the amendment offered by the Senator from North Carolina—on this side of the aisle we have no speakers. I would take this opportunity, Madam President, to speak for about 2 or 3 minutes.

Madam President, I certainly understand the intentions of the Senator from North Carolina in offering this amendment. Those intentions, I assume, are to cover some of those postal employees who may not be covered by the postmasters and postal supervisors legislation.

The Senator from North Carolina made a very strong point when he stated that all these postal employees are not covered by this bill. The Senator from North Carolina is precisely correct on that point. In fact, it is not the intention, nor was it ever the intention, of this particular piece of legislation to reach out under one umbrella and cover every postal employee or every other Federal employee in the U.S. Government.

This legislation is specific, it is narrow, and it relates to two classes of employees who under the law may not—I report, under the law may not—join a union, and therefore they are precluded from participating in collective bargaining agreements.

So the purpose of this bill, Madam President, is not to be all inclusive but to deal with postmasters and postal supervisors under this particular provision.

This legislation has passed the House of Representatives on two occasions by a unanimous vote. These items that the Senator from North Carolina has discussed today have been discussed by the Governmental Affairs Committee. In our markup of this particular piece of legislation, by a 12-to-0 vote, this bill has been referred to the floor of the U.S. Senate.

I say to my distinguished friend from North Carolina that if he wants to amend or change a piece of legislation to be all-inclusive of additional postal or Federal employees, I do not think that the Senator from North Carolina will have to wait very long, because it is my understanding that the House of Representatives is now considering legislation to do something like the Senator from North Carolina desires.

So, once again, 80 Members of this body have signed on as cosponsors of this bill. It is specific for postal supervisors and postmasters. There will be another day for a House bill covering all postal employees. We think that the time has come for us to pass this legislation, pass it in its present form, not have to go through a lengthy conference with the House of Representatives. We think the time is today, and we should pass this legislation and send it to the President's desk.

Madam President, I yield the floor.

Mr. STEVENS. Madam President, I merely wish to comment on a portion of the bill, not the pending amendment, but the bill itself which was called up by my good friend Senator PRYOR.

In my former capacity as chairman of the subcommittee, of which Senator PRYOR is now chairman, I had undertaken to fulfill a commitment to the former Postmaster General, Al Casey, who felt that the Postal Service should have the right to appeal these decisions to the Federal Circuit Court. That matter is now pending before the Federal Circuit Court of Appeals in the case of OPM against Shuck and Washington.

I have had correspondence with my friend from Arkansas, the manager of the bill, and I had desired to bring up that matter in connection with this bill. However, in view of the statement I have received from Senator PRYOR, which indicated that it is his intention to revisit the extent to which further relief may be necessary and appropriate once a decision is entered in the Shuck case, I shall not offer that amendment at this time.

With regard to the pending amendment of the Senator from North Carolina, I shall oppose it. I agree with him in principle concerning appeal rights of individual members of the Postal Service, but the real difficulty is that now to change the system that exists, by this amendment, I think would be wrong. I think that if we are to address the whole question of how the employee rights are to be protected within the Postal Service, which is an independent corporation and does have bargaining representatives for its employees, we should conduct a different type of hearing and deal with it in a different manner. It is my understanding that, at the present time, employees other than those covered by this bill do have appeal rights. Those rights are protected by bargaining representatives of units that the employees have seen fit not to join.

I think that imposing the concept of covering all nonbargaining unit employees on the existing labor-management agreements between the Postal Service and the employee representatives, without real study as to how that would impact on those contracts,

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future of the Arctic. With hindsight, it's easy to see that the congressional debates which preceeded passage of the Alaska Native Claims Settlement Act of 1971, the Trans-Alaska Pipeline Act of 1973, the Alaska Natural Gas Transportation Act of 1976, and the Alaska Lands Act of 1980, were sometimes characterized by ill-informed, sensational, and misleading information.

For instance, the Senate was only able to narrowly pass the Trans-Alaska Pipeline Act with the tie-breaking vote of the Vice President. Many Senators who opposed the pipeline believed the assertions of extreme environmentalists who argued that any development would seriously jeopardize the future of the central Arctic caribou herd and other wildlife. While we now know that responsible development can occur in the Arctic, ignorance of the truth in 1973 almost exacted a significant price—the pipeline might never have been built.

Mr. President, as the old saying goes, if you think knowledge is expensive, try ignorance. The basic purposes of the Arctic Research and Policy Act is to increase our knowledge of the Arctic in order that we can make wise decisions about its future and the future of our Arctic nation. As a consequence of the act:

The United States now has an Arctic Research Commission which meets regularly to advise the President and Congress on matters of Arctic Research;

The United States has a Federal Interagency Committee to coordinate Federal Arctic research efforts.

We have a coordinated Arctic research budget.

We are looking closely at the need for new research platforms, icebreakers, and other mechanisms to study the Arctic.

Finally, we have this document that was just transmitted to the Congress by the President—the first 5-year Arctic research plan.

The fact is, we've come a long way in the short time since the passage of the Arctic Research and Policy Act. And that's fortunate, because there is much we must know about the Arctic if we expect to move into what some have called "the Age of the Arctic" with confidence. For instance:

We must find the new technologies we need to develop Arctic resources wisely while protecting the Arctic ecosystem;

We must fully understand how Arctic systems operate if we expect to address problems such as Arctic haze and the greenhouse effect.

We must improve our knowledge of glaciers, sea ice, permafrost, and snow in order to perfect new Arctic air, land and maritime transportation technologies.

We must fully understand disruptive auroral displays and high latitude atmospheric disturbances if we expect to enjoy dependable telecommunications capabilities in the Arctic;

Finally, the Arctic, in stark contrast to the Antarctic, is the home to an indigenous people who have lived and hunted in the region since time immemorial. We must fully understand the Arctic and the short and long-term impacts of what we do there if we expect to protect the unique lifestyle of the Inuit—Eskimo—people.

Mr. President, it is clear that the Arctic, once considered a remote and forgotten area of our planet, is emerging as one of the most important regions of the world. Congress has recognized this fact. Building on the foundation of ARPA, the United States is poised to take its rightful place as a leader among the Arctic nations of the world.

In closing, I want to say just a few words about the plan and how it evolved. A tremendous amount of time, effort, and consultation went into this plan—more than we will ever know. It may interest my colleagues to know that meetings and workshops leading to the plan were held in Hanover, NH; Anchorage, AK; Boulder, CO; Barrow, AK; and Washington, DC.

Moreover, the members and staff of the Interagency Arctic Research Policy Committee, the Commissioners and staff of the Arctic Research Commission, the National Science Foundation, Arctic residents, other interested members of the public, and scientists in and outside of government, have all made significant contributions in time, energy, and expertise far above and beyond their normal duties. We owe them all a special debt of gratitude. The result of their efforts is before us today: A comprehensive plan that will help us to chart our course as a true Arctic nation.●

## COMMITTEES TO HAVE UNTIL 7:30 P.M. TO FILE REPORTS

Mr. BYRD. Mr. President, I ask unanimous consent the committees have until 7:30 today to file reports.

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

## ORDERS FOR TUESDAY

ORDER FOR ADJOURNMENT UNTIL 11 A.M. TOMORROW

Mr. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business the Senate stand in adjournment until the hour of 11 o'clock tomorrow morning.

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

ORDER OF PROCEDURE

Mr. BYRD. Mr. President, I ask unanimous consent that on tomorrow the call of the calendar be waived and no motions or resolutions over, under the rule, come over.

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

MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that on tomorrow after the two leaders are recognized there be a period for morning business not to extend beyond 11:30, the Senators may speak therein up to 5 minutes each.

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

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

The PRESIDING OFFICER. The Senator from New Hampshire is recognized.

## NOMINATION OF ROBERT BORK TO BE SUPREME COURT JUSTICE

Mr. HUMPHREY. Mr. President, I wish to comment on some noteworthy positive developments regarding our forthcoming consideration of the Bork nomination.

Though the chairman of the Judiciary Committee continues to unreasonably delay the start of the hearings on Robert Bork, indeed the delay will by far surpass any previous delay in modern times for the consideration of a Supreme Court nomination, I am pleased to note nonetheless that several distinguished Members from the other side of the aisle—that is the side opposite from which I am now standing—have made commendable efforts to bring some fairness and reasonableness to bear on the consideration of the nomination.

The majority leader and the senior Senator from Arizona have cautioned their colleagues to avoid premature judgments and to objectively examine Judge Bork's professional qualifications, judicial temperament, and other relevant criteria.

Mr. President, Senators will recall the inflammatory and intemperate rhetoric heard on this floor on the very day the nomination was announced. We were told then that the addition of this distinguished American to the Supreme Court would somehow result in "blacks being forced to sit at segregated lunch counters, rogue police breaking down citizens' doors in midnight raids," for example.

Such demagoguery has no place in our deliberations on this critically important nomination. That is why I welcomed and commend the refreshing and responsible statements of the majority leader and the Senator from Arizona.

Let us have a fair and rational debate. It is not asking too much. Indeed, the American people expect it of us in deliberating the confirmation

of a candidate for so important an office.

I can think of no more relevant criterion for us to consider than the nominee's key performances as a judge on the U.S. Court of Appeals for the D.C. District Court over the past 5 years. That position, Mr. President, is literally as close as one can get to the Supreme Court in our Federal judicial system without being on the High Court itself.

Judge Bork has been a member of that court now for 5 years, unanimously confirmed by the Senate in 1982. And how he performed as a U.S. court of appeals judge unquestionably provides the best possible evidence of how he would perform on the Supreme Court.

His record on the court of appeals also provides the best evidence for evaluating the charges of those who, in my opinion, unfairly and unreasonably claim that Mr. Bork is an extremist whose views are outside the mainstream of responsible jurisprudence.

Judge Bork's actual record as a Federal judge not only refutes such charges beyond any dispute, but also demonstrates that he is one of the most qualified and responsible judges ever nominated to the Supreme Court.

On the D.C. Circuit Court of Appeals, Robert Bork has authored over 100 opinions for the majority. Not one of those opinions has been reversed by the Supreme Court. Not one.

Hardly the work of an extremist, Mr. President. In fact, although the losing party has petitioned the Supreme Court to review 13 of Bork's majority opinions, his opinions have been so well-grounded that the Court has not considered it necessary to review a single one of them. The fact that the losing parties decided not to seek review of Bork's 87 other majority opinions further reenforces the soundness of those rulings. The sounder the reasoning in an opinion, the less likely it is that lawyers will pursue an appeal.

Equally remarkable is the fact that the Supreme Court has not reversed any of the 400 majority opinions in which Judge Bork has joined; in concurrence, not as author.

He has authored 100, none of which has been overturned. He has taken part and participated and concurred in some 400, not one of which has been reversed.

These hard facts are the most eloquent and objective possible testimony to the soundness of Bork's judicial approach. A judge who endorses and applies legal views which are "extremist" or outside the judicial mainstream could not possibly compile such an extraordinary record of consistently sound rulings, which have been upheld by the Supreme Court.

These are not the only facts from Judge Bork's judicial record that refute the unfair and unreasonable charges which some have made against the nominee. Other objective data demonstrate the fallacy of claims that his judicial philosophy places him on the "outer fringes" of responsible judicial decisionmaking.

Bork has voted with the majority of the D.C. circuit in 94 percent of the cases he has heard during his tenure there. Yet the D.C. Circuit Court had 7 Democratic appointees out of 10 members when he joined it, and presently has 5 Democratic appointees out of 10 members. This court includes some of the most prominent liberal jurists in the Nation, including Chief Judge Patricia Wald and Judge Abner Mikva.

Interestingly, when Supreme Court Justice Antonin Scalia sat on the D.C. Circuit Court with Judge Bork, Scalia and Bork voted the same in 84 out of the 86 cases—more than 98 percent—in which they both participated. More similar voting records would be difficult to find among any pair of judges. Are Bork's critics prepared to call Scalia an extremist as well? Are Senators prepared to admit they voted to confirm to the Supreme Court an extremist in the person of Antonin Scalia with whom Judge Bork voted 98 percent of the time? Justice Scalia was confirmed by a vote of 98 to 0 one year ago.

Where, then, is the basis for harshly condemning a nominee whose judicial record is virtually identical to that of another nominee who was unanimously confirmed less than a year ago? I suggest that the question provides its own answer—none!

The chairman of the Judiciary Committee was candid enough to concede last fall that if Judge Bork were nominated and "looked a lot like Scalia," then the chairman would "have to vote for him," despite the expected attacks from the special interest groups.

Well, Judge Bork does "look a lot like Scalia," at least from the standpoint of their voting records as appeals court judges. That is the point of the remarks I am delivering tonight. A 98-percent rate of agreement in voting record could hardly be more alike. And that is the standpoint that should count when we are considering a nomination for the highest appeals court in the land. Or maybe we misunderstood the distinguished Senator from Delaware when he used the phrase "looks a lot like Scalia." Maybe the Senator meant facial appearance. Maybe he favors jurists who are clean-shaven. Could that have been it? In that case, we must get Bork to shave off his beard, and then the Senator from Delaware no doubt will be prepared to support him.

The anti-Bork campaign being waged by certain special interest groups in connection with Presidential campaigning is an ill-disguised attempt to divert this confirmation process from its proper and legitimate task. We should be deciding whether Judge Bork, like Justice Scalia, has the qualifications, the judicial record, and the integrity befitting a Supreme Court Justice. Unless our hearings reveal some serious impropriety or flaw undetected by the prior hearings and microscopic examinations of Robert Bork's personal and public record, it is quite clear that he meets those tests.

Mr. President, like others, including many Senators on the Democratic side, I urge my colleagues to keep their focus on these relevant and legitimate considerations. We should not and cannot allow this important process to be dominated, distorted, by inflammatory assaults designed to turn our confirmation process into some element of the Presidential campaign by certain Members.

If each of us on both sides of the aisle listens to the wise admonitions of the majority leader and the Senator from Arizona, we will at least get off to a good start.

Mr. President, likewise, in connection with the Bork nomination, I ask unanimous consent to place in the RECORD an editorial on that subject printed in the Fosters's Daily Democrat, Dover, NH, on July 30, 1987.

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

[From the Dover (NH) Foster's Daily Democrat, July 30, 1987]

THE BORK BROUHAHA

OPPOSITION TAINTED BY OPPORTUNISM

Critics of U.S. Court of Appeals Justice Robert H. Bork base their opposition to his nomination to the U.S. Supreme Court on two fundamental arguments—one weak and the other illogical.

First, opponents contend Supreme Court nominees have historically been judged on their political ideology, not only their scholarly qualifications. Bork is brilliant, they admit, but he's too right-wing.

Historically, they are only partially right. Yes, about 20 percent of all presidential appointments to the high court have been rejected by the Senate—many of those for reasons rooted in politics. But that means an overwhelming majority, 80 percent, have been approved.

A credible case can be made that the Senate's constitutional charge to advise on and approve presidential appointments to federal courts provides for a role more aggresive than simply validating a nominee's sound morals and high intelligence. Supreme Court justices serve for life—all the more reason an appointee should be subjected to the same spirit of checks and balances that characterizes other conflicts between the executive and legislative branches of government.

However, history also shows the Senate generally gives presidents the benefit of the doubt—as the 80 percent approval rating attests. Even when the Senate does not agree with a court nominee's opinions, it tends to discount political differences and accedes to presidential prerogative.

The Bork nomination has crossed the bounds of legitimate ideological debate. it has become a tawdry partisan show trial tainted by the special interest politics of presidential campaigning. On issues relating to the Supreme Court, differences of opinion should be debated with an eye on civility and reason—a fact lost on Sen. Edward Kennedy and presidential hopeful Sen. Joseph Biden, who is chairman of the Senate's Judiciary Committee.

Kennedy recently made Bork out to be less humane than Adolf Hitler and Biden pledged to fight the nomination after first saying eight months ago that Bork was such an excellent judge he would vote to confirm Bork if he were nominated.

The Senate was never intended to be a rubber stamp for Supreme Court nominations, but neither was it meant to conduct confirmation proceedings as a kangaroo court. The rhetoric from the left leans to the latter.

The argument absent of logic is the one that says at another time Bork would be acceptable, but because he might become a swing vote on the conservative side, he must be rejected to maintain political "balance" on the court. Those making that claim never complained about the lack of "balance" during the heyday of the Warren Court. They showed no constitutional consternation when liberal rulings overturned established conservative decisions. Now that liberal sacred ground is threatened, suddenly the notion of "balance" is in vogue. Balance is relative. If anything, a more conservative court is needed in the 1990s to "balance" the liberal court of the 1960s and 1970s.

The big point the liberals are missing is that Bork is simply not the ogre they make him out to be. His writings are controversial, but actions speak louder than words. During Bork's tenure on the U.S. Court of Appeals for the District of Columbia, not one of his decisions has been overruled by the Supreme Court on appeal.

Furthermore, Bork is a devout follower of judicial restraint; he favors judicial intervention only when absolutely necessary. He is more likely to vote to maintain the status quo than incite a conservative counterrevolution.

When the political hysteria and opportunism is stripped away, what remains is a Supreme Court nominee with outstanding qualifications whose ideology has been unfairly distorted. Bork deserves to be confirmed.

Mr. HUMPHREY. Mr. President, I would just note that the editorial is titled "The Bork Brouhaha" and the subtitle is "Opposition Tainted by Opportunism." The editorial takes the opponents of Judge Bork to task for unfairness, unreasonable conduct and irresponsible charges against the nominee.

Inasmuch as some Members of the Senate are campaigning for the Presidency, I thought they might like to read this editorial from one of the important papers in New Hampshire, a State which everyone knows has the first Presidential primary.

Mr. President, I yield the floor.

## ADJOURNMENT UNTIL TOMORROW AT 11 A.M.

Mr. BYRD. Mr. President, if there be no further business, I move, in accordance with the order previously entered that the Senate stand in adjournment until the hour of 11 o'clock tomorrow morning.

The motion was agreed to and the Senate, at 6:37 p.m., adjourned until Tuesday, August 4, 1987, at 11 a.m.

## NOMINATIONS

Executive nomination received by the Senate August 3, 1987:

DEPARTMENT OF JUSTICE

Samuel A. Alito, Jr., of New Jersey, to be U.S. attorney for the district of New Jersey for the term of 4 years, vice W. Hunt Dumont, resigned.

## CONFIRMATION

Executive nomination confirmed by the Senate August 3, 1987:

FEDERAL RESERVE SYSTEM

Alan Greenspan, of New York, to be a Member of the Board of Governors of the Federal Reserve System for the unexpired term of 14 years from February 1, 1978.

Alan Greenspan, of New York, to be Chairman of the Board of Governors of the Federal Reserve System for a term of 4 years.

The above nomination was approved subject to the nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.

The legislative clerk proceeded to call the roll.

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

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

## RECESS FOR 15 MINUTES

Mr. BYRD. Madam President, there will be no more rollcalls today. Some discussions are going on at the moment. Rather than keep the Senate in a quorum call longer and so as to give the doorkeepers and others a chance to get a drink of water and a breath of fresh air, I ask unanimous consent that the Senate stand in recess for 15 minutes.

There being no objection, the Senate at 5:32 p.m., recessed until 5:47 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer [Ms. MIKULSKI].

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

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

## JUDGE BORK AND THE FIRST AMENDMENT

Mr. HUMPHREY. Madam President, last night in remarks before the Senate I called my colleagues' attention to the extraordinary track record compiled by Robert Bork as a member of the U.S. Circuit Court of Appeals for the District of Columbia. It is doubtful—and I am having this research done now so I will have more authoritative information on this point, but I think it is fair to say—it is doubtful that any other appellate judge in the Nation can match the number of majority decisions he or she has written or joined in with without a single reversal of those decisions by the Supreme Court.

Judge Bork's record on this point is extraordinary. He has written approximately 100 majority decisions, not one of which has been overturned by the Supreme Court. He has joined in, concurred in, more than 400 opinions in the last 5 years, likewise which have not been overturned by the Supreme Court.

I make the point because it is absurd to argue that a judge with such an exemplary record serving at the highest levels of the Federal judiciary, just below the Supreme Court, is undeserving of confirmation because of his judicial philosophy, as his opponents allege.

Beyond the matter of Bork's impeccable record, impressive record, extraordinary record—probably a unique record—it is important to dispel some of the misleading arguments made by the partisan groups attacking his positions in various critical areas of the law.

I want to focus this evening on the charges about Robert Bork's hostility to the first amendment, which charges are nothing more than rubbish.

Seizing upon an article Judge Bork wrote 16 years ago exploring a theoretical approach to first amendment issues, the opponents claim that Bork has an unacceptably narrow view of free speech rights. Once again, however, these criticisms are refuted fully by the observable facts of Bork's established judicial record. Bork has written major opinions in the D.C. Circuit which reflect exceptional sensitivity to the first amendment. These opinons are flatly incompatible to charges that his judicial philosophy gives short shrift to civil liberty and free speech in particular.

Madam President, in Ollman versus Evans and Novak, Bork wrote a concurrent opinion which extended novel first amendment protection to journalistic opinion. The issue was whether a newspaper column's critical characterizations of a Marxist professor were privileged opinion entitled to constitutional protection against liable suits. Judge Bork held that they were, and stressed that preservation of first amendment freedom sometimes requires a flexible judicial approach to contemporary situations.

Bork's opinion in Ollman was praised by the New York Times. Hear that, opponents who suggest that Bork is unfriendly to free speech.

Bork's opinion in Ollman was praised by the New York Times, and the Washington Post. Hear that, likewise. Both the Washington Post and the New York Times praised one of the two principal decisions which Bork was involved in that bore directly on free speech.

In fact, in one of the few cases where they differed while on the U.S. Court of Appeals, Antonin Scalia sharply dissented against Bork's conclusions as an unwarranted expansion of the first amendment theory.

So the man we confirmed by unanimous vote of 98 to nothing less than a year ago disagreed with Judge Bork in the Ollman decision which was about free speech. Bork was praised by the Washington Post and the New York Times for the correctness of his decision. Scalia dissented from Bork and we nonetheless, and rightly so, confirmed Scalia by 98 to 0.

Significantly, during Judge Scalia's confirmation hearings for the Supreme Court, the senior Senator from Massachusetts pointedly noted that Scalia had taken a more restrictive view of first amendment liberties there than Bork did. Yet, now the tune has changed, and Judge Bork, who was the hero of Ollman, is suddenly portrayed as one who is suspect in the area of free speech. It has become apparent that these charges against Bork have little to with the facts and everything to do with partisan political considerations.

In another key first amendment case, Judge Bork held that the Washington Metro's refusal to accept a poster harshly critical of the Reagan administration for display in subway stations was an unconstitutional prior restraint. The poster in question was a crude depiction of the President and other administration officials seated at a table full of food and appearing to laugh at underprivileged bystanders. Even though Metro had rejected the poster for violating Metro's guidelines with respect to deceptive advertisement, Judge Bork stressed that "the thumb of the court should be on the speech side of the scales." He held that any prior restraint of political messages on the basis of alleged deceptiveness is unconstitutionally overbroad.

So there are the two most important cases bearing on the first amendment, bearing on free speech, in which Bork has participated, and in both cases he was the hero; and in one case, in Ollman, he was cited as a hero by the Washington Post and the New York Times.

So it is clear from this record as a judge that he is very strong, indeed, on maintaining the sanctity and the strength of first amendment rights. The case of Ollman and the Metro poster case are the proof for those who want to look beyond political demagoguery and look at his decisions, look at his performance, look at his record, which is spotless as a judge.

I point out again that in over 100 decisions which he authored, he has been upheld every time by the Supreme Court—every time such decisions have been appealed. He has never been overruled by the Supreme Court.

When Judge Bork has rejected expansive claims in this area, the correctness of his rulings likewise has been borne out. A major case in point was Community for Creative Nonviolence versus Watt. In that case, a majority of the D.C. Circuit reached the curious conclusion that sleeping overnight in Lafayette Park constituted "protected speech," and therefore the Park Service was barred from enforcing its regulations against abuse of the parks. But Judge Bork joined Judge Scalia in dissenting. They said that the majority's decision "stretch(es) the Constitution not only beyond its meaning but beyond reason, and

beyond the capacity of any legal system to accommodate."

So, in that case, he was on the other side of the fence, if you will. He felt that the majority, themselves, were overbroad in interpreting the first amendment. So, what happened? Did the Supreme Court stomp on Judge Bork's opinion? Not at all. By a vote of seven to two, the Court agreed with Scalia and Bork and reversed the D.C. Circuit Court ruling that sleeping in the park was free speech. Interestingly, Judge Powell, whose regulation created the vacancy for which Robert Bork is being considered, sided with the Bork view, as he almost always has, in reviewing D.C. Circuit Court rulings.

So, when Bork was in the majority on first amendment rights, he was upheld by the Supreme Court. When he was in the minority on first amendment rights, he was upheld by the Supreme Court. A spotless, flawless, perfect record; a 1,000 batting average for Robert Bork.

Yet, there are some who, without any substance, without any basis, claim that he is weak on first amendment rights. The record proves the critics wrong, for those who want to look at the record.

As in other areas of the law, Judge Bork combines sound constitutional principles with good common sense to reach just and correct resolution of first amendment disputes.

I urge my colleagues to consider these realities against the distortions, dishonest distortions, of Judge Bork's record being spread by his opponents. This is a judge with a proven record of reaching correct legal decisions in over 400 cases. This is a record second to none. This is a judge whose judicial record is nearly a perfect match for an outstanding Supreme Court Justice whose confirmation we unanimously approved about a year ago—speaking of Scalia. "He looks like Scalia," to use the phrase of the chairman of the Judiciary Committee. He looks like Scalia. The record proves he looks like Scalia. The records are almost identical. We confirmed Scalia by 98 to 0, less than a year ago.

Mr. President, these are the kinds of relevant and objective facts we must focus upon if we are to have a fair and reasonable confirmation process—fair and reasonable. Is that too much to ask? Can we have fairness and responsibility instead of demagoguery? I think it is not too much to ask.

There are those who claim that Bork is an extremist. His record proves that he is not. He looks like Scalia. Was Scalia an extremist? Are Senators prepared to admit that they confirmed to the Supreme Court, by a vote of 98 to 0, a man who was an extremist—Scalia?

Their records are almost identical on the D.C. Circuit Court, where they both served. Are Senators, likewise, prepared to admit that those of us in 1982, those who were here then—including the chairman of the Judiciary Committee, including the senior Senator from Massachusetts—those who, with the chairman of the committee, have been the leading vocal opponents of Bork—are we willing to say that in 1982, when confirming Bork, after careful scrutiny, we confirmed an extremist by unanimous vote?

Is that what the Senate is asking the American people to believe? It is preposterous. If Robert Bork was an extremist, was the ogre his opponents portray him to be, he would not have been confirmed by a unanimous vote 5 years ago to the second-most important court in this country, and neither would he have been confirmed as Solicitor General, a prior post he held, the third highest post in the Justice Department.

Mr. President, all the nominee wishes for, I am sure, and all the President hopes and wishes for is fairness and reasonableness. I think that if we have those things, it will be clear that Robert Bork looks a lot like Scalia. I would hope that the chairman, who said that, on that basis, he would vote to confirm, notwithstanding all the pressure of the special interest groups which play a part in the selection of the Democratic nominee for President, would vote to confirm. I hope that ultimately the chairman and every Member of this body will vote to confirm Judge Bork, assuming that nothing untoward is turned up in the hearings. There is always that possibility, and we should keep an open mind. As Members can tell, I am inclined to support Judge Bork, but I have not committed. As a member of the Judiciary Committee, I think I should remain openminded, at least until after the hearings, and I intend to do so. One never knows what might come up. But if there is anything untoward, it has never been discovered, either in his record as a member of the D.C. Court or in the confirmation process for that position or in the confirmation process for the post of Solicitor General.

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

The PRESIDING OFFICER (Mr. GRAHAM). 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.

## BICENTENNIAL MINUTE

AUGUST 4, 1789: ESTABLISHMENT OF THE DEPARTMENT OF WAR

Mr. DOLE. Mr. President, 198 years ago today, on August 4, 1789, the Senate approved legislation to establish the third of the three original executive branch agencies: the Department of War. Under the "Articles of Confederation," the seeds of the future War Department had been planted and cultivated by Henry Knox, a distinguished Revolutionary War commander. In September 1789, the Senate confirmed Knox as the first Secretary of War.

With a personal staff of only two clerks, Knox supervised the Nation's two armories, in Springfield, MA, and Harper's Ferry, VA, while maintaining a well-regulated militia in support of a small 560-man Regular Army. The War Department's administrative structure consisted of a quartermaster's section, a fortifications branch, a paymaster, an inspector general, and an Indian office. By 1800, as the Federal Government moved to its new Capitol in Washington, the task of governing the military affairs of the entire Nation had overwhelmed the original tiny staff, and the number of department personnel had expanded to 80.

The young War Department was plagued by mismanagement, failure, and incompetence. Following a 1791 Indian victory over Federal forces, a congressional investigating committee blamed improper organization, and a lack of troop training and discipline, for the embarrassing defeat. In 1794, Secretary Knox resigned, distracted by the burden of his wife's gambling debts and undercut by President Washington, who considered military affairs as his own personal area of expertise. During the following century and a half, the War Department was headed by such notable national figures as James Monroe, John C. Calhoun, Jefferson Davis, and William Howard Taft. Under the 1947 "National Security Act", the old War Department was merged with the Navy Department to create the new Department of Defense.

## MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Ms. Emery, one of his secretaries.

## EXECUTIVE MESSAGES REFERRED

As in executive session, the Presiding Officer laid before the Senate messages from the President of the United States submitting a treaty, which was referred to the appropriate committees.

(The treaty received today is printed at the end of the Senate proceedings.)

1987, the State has reported 63 cases. Specialists who work with pediatric AIDS cases believe the number is at least twice as high. The difference is explained by the strict classification currently required by the CDC. This classification is being revised and the full dimensions of this childhood tragedy will be more fully disclosed. Several of these children have been abandoned in the hospital, with no place to go. And additional numbers of babies born to drug abusing mothers have been left behind.

I first learned about the plight of AIDS babies from a dedicated physician in Newark, Dr. James Oleske. His commitment to his tiny patients is heartwarming. Dr. Oleske sees a need for the services that this bill would provide and I value his counsel. Even when relatives or foster parents do take their children home, they need encouragement and assistance from hospital personnel.

Mr. President, hospitals are wonderful, caring places for those who need their services. But they are no environment for a child to be in, especially if the child does not require the high level of care provided in hospitals. This bill is intended to offer the hope of a more normal homelife for children whose only home has been a hospital.

I urge my colleagues to join in support of this much-needed legislation.

The ACTING PRESIDENT pro tempore. The question is on agreeing to the committee amendment.

The committee amendment was agreed to.

The ACTING PRESIDENT pro tempore. If there is no further debate, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, was read the third time, and passed.

Mr. BYRD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. METZENBAUM. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

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## NOMINATION OF ROBERT BORK TO BE SUPREME COURT JUSTICE

The ACTING PRESIDENT pro tempore. The Senator from North Carolina.

Mr. SANFORD. Mr. President, on July 23, the distinguished minority leader argued on the floor of the Senate that for the Senate to consider the views of a nominee on specific political and social views, as opposed to his fitness and merit, "would offend common sense, would be contrary to the intent of the framers, and would, in the end, be shortsighted." On the same day, my colleague and friend, the assistant minority leader, the Senator from Wyoming, argued that if we do not like Judge Bork we should just say so "instead of somehow trying to shroud the political, partisan, and special interest opposition in some type of vapid rationalization or some ponderous historical perspective." While I have the utmost respect for both gentlemen, their arguments miss the point. Surely, they jest!

I am not prepared today to make a decision on how I will vote on confirmation of Judge Bork, but I think too much of this institution, the U.S. Senate, to trivialize the Senate's role in the formulation of our Supreme Court. Of course the framers of the Constitution intended to involve many minds, to spread the privilege and responsibility of voting on nominations to our Supreme Court. I take this duty very seriously. How can we look at our history, how can we study our Constitution, and take any other view? In my opinion, the gravest responsibility of a Senator, with the exception of voting on a declaration of war, is selecting Justices of the Supreme Court.

For that reason, I have studied carefully what the role of the Senate was intended to be, and historically has been, in the selection of Supreme Court Justices. It is clear that the Senate should properly consider the political views and ideological leanings of the nominees, and it has done so in the past. Since the Constitution was ratified 200 years ago, the Senate has often refused to confirm Presidential nominees to the Supreme Court, many on purely ideological grounds.

I am a middle grounder myself, feeling that judges should not be hung up on leanings too far in any ideological direction. They should be fairminded in seeking justice in the case at hand, leaving it to others to promote ideologies. I join those who argue that it is entirely proper, indeed incumbent upon, the Senate to examine carefully all aspects of a nominee's background and qualifications, including his or her political views and judicial and philosophical inclinations.

I will not, as the minority leader has suggested, consider political and social views of the current nominee to the exclusion of his "fitness and qualifications." I do not intend to apply a litmus test to his views on specific issues. However, I do consider his ideology to be essential elements of his qualifications for this lifetime appointment, and the President has been fairly explicit in saying ideology was a factor with him.

As Walter Dellinger, professor of law at Duke University, said in 1985:

> I do not mean to suggest that a Senator should attempt to impose his or her own view on the Court. In deciding whether to consent to a Supreme Court nominee's appointment, a Senator ought to probe for evidence of intelligence, integrity, and open-mindedness—a willingness to be persuaded by cogent argument. Whether a Senator will also take philosophy into account should depend to a large degree upon whether the President has done so in making the nomination . . . When a President attempts to direct the Court's future course by submitting a nominee known to be committed to a particular philosophy, it should be a completely sufficient basis for a Senator's negative vote that the nominee's philosophy is one that the Senator believes would be bad for the Country.

Nor do I consider the study and discussion of constitutional law and history to be "some type of vapid rationalization or some ponderous historical perspective." I am not hiding behind the Constitution, as suggested by the Republican leadership. Rather, I am proclaiming constitutional law and history as essential to the responsible exercise of our duty as U.S. Senators.

I will not be one to seek "balance" on the Supreme Court. I believe we should not veer too far in either direction. The very fact that Supreme Court Justices have not been named by one person has been our greatest safeguard against having extremists on the Court. Over the years, the Senate has exercised a moderating influence. We have not veered so much from one extreme to another for the very reason that more than one person is directly involved in placing individuals on the Supreme Court. That is another example of the wisdom of those who framed the Constitution.

In 1959, a young Arizona lawyer, outraged with the Warren court's decision enforcing the "equal protection of the laws" for racial minorities, demanded that the Senate do a better job of determining the judicial philosophy of Supreme Court nominees. "The only way for the Senate to learn of these sympathies," William Rehnquist wrote, "was to make proper inquiries during the confirmation process."

We will, Mr. Chief Justice. and I don't want anyone who leans too much into the wind or too much against the wind of fairness and justice. Fairness and justice are the purpose of the courts.

Thank you, Mr. President. I yield.

The ACTING PRESIDENT pro tempore. The Senator from Delaware.

Mr. BIDEN. Mr. President, I compliment my colleague from North Carolina on his fine statement. I have a relatively long statement which, in the interests of time and conforming with the morning business requirements, I will at some point ask unanimous consent to insert. But I would like to just highlight a few parts of it.

Today I would like to speak frankly about what is really going on here.

I, and my Democratic colleagues on the Judiciary Committee, have been charged with being unfair. We have been accused of playing politics with the Bork nomination.

This nomination has been portrayed as just one other reasonable Supreme Court nomination. We are told that we should not consider the political philosophy of the nominee. We were told that to do so is another example of playing politics with confirmation.

There is a great deal at stake with this nomination. To attempt to suggest that this is not one of the most controversial nominees who has been sent up in decades would quite frankly be somewhat disingenuous. I might add parenthetically that I find it interesting that no one questions how anyone could automatically support the nominee.

The press does not write that some Senators have been unfair because they have concluded at the front end that they know they are going to support the nominee. Yet, if someone suggests that they are going to oppose the nominee, it must be that it has something to do with politics.

I am at a loss to understand that. How is the fact that a colleague of mine announces he is for the nominee any different, any more or less premature than the colleagues who say they are opposed to the nominee?

Some of us know a great deal about the nominee. I think he is a fine man. But I have read almost everything he has written since 1962. I thought they were going to send him up back when they sent up Justice O'Connor. So I got prepared. I read a lot. I thought they were going to send him up when they sent up Justice Scalia. I read a lot more.

For me to suggest now that I do not know what he stands for and what he writes and what he does not write, it seems to me would be a little bit silly.

I think it is a little bit silly for someone to say I know I am for the nominee, therefore I have taken my stand, but it is unfair for you to say you are against the nominee. I think it is, somewhat disingenuous. I would hope the press would note that.

The fact of the matter is that those of us who will oppose, or who are skeptical about the nomination, did not create this controversy. The President created the controversy. He made the nomination even after he was advised that it would be a very controversial nomination.

I ask unanimous consent to have printed in the RECORD, not take the time now, the circumstance in which this came about.

There being objection, the material was ordered to be printed in the RECORD, as follows:

ADVICE AND CONSENT ON THE SUPREME COURT NOMINATION: A CHRONOLOGY OF EVENTS

June 26—Justice Lewis Powell resigns.

June 26—Senator Biden issues statement on Powell resignation:

Pointing to important role that will be played by Powell's successor;

Stating, "The scales of justice should not be tipped by ideological biases";

Calling on the President to nominate someone "with an open mind—someone, in short, in the mold of Justice Powell"; and

Pledging to "examine with special care any nominee who is predisposed to undo long-established protections that have become part of the social fabric that binds us as a nation."

June 27—Senator Biden calls Chief of Staff Baker indicating that Senators Biden and Byrd would like to consult with Administration officials to offer "advice" in the selection of the nominee.

June 30—Senator Biden and Senator Byrd meet with Attorney General Meese and Chief of Staff Baker:

Senator Biden advises Meese and Baker that the Administration should nominate an individual on whom the Senate could act swiftly;

Senator Biden reiterates call for Administration to nominate someone in the mold of Justice Powell—"a conservative with an open mind"; and

After outlining criteria he would advise be applied to the list of candidates in the selection of the nominee, Senator Biden advises Meese and Baker that some candidates do meet criteria in his judgment but that he doubts whether Judge Bork does.

July 1—President announces nomination of Robert Bork:

Nomination comes within 24 hours of meeting during which 15 candidates were discussed and Senators Biden and Byrd expressed reservations about the selection of Judge Bork.

July 1—Senator Biden holds press conference in Houston and issues statement on the selection of Judge Bork:

Senator Biden reiterates the importance of the nomination, calling it "one of the most important nominations to the United States Supreme Court in decades";

Senator Biden commits himself as Chairman of the Judiciary Committee to doing everything possible to ensure that Judge Bork receives full and fair confirmation hearings;

Senator Biden reiterates criteria he suggested to Meese and Baker—someone who could be acted upon quickly by the Senate and someone with an open mind;

Senator Biden again expresses doubts about Judge Bork meeting those criteria, saying that he has "grave doubts" about the nomination and that he expects it to cause "a difficult and potentially contentious struggle in the Senate."

Mr. BIDEN. When the administration submitted a list of 15 names, that said here are the ones among whom we are going to choose. This is not an exhaustive list but all these people qualify. What do you think?

We went down the list and said that at least half of the names would go through here quickly, but that a couple would have real problems.

Who would have problems?

Mr. Bork would have real problems because his views are so well known and so controversial.

The administration took that advice. Less than 20 hours later, they announced the nomination of Judge Bork. So I wonder how serious they were asking our advice in the first place.

It was clear from the start that this would be an enormously important nomination. Before any Senator, before any Congressperson, before anybody made any statement about whether they were for or against Mr. Bork or who should or should not be sent up, the leading newspapers in America knew what was at stake. Let me just read some of the headlines.

"Powell Leaves High Court—President Gains Chance To Shape the Future of the Court." New York Times, July 27, 1987.

"White House Search for a Justice; New Balance on Court Is Sought," New York Times headline, July 27.

"Justice Powell Quits, Opens Way for Conservative Court," Los Angeles Times headline, July 28.

"Reagan Gets His Chance To Tilt the High Court," New York Times headline, July 28.

"Picking a Supreme Court Justice To Perpetuate the Reagan Legacy," Los Angeles Times headline, July 28.

Folks, let us not kid each other here. What game is the press playing? What game are we playing? The fact is that everybody knows what is at stake here: the future of the Court, and, in turn, the direction of America.

The Court is one of the coequal branches of Government. It has as much power as a Senate, as a House, as a President.

So, what is this game that the press is playing, the game that the editorial writers are playing, the game that Senators are playing? Everybody, including the press, acknowledged the stakes immediately. The stakes are nothing less than the future direction of the Court.

I tried to discourage this nomination when asked my advice. I let the administration know. The administration has a right to reject my advice. They have a right not to listen to my point of view. I understand that.

But the question that faces us now is: How should the Senate respond? I think it is unquestionably clear that the Senate has a right, a role, and an obligation to consider what is at stake.

I fully understand that many Senators have had neither the opportunity nor the obligation, as I have had, to spend hours and hours so far reading everything that Judge Bork has written. I fully understand. I think it is very wise or prudent for a man or woman in this body who does not know the record not to take a preliminary position. I acknowledge that it is possible that Judge Bork could come forward and say, "All of what you thought I meant and what I wrote I did not mean" and thereby change my mind.

To the extent that he has been misrepresented in any way, I keep an open mind.

I would like, finally, to discuss the timing of the hearings. I think we have this settled now. On the timing

of the hearings, I immediately began by consulting with the minority. The first person I called was STROM THURMOND.

To conclude, in the interest of time and within the required time, we will begin hearings on September 15. We will go consistently until we can conclude the hearing and have a vote in the committee. Our target date is October 4 so that it can be sent to the floor—if, in fact, it is the will of the committee—shortly thereafter. There is no desire, and there has never been any desire, and there never will be, any desire, to delay on this nomination. The only debate that has ever taken place, is whether my Republican friends were right in wanting to start on August 31 or whether I am right in starting on September 15. That is what is at issue here. People are making a mountain out of a molehill.

In the meantime, we have an FBI Director that we are supposed to confirm. I will hold hearings on the FBI Director on Wednesday and Thursday when we return. I believe it is the 8th and 9th or 9th and 10th, Wednesday and Thursday, upon our return. We will move directly to Judge Bork and he will have a full, fair, and thorough hearing. Then the Senate will work its will.

Mr. President, I have a lengthy statement on advise and consent to respond to statements made by my colleagues taking a different view.

ADVICE AND CONSENT: RESPONSE TO SENATORS DOLE, HATCH, HUMPHREY, AND SIMPSON

In an address to the Senate on July 23, I attempted to offer a historical answer to a recurring question: Should Senators consider the constitutional and political views of Supreme Court nominees in deciding how to cast their votes?

The response to my speech has been provocative. After I finished speaking, Senators DOLE, HUMPHREY, SIMPSON, and HATCH rose to challenge my conclusion that "history, precedent, and common sense" say it is incumbent upon the Senate to consider all aspects of a nominee's qualifications—including his political and constitutional views. The next day, on July 23, the New York Times published a poll suggesting that "Americans say that the Senate should attach a great deal of importance to a Supreme Court nominee's position on constitutional issues in weighing confirmation." On July 30, Senator HATCH rose with a detailed and interesting contribution to the historical debate.

My argument was simple. I argued that the Founders intended the Senate to serve as a check on the President to preserve the independence of the judiciary and to prevent the President from politicizing the appointments process. I argued that, in case after case, the Senate has scrutinized the judicial philosophy, as well as the professional competence, of nominess. And in several important cases, it has rejected professionally qualified nominees because of their political and constitutional views.

I was pleased to see that while Senators DOLE, HUMPHREY, SIMPSON and HATCH took issue with nuances of my interpretation—i.e. specific intentions of specific founders, or the specific circumstances in which it is proper for the Senate to check the President—none questioned the Senate's right to consider judicial philosophy, nor the fact that it has often done so in the past.

I was also pleased to see that on substantive points, Senators DOLE and HATCH and I are in complete agreement. Senator DOLE concluded that the Bork nomination is "The most important nomination in my view that Ronald Reagan has made since he became President, if you look at what impact it could have after he leaves the Presidency in January 1989."

Senator DOLE is correct on that score. I argued simply that, in view of constitutional history and Senate precedent, it would be patently irresponsible of Senators not to consider that impact in casting their votes.

Today, I am happy to respond to specific points raised by Senators DOLE, HUMPHREY, SIMPSON, and HATCH:

1. Senator DOLE said: "Consideration of a nominee's views on specific political and social issues, as opposed to his fitness and merit . . . would offend common sense, would be contrary to the intent of the Framers and would in the end be horribly shortsighted."

It is hard to see how considering a Supreme Court nominee's opinions about major constitutional issues "would offend common sense." Common sense suggests that it would be difficult for the Senate to judge a nominee's "fitness" to uphold the Constitution without taking a close look at his approach to constitutional questions.

It is no surprise that the majority of Americans agree. A New York Times/CBS News Poll asked the following question: "When Senators decide how to vote on confirming a President's nominees for the Supreme Court, after satisfying themselves about the nominee's legal experience and background, how much importance should a Senator attach to the nominee's positions on major constitutional issues?"

65% of Democrats, and 63% of Republicans, said the Senate should pay "a lot" of attention to a nominee's positions on constitutional issues. 25% said "a little," and only 6% said none at all.

2. What of Senator DOLE's second point about the intent of the Framers?

He said: "Had the Framers intended that the Senate should consider views on Political or social issues as a criterion for confirmation, the Constitutional Convention would have adopted a proposal that would have exclusively lodged the appointment power in either the Senate or the entire Congress."

It was precisely because they were concerned about a nominee's political and social views that they rejected proposals to give the appointment power exclusively to the Senate, Congress, or to the President. The proponents of executive power and the proponents of Senatorial power shared one basic concern: protecting the absolute independence of the Judiciary. In adopting the advice and consent compromise, even those who favored a strong executive were confident that the Senate would provide an important check on presidential power. Even Hamilton—whose defense of executive power was so extreme that many called him a secret "monarchist"—even Hamilton agreed. He responded to the argument that the Senate's power to refuse confirmation would give it an improper influence over the President: "If by influencing the President, he meant restraining him, this is precisely what must have been intended. And it has been shown that the restraint would be salutary."

3. Senator Dole offers a different reading of Hamilton. He states: "In Federalist 76, the Senate's role in the confirmation process was limited to weighing the qualifications, rather than the politics, of each candidate." To support his view, he quotes Hamilton's statement that requiring the cooperation of the Senate would be "an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity."

But the quotation only reinforces my point. Hamilton relied on the Senate to keep the President from playing politics with the nominations process. In discouraging the President "from betraying a spirit of favoritism, or an unbecoming pursuit of popularity," the Senate would have to ensure that the nominee was not being appointed on the basis of his politics rather than his qualifications. In addition to choosing incompetent cronies, the President might also attempt to pander to the electorate by appointing qualified nominees whose political views—not to mention judicial philosophy—were well known in advance and "popular" with particular factions or interest groups. Thus, the Senate would have to consider those views thoroughly to guarantee the nominee's independence from the President.

And thus, Federalist 76 concludes by expressing "sufficient grounds of confidence in the probity of the Senate, to rest satisfied not only that it will be impracticable to the Executive to corrupt or seduce a majority of its members; but that the necessity of its cooperation in the business of appointments will be a considerable and salutary restraint upon the conduct of the magistrate."

Just a personal note here—it struck me how Senators Dole and Hatch and I could draw such different interpretations about the intent of the Framers from the same historical evidence. It just confirms my basic point: that the scholarship of original intent is a notoriously inexact science. The Founders spoke with many different voices. They rarely tell us what they had in mind and, even when they do, reasonable people can not agree what they meant, as the present debate shows. That is why the Framers themselves did not intend future generations to be bound by their specific intentions, only by their general principles. That is why, at the Congress of 1796, Madison said:

"He did not believe a single instance could be cited in which the sense of the Convention had been required or admitted as material in any constitutional question. . . . But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several state conventions.

But even those who are wedded to specific intentions will find it difficult to support Senator Dole's view that consideration of a nominee's constitutional views would offend the intent of the Framers. Who, after all, would know better what standard the Framers intended the Senate to apply than the

generation of the generation of the Framers themselves? It can hardly be argued that those who rejected John Rutledge because of his opposition to the Jay Treaty in 1795 were unaware of the intent of the Framers. It can hardly be argued that Rutledge was unqualified to sit on the Court—he was a Framer himself. Thus it is clear that, in the generation of the Framers, it was entirely legitimate to reject a nominee on the basis of politics alone. I argued for a more circumspect approach to advice and consent—focusing on constitutional, rather than political, views, and only when the President attempts to remake the Court in his own image.

4. Senator HUMPHREY says: "Today, some Senators would have us believe that 100 Senators in 1982 were grossly derelict in our duty when we confirmed Robert Bork unanimously to the D.C. Circuit Court of Appeals. Either the Senate acted as a fool in 1982 or some Senators are acting as fools in 1987. . . . They leave us incredulous. They leave us aghast. Either they were extraordinarily careless in the discharge of their responsibility five years ago, or there is a great deal of hypocrisy about today. It is grossly unfair. It is grossly and shamefully unethical."

But Senator HUMPHREY is missing the point. All three of the Supreme Court nominees who were rejected by the Senate in the Twentieth Century had earlier won Senate confirmation as Circuit Court Judges. (A fourth, Abe Fortas, whose nomination as Chief Justice was withdrawn after a filibuster, had earlier been confirmed as an Associate Justice.) The history speaks for itself: the Senate has always held Supreme Court nominees to entirely different standards than Appeals Court nominees. And with good reason.

As the only court of no appeal, the Supreme Court establishes the constitutional precedents that the lower courts are bound to respect. As a result, qualifications that might be acceptable in a lower court nominee are not sufficient to guarantee Supreme Court appointment.

As an Appeals Court Judge, Robert Bork is constitutionally bound to respect and to apply Supreme Court precedents. To ignore them would be to defy his constitutional responsibility. For example, in a footnote to *Dronenburg* v. *Zech*, Judge Bork wrote: "It may be only candid to say at this point that the author of this opinion, when in academic life, expressed the view that no court should create new constitutional rights. . . . The Supreme Court has decided that it may create new constitutional rights and, as judges of constitutionally inferior courts, we are bound absolutely by the decision."

On the Supreme Court, however, the nominee would no longer be so bound by past precedent. On the contrary, he would be more free to overturn many of the precedents that had restrained him on the lower court. And his writings indicate that he would do so. He wrote in 1971: "Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in framing the Constitution. It follows, of course, that broad areas of constitutional law ought to be reformulated."

5. Senator SIMPSON says: "Nothing I find in the historical practice . . . requires or even suggests anything about balance between liberals and conservatives when a new nominee is presented for a vacancy."

Of course, the historical record is filled with references to the balance of the Court. I quoted many of them in my speech. During the debate over Clement Haynsworth, Senator Muskie of Maine spoke movingly of the Senate's duty to consider the impact of a nominee's views on the balance of the Court. He said: "it is the prerogative of the President, of course, to try to shift the direction and thrust of the Court's opinions in this field by his appointments to the Court. It is my prerogative and my responsibility to disagree with him when I believe, as I do, that such a change would not be in our country's best interests."

During the debate over Associate Justice Marshall in 1967, Senator THURMOND also expressed concern over balance: "This means that it will require the appointment of two additional conservative justices in order to change the tenor of future Supreme Court decisions."

The Parker nomination in 1930 was rejected specifically because progressive Republican Senators disagreed with the extremely conservative direction of the Taft Court and felt that Parker's appointment would shift the Court even further to the right.

6. But Senator SIMPSON and Senator HATCH appear to misunderstand my concerns about balance. Senator HATCH says, "The capstone of Senator BIDEN's theory is that the balance of the Court must be protected, that if a single nomination might upset that delicate balance, it must be rejected. This notion derived from a prominent theme in Professor Tribe's book God Save This Honorable Court, deserves an examination."

In fact, my concerns about balance are entirely different than Professor Tribe's. I was not arguing that a particular balance should be maintained. I was merely discussing the circumstances in which the Senate should consider judicial philosophy. Under normal circumstances, I said, the Senate would prefer not to check the President. But when the balance of the Court is in question, and a single nomination has the power to shift the direction of the Court in favor of the President's political agenda, then the Senate has a responsibility to pay close attention to judicial philosophy.

Senator HATCH also says: "If past Presidents had striven to preserve the Court's ideological balance, the vile separate but equal doctrine of *Plessy* v. *Ferguson* would still be the law of the land."

Again, my point was very different. History suggests not that Senators should strive to preserve the status quo, but that, in a divided time, each Senator has a responsibility to consider the effect of a nomination on the balance of the Court. Each Senator will then have to make an individual decision about whether or not that influence is in the best interest of the country.

Incidentally, if past Supreme Courts had striven to adhere rigidly to the original intent of the Founders, then *Plessy v. Ferguson* would still be the law of the land.

7. Senator HATCH appears to have misunderstood my conclusion that "The Framers intented the Senate to take the broadest view of their constitutional responsibility."

He seems to suggest that in endorsing a "broad role" for the Senate, I was calling for the Senate to have exclusive control over nominations as well as appointments. That would require a new Constitutional Convention and a reenactment of the Virginia Plan—which would be carrying "original intent" a little too far. Senator HATCH says:

"In the first place, the 'broadest role' for both the President and the Senate was rejected by the Convention. The Convention arrived at a compromise that Madison, the Framer of the compromise, designed to achieve the results just discussed. This is hardly the 'broadest role' for the Senate. Furthermore, the Senate was given no nominating authority whatsoever."

Obviously, I was not arguing that it should be.

I noted simply that every time the Convention was faced with a choice between appointment by the President and appointment by the Senate, they chose the Senate. Having repeatedly rejected exclusive appointment by the President, as "leaning too much toward monarchy," it is inconceivable that, in adopting the advice and consent compromise, they intended the Senate to be a rubber stamp. In "giving the Senate," in the words of Governeur Morris, "The power to appoint judges nominated to them by the President," the Framers were confident that the independence of the Judiciary would be protected.

In regard to the interesting historical details introduced by Senator HATCH, he is correct in noting that the Convention's initial vote (on June 5, 1787) did reject vesting the sole appointment power in the Congress as a whole. And he also notes correctly that Madison had not yet made up his mind about where the appointment power should be vested. But Madison's basic inclination—expressed both on June 5 and on June 13—was for the Senate alone to make appointments. The Convention voted repeatedly to adopt this view, and its vote stood until virtually the end of the Convention, on September 7. Whatever one's opinion of the Convention's final choice—and I happen to think it was a wise choice—the Framer's adherence to Senate appointment for so long, and against several attempts to give it solely to the Executive, can only be read as suggesting a very considerable degree of confidence in the Senate's capacity to take a far-reaching role in the appointment of judges. That is what I meant in saying that the Framers took the "broadest view" of the Senate's role in the appointment process.

Some of Senator HATCH's other assertions illustrate the danger of taking historical statements out of context to serve modern purposes. Specifically, Senator HATCH quotes both Mr. Madison and Mr. Ghorum as expressing fears of "cabal," "intrigue," and "partiality" in legislative appointments to the Judiciary. From this he concludes that Senate examination of anything other than the competence and character of the nominee would, in the minds of the Framers, raise the spectre of "political intrigue and partiality."

But Senator HATCH fails to note that these fears were raised in the context of giving the Legislature or Senate sole power of appointment—"The election of the Judges by the Legislature" (Madison, 1 Farrand 120). Of course, Madison and Ghorum were correct that such elections would be particularly susceptible to vote-trading, favoritism and "jobbing."

Senator HATCH also fails to note that the Framers had even stronger fears about giving the Executive sole power of appointment. Flush with the memories of royal favorites around the Court of George, the Framers resolved to avoid at all costs government by intrigue. That is why Hamilton felt compelled to allay those fears in Federalist 76. That is why John Rutledge expressed the fear that "the people will think we are leaning too much toward monarchy." And that is why the Convention never once

voted to give the appointment power solely to the Executive.

But it is obvious that when the Executive nominates, and the Senate approves, the dangers are entirely different. Votes can not be "jobbed" among different candidates; "cabals" and "factions" can not be formed for local favorites. Instead, as Madison said in endorsing the advice and consent formulation, the Senate's participation would provide "security * * * against any incautious or corrupt nomination by the Executive." (2 Farrand 43a)

So the Framers' final advice and consent formulation exemplifies the Framers' wisdom in constructing effective checks and balances—dividing power to prevent its abuse. They refused to give the appointment power to the legislature alone. They refused to give it to the President alone. Through most of the Convention, they gave it to the Senate alone. At the end of the Convention, they thought better of exclusive appointments and divided the power between the President and the Senate. It is utterly inconsistent with the broad design of the Constitution to assert that they "intended" perfunctory checks on the power that they were determined to check at all costs.

8. In turning finally to Senator Hatch's inquiry into the precedents for Senate confirmation or rejection of Supreme Court Nominees, I was struck at the outset by a curious point. "Most damaging" to my case, he claims, "is the fact that only five of the 26 nominees who failed to win confirmation have been turned down since 1893. But if his standard for judgment in the first place is the Framers' intent, surely he should focus on the record of the first decades after ratification. Who would know better what standard they wanted the Senate to apply than the generation of politicians that wrote and ratified the Constitution itself? The Rutledge precedent set the stage for a century of intensely political battles. I warned of the costs of those battles and argued that the Senate should take a more circumspect view, looking to constitutional philosophy rather than immediate political isues.

Much of Senator HATCH's treatment of the Senate precedents displays a tendency to pick and choose among historical evidence. He takes most of his examples from Harry Abraham's Justices and Presidents, which he quotes repeatedly and approvingly. But he fails to note that Mr. Abraham lists seven historical and constitutional bases for Senate rejection, six of which are clearly rooted in politics or philosophy. Abraham says:

"Just why were the twenty-seven rejected either outright or simply were not acted on by the Senate? Among the more prominent reasons have been: (1) Opposition to the nominating President, not necessarily the nominee; (2) The nominee's involvement in visible or contentious issues of public policy, or, simply, opposition to the nominee's perceived political or sociopolitical philosophy (i.e. "politics"); (3) Opposition to the record of the incumbent Court which, rightly or wrongly, the nominee had presumably supported; (4) Senatorial courtesy (closely linked to the consultative nominating process); (5) A nominee's perceived "political unreliability" on the part of the part in power; (6) The evident lack of qualification or limited ability of the nominee; and (7) Concerted, sustained opposition by interest or pressure groups. Usually several of these reasons—not one alone—figures in the rejection of a nominee. [Abraham, p. 39]

In short, Abraham is hardly the best source for Senator HATCH's claim that Senate review of nominees has been strictly limited to nominal qualifications.

In his long discussion of the specific reasons for rejection, Senator Hatch treads on dangerous ground. "Lame duck" nominations and "partisan attempts to thwart an unpopular President" are clearly dangerous for the Court and for the country, and I would not recommend either of them today. But they confirm rather than question the precedents for expansive Senate purview. Of course, not all of the "lame duck" nominations have been strictly partisan. Jeremiah Black's defeat in early 1861 was related to Lincoln's imminent inauguration, but there would have been little reason for Republicans to oppose him had they agreed with his views of the impending struggle. Instead, an equally decisive factor in Black's repudiation was his refusal to sanction the use of force to maintain the Union—an issue of constitutional philosophy par excellence. (Kurland, at 208)

Conceding, finally, that the Senate has, after all, opposed qualified nominees on the basis of their constitutional views, Senator Hatch tries to make the case that they have been wrong to do so. Historical speculation based on 20-20 hindsight is about as scientific as speculations based on original intent. But I'm happy to give it a shot. Senator HATCH claims that Judge Parker—the last nominee rejected exclusively for his constitutional views, would have made a better Justic than Owen Roberts, whose "switch in time" defused the Court Packing Plan. Others have also wondered, "what if?" Who knows? Certainly, his record on the 4th Circuit after his Supreme Court nomination vindicated some of the fears of the progressive Republicans who felt he and the Taft Court were too conservative. It was Parkers' ruling on the Court of Appeals in the watershed case of *Near* v. *Minnesota* in 1931 that the Supreme Court reversed by only a 5-4 vote. In other words, Parker's elevation to the Supreme Court would have made prior restraints on press freedom the law of the land.

Similarly, his decision in *Briggs* v. *Elliott* was also overturned by the High Court in *Brown* v. *Board of Education*. Perhaps Senator Hatch would defend Judge Parker's decision in *Briggs* as only following the precedent of *Plessy* v. *Ferguson* that *Brown* overturned. Nonetheless, Parker's stern observation in *Briggs* that official segregation was "grounded in reason and experience" smacks more of enthusiasm than simple respect for precedent.

Senator HATCH also regards as a "mistake" the opposition to Roger Taney—the man who carried out the Executive order that two Treasury Secretaries would rather resign than execute; the man who on the Supreme Court declared that blacks had "no rights which the white man was bound to respect." The Whigs who controlled the Senate in 1835 did not simply wish to retaliate against Jackson and Taney for the withdrawal of federal deposits from the Bank of the United States. They felt that Taney's compliance with Jackson's illegal order, in contrast to the principled refusals of his two predecessors, rendered him, in the words of a New York newspaper, a "supple, cringing tool of power." While Taney's initial performance as Chief Justice was creditable, his ultimate legacy to the nation realized the worst Whig fears. The Dred Scott decision, which Taney wrote for a divided court, was, in the words of Chief Justice Hughes, the greatest "self inflicted wound" in the history of the Court. In refusing to rule slavery unconstitutional, Taney helped to precipitate the greatest constitutional crisis in our history—the Civil War.

But these are historical quibbles. On the substantive point, Senator HATCH and I agree. Senator HATCH's speech was entitled, "The Dangers of Politicizing Supreme Court Selections." He concluded, "ideological involvement in the selection of judges is a two-edged sword." And he noted that "Nowhere [in the Constitutional Convention] do we find hints of the need for political purity as a qualification for the non-political task of judging."

Senator HATCH is correct. But it is the President, not the Senate who has introduced politics and ideology into the selection process. That is why Professor Walter Dellinger said, in 1985:

"Whether a Senator will also take philosophy into account should depend to a large degree upon whether the President has done so in making the nomination. . . . When a President attempts to direct the Court's future course by submitting a nominee known to be committed to a particular philosophy, it should be a completely sufficient basis for a Senator's negative vote that the nominee's philosophy is one that the Senator believes would be bad for the country."

Mr. President, I will conclude by suggesting that I think this thing is finally settled. I have spoken at length with the ranking member, Senator THURMOND, and to some degree with the minority leader, Senator DOLE. The hearings will begin and they will conclude and we will have plenty of time in the Senate to determine whether or not Judge Bork should become Justice Bork or remain Judge Bork.

Mr. HUMPHREY. Will the Senator yield?

Mr. BIDEN. I ask unanimous consent that I may have an additional 2 minutes to respond.

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

Mr. BIDEN. I yield to my colleague from New Hampshire.

Mr. HUMPHREY. Mr. President, is the Senator suggesting that there was an agreement with the ranking member of the Judiciary Committee, Senator THURMOND, for reporting out this nomination by a date certain?

Mr. BIDEN. I am stating that the Senator and I in open hearings today in the committee agreed that the target date for reporting this out would be October 1. The Senator and I and other members of the Judiciary Committee agree—this was probably prior to your coming to the committee, Senator, but you will find out—that word means a lot in that committee. I have given my word. We will report by that date and we will vote by that date, assuming that all witnesses that both sides could agree to will be heard by that time and assuming that we will have a day before the target date for an executive session. That is what

I discussed today in the open session with the ranking member, Senator THURMOND.

Mr. HUMPHREY. You said after all the witnesses have been heard plus 1 day, assuming all the witnesses have been heard plus 1 day, October 1 would be the target date.

Mr. BIDEN. That is the target. I fully expect we can meet that day. I laid out the specifics. We will begin meeting on the date to begin hearings with Judge Bork on the 15th. We would have opening statements in the morning from all Senators. We would then call up Judge Bork at 2 o'clock and we would keep him as long into the night as he wished to go to expedite the matter. We would go late in order to be able to get the nomination going forward. We would spend time. We would meet on Mondays and Fridays, we expect, based on the requests we have thus far for witnesses. I have asked the minority to submit to me a list of witnesses they wish to have testify.

Senator THURMOND and I will agree on what witnesses there should be. It is my expectation that we will be able to complete the final day of hearings on Monday, the 27th, or Tuesday, the 28th. I believe I have the dates correct, recalling from the top of my head. If that were the case, we would be prepared to bring up the nomination in executive session for a vote on October 1.

The ACTING PRESIDENT pro tempore. The time of the Senator has expired.

## EXTENSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. The Chair will inform Members that the time for morning business has expired.

Mr. BYRD. I ask unanimous consent that morning business continue for 45 minutes and that Senators be permitted to speak therein.

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

(Mr. WIRTH assumed the chair.)

## NOMINATION OF ROBERT BORK TO BE SUPREME COURT JUSTICE

Mr. McCONNELL. Mr. President, I listened with great interest to the chairman of the Judiciary Committee with reference to the nomination of Judge Robert Bork to be a member of the Supreme Court. I might say I for one have no objection whatsoever to the chairman of the Judiciary Committee making an early decision on the Bork nomination. I think that is entirely his prerogative. I, too, have made an early decision on the Bork nomination. I have decided to support Judge Bork. I think the Senator from Delaware and I both know a good deal about the nominee. He probably has read more of the nominee's material than I have, but I think it is not fair to criticize the chairman of the Judiciary Committee for making an early decision. I do, however, have some quarrel with the manner in which the decision was made.

I recall as a member of the Judiciary Committee last year listening to debate and proceedings on Justice Rehnquist and Judge Scalia and their nominations to the Court. My friend from Delaware said at the time, "I am not just against any conservative. For example, if the administration were to send up Judge Bork, I would have to be for him and take the heat."

I recall thinking at the time that this was a courageous statement for my friend from Delaware to make, and I remember thinking that was quite an observation. I also remember thinking at the time I wonder what will happen if you do at some point get Judge Bork for the Supreme Court.

Mr. President, that is, of course, what we have. I understand the pressures to which the chairman of the committee is being subjected on this issue. We all do. And as he said earlier, we certainly know what is at stake. This is a most important nomination.

Many years ago, Mr. President, back in the late 1960's as a matter of fact, I was a legislative assistant to a Senator who served on the Judiciary Committee and was in the Senate as a staffer during the Haynsworth-Carswell period and observed the Senate during that particular time struggling with the question, "What is the appropriate inquiry of this body when any President of the United States sends up a nomination to the Supreme Court?"

The Senate has struggled with that issue over the years. There have been nominees rejected. I studied the matter at that time in great detail. As a matter of fact, I wrote a law journal article which appeared in the University of Kentucky Law Journal back in 1971 on that very question. The Senator for whom I worked at that time reached the decision to support Haynsworth and to oppose Carswell.

Those two nominations in those days had a tendency to get linked together; you were either against them both or for them both, and nobody sort of looked through the quality of the nominees to get at the crux of the matter—nobody, that is, except the fellow for whom I worked, who in my judgment made the appropriate decision on those two nominees. He supported Haynsworth but he opposed Carswell. How did he reach that decision? He reached the decision through an effort not only to research what the history of the Senate had been in advising and consenting to these nominees but also what the appropriate inquiry of the Senate ought to be.

I ask unanimous consent that my 1971 article in the University of Kentucky Law Journal appear in the RECORD.

There being no objection, the article 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.)

(Author's note.—This article represents the thoughts and efforts of over a year's involvement in the Senate with three Presidential nominations to the Supreme Court. The experiences were possible only because of the author's association with the Junior Senator from Kentucky, Marlow W. Cook, and the conclusions drawn and suggestions made, many of which may be found in a speech by the Senator of May 15, 1970, represent, in large part, a joint effort by the two of them to evolve a meaningful standard by which the Senate might judge future Supreme Court nominees.

(Only rarely does a staff assistant to a Member of Congress receive the opportunity to express himself by publication or speech on an issue of public significance. For the freedom and encouragement to do so in this instance, the author is grateful to Senator Cook.)

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 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

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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 1988 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 peripherally. [1]

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 senatorial 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 this 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." [2]

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 has rejection was based entirely upon his opposition to 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. It is, of course, a declaration that they will receive none but Tories hereafter into any department of Government." [3]

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." [4] 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 off the United States." [5]

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. [6]

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." [7]

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 shall be drawn from the preceding that Supreme Court nonimations 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, Elihu 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." [8]

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.[9]

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.[10]

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.[11]

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.[12]

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 suggested 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 expedience.

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 and 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 latter 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 progressive 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 judgement 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 my judgment of this nominee's fitness to the issue of ethics of qualifications." [13]

The ethical questions which were raised about Judge Haynsworth were certainly relevant to the proper inquiry of the Senate into qualifications for 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.[14]

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." [Emphasis 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,[15] 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 Deering-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 a 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." [16]

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 con-

cerned 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.,[17] Donohue v. *Maryland Casualty Co.*,[18] and *Maryland Casualty Co.* v. *Baldwin*.[19]

Consistently ignored during the outrage expressed over his having sat in these cases were the pleas of many of the Senators supporting the nominations 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 Kinnear Weed Corp. v. Humble Oil and Refining Co.[20] and Lampert v. Hollis Music, Inc.[21] 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 portion 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 Kinnear 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."[22]

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,[23] 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 Brunswick Corp. v. Long[24] 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.[25] 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 U.S.C. § 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); nd fourth, prolong the decision upon confirmation for a while until the politicans in the Senate reacted 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 and Frankfurters and stuff like that there.—Senator Roman Hruska, 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 1981, 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) judical 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 columists 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 volations 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, a 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 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 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 suspicious 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 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,[27] 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;"[28] "The Physician and His Estate;"[29] and "Allowance of In Forma Pauperis in Section 2255 and Habeas Corpus Cases."[30] In addition, at the time of his 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 medico-legal 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 in three cases in which he actually owned stock in one of the litigants before him: Hanson v. Ford Motor Co.,[31] Kotula v. Ford Motor Co.,[32] and Mahoney v. Northwestern Bell Telephone Co.[33] In a fourth case, Minnesota Mining and Manufacturing Co. v. Superior Insulating Co.[34] Judge Blackmun acting similarly 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 spirit 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 anti-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 breach of his Haynsworth test with the following interesting 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 cases."[35]

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 Judge 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."[36]

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 to 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,[37] 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." [38] 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 than had Judge Haynsworth. However, Judge Blackmun 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 also 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 frown 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 Carswell 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. [39] 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 conclusions, their 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 no 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.

FOOTNOTES

[1] For recent articles discussing the role of the Executive see Bickel, *The Making of Supreme Court Justices, 53* The New Leader, May 25, 1970, at 14-16; Commager, Chossing Supreme Court Judges, 162 The New Republic, May 2, 1970, at 13-16.

[2] J. Harris, The Advice and Consent of the Senate 302-03 (1953).

[3] C. Warren, The Supreme Court in U.S. History 134-35 (rev. ed. 135).

[4] 2 C. Warren, The Supreme Court in U.S. History 10 (rev. ed. 1935).

[5] *Id.* at 12.

[6] *Id.* at 13-15.

[7] *Id.* at 16.

[8] J. Harris, *supra note 2, at 99.*

[9] *Id.*

[10] *Id.* at 113.

[11] *Id.* at 115-27.

[12] *Id.* at 127-32.

[13] Letter from Senator Marlow W. Cook to Charles Hagan, October 21, 1969.

[14] For complete discussion of all issues raised by the "Bill of Particulars" see speech of Senator Marlow W. Cook, 115 Cong. Rec. S12314-20 (daily ed. Oct. 13, 1969). *See also* Report of Senate Judiciary Committee on the Nomination of Clement F. Haynsworth, Jr., Executive Report No. 91-12, 91st Cong., 1st Sess. (1969).

[15] 325 F.2d 682 (4th Cir. 1963).

[16] *Hearings on Nomination of Clement F. Haynsworth, Jr., of South Carolina to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 115-16 (1969).

[17] 381 F.2d 380 (4th Cir. 1967).

[18] 363 F.2d 412 (4th Cir. 1966).

[19] 357 F.2d 228 (4th Cir. 1966).

[20] 403 F.2d 437 (5th Cir. 1968).

[21] 405 F. Supp. 3 (E.D.N.Y. 1952).

[22] *Hearings on Nomination of Clement F. Haynsworth, Jr., supra* note 15, at 469.

[23] 296 P. 883 (Cal. 1931).

[24] 392 F.2d 337 (4th Cir. 1968).

[25] *Hearings on Nomination of Clement F. Haynsworth, Jr., supra* note 15, at 238.

[26] *See Hearings on Nomination of George Harrold Carswell of Florida to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary,* 91st Cong., 2nd Sess. (1970). *See also* Report or Senate Judiciary Comm. on Nomination of George Harrold Carswell, Executive Report No. 91-14, 91st Cong., 2nd Sess. (1970).

[27] *See Hearings on Nomination of Harry A. Blackman of Minnesota to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary,* 91st Cong., 2nd Sess. (1970).

[28] Blackmun, *The Marital Deduction and Its Use in Minnesota,* 36 Minn. L. Rev. 50 (1951).

[29] Blackmun, *The Physician and His Estate,* 36 Minn. Med. 1033 (1953).

[30] Blackmun, *Allowance of In Forma Pauperis in Section 2255 and Habeas Corpus Cases,* 43 F.R.D. 343 (1968).

[31] 278 F.2d 588 (8th Cir. 1960).

[32] 338 F.2d 732 (8th Cir. 1961).

[33] 377 F.2d 549 (8th Cir. 1967).

[34] 284 F.2d 478 (8th Cir. 1960).

[35] Report of Senate Judiciary Comm. on Nomination of Harry A. Blackmun, Executive Report No. 91-18, 91 Cong., 2nd Sess. 9 (1970).

[36] *Id.*

[37] No. 19, 749, (February 4, 1970).

[38] Report of Senate Judiciary Comm. on Nomination of Harry A. Blackmun, *supra* note 34, at 10.

[39] *But see Walsh, Selection of Supreme Court Justices,* 56 A.B.A.J. 550-60 (1970); Report of the Standing Comm. on the Federal Judiciary of the American Bar Association (1970).

Mr. McCONNELL. It was pretty clear to this Senator back in those days, and it is still clear to him today, that if we decide that the Senate and the President are on coequal footing on these nominations—in other words, any inquiry that is relevant to the President is relevant to the Senate—we have a formula for gridlock in the future.

What disturbs me is that if a majority of the Senators in this body today decide, for whatever reason, that the test is no longer competence or qualifications or a variety of other issues that deal with the question of fitness, but that we instead should look at all the criteria that a President, any President, might take into account, we have a formula for gridlock.

If the Senate happens to be conservative at a given moment and the President is a liberal, he might never be able to get a nominee approved.

Over the years, going back to the beginning of this country, there have been some Senators at any given moment who have said: "Philosophy is relevant. I choose to make it relevant. I decide how to cast my vote, and I will vote 'no' against the nominee." But I think it is safe to say that on no occasion was that the majority view in the Senate.

Nominees have been rejected, as we all know, but I do not think that in any one of those instances a majority of the U.S. Senate reached the decision to reject a nominee on the basis that the nominee's philosophy was simply repugnant. Some took that view. Others may have felt it in their souls. But, in fact, the stated purpose, the stated reason, for objecting to the nominee was that the nominee somehow did not meet professional qualifications or standards or fitness that we can generally agree upon.

So what I worry about during the course of the Bork nomination is that the Senate reach an unfortunate decision that anything that is relevant to the President's consideration is relevant to our consideration and that that will be a formula for a gridlock.

The framers of the Constitution considered giving to the Senate the authority to appoint a Supreme Court

Justice. They rejected that. Clearly, there is a difference between appointing, on the one hand, and advising and consenting, on the other. They are different words; they must have a different meaning.

It seems to me that the appropriate role for us in this body is to look at the character, the professional qualifications, the fitness, if you will, of the nominee, and to leave to the one person who is elected by all the people of the United States the philosophical judgment. I think that if we follow that standard, if a majority of this body follows that standard, it will be well served when the President of the United States may be of a different philosophical persuasion.

If, on the other hand, we are going to decide, during the course of the nomination of Judge Bork, that it is entirely relevant for the Senate to consider philosophical leanings of a nominee, then Senators such as myself, who might prefer a conservative nominee—a year and a half from now, for example, if the chairman of the Judiciary Committee might be President of the United States, he might be confronted with a situation in which there is deep-seated philosophical opposition to an arguably well-qualified liberal nominee for the Supreme Court.

So the question is whether we ought to do down that road. I hope that as this debate unfolds over the coming months, we will seriously consider once again, as the Senate has on frequent occasions over the years, what is the appropriate role for this institution in advising and consenting to Presidential nominations to the Supreme Court. It is a most serious question, and we ought to think very long and very hard about what our appropriate inquiry ought to be. Otherwise, the Senator from Kentucky feels that we will have continued periods of gridlock over Presidential nominations to the Supreme Court.

Mr. BIDEN. Will the Senator yield?

Mr. McCONNELL. I yield.

Mr. BIDEN. The Senator paraphrased my earlier statement that if they send up Bork, I would have to be with him. The implication is that somehow the Senator from Delaware has changed his view and that the change may have been because of pressures of the chairmanship.

I would like to point out to the Senator that upon voting for Judge Scalia, I said to Judge Scalia at the hearing that had Judge Scalia been changing the balance on the Court, were he replacing someone other than a conservative like Chief Justice Burger, I might not be able to vote for him.

After that hearing, after voting for on Scalia and setting out my reservations, I was asked what would happen if they sent up a Bork. My response was that if he were like Scalia I would probably have to vote for him, regardless of what anybody said. I got "heat" for voting for Scalia.

My reference was in the context of the Scalia nomination—I understand the political value of taking it out of context. I am not saying that the Senator from Kentucky did that, because he might not be aware of my comments on Scalia. But the reference was made in the context of a Bork replacing a conservative Justice. I laid out my view clearly then. I said that if the fundamental direction of the Court were changed as a consequence of a vote on a nominee, I would carefully consider the wisdom of change.

It is my view that Judge Bork's appointment to the Court would fundamentally change the direction of the Court. That is why Judge Bork is not Judge Scalia. There is nothing inconsistent in what the Senator from Delaware did.

Mr. McCONNELL. I said that not to impugn the motives of the chairman.

Mr. BIDEN. I appreciate that. I just want to clarify the record.

I should like to say one more thing. I share the Senator's concern about gridlock, and I will make an agreement with him. If he will read my speech on advise and consent, I will read his law review article. At least, I would be curious to know the Senator's reaction to my analysis of the historical circumstances in which the philosophy of the nominee clearly becomes a matter of concern to the Senate.

I suggest this: I believe there is historical evidence for using the phrase "advise and consent" for the express purpose of avoiding gridlock.

The reason why the Constitution requires the advice of the Senate—is to avoid conflict in those circumstances where the President is clearly philosophically different from the Senate, the Framers of the Constitution envisioned that possibility. It is implicit in such a division that the country is divided. If you have a President with one philosophical view and the Senate is controlled by the opposite party, with a different philosophical view, at least arguably, the country is divided on the issue.

To avoid gridlock both sides should be reasonable—a President should seek the advice of the Senate, and the Senate should not insist that there be a liberal or a moderate.

Of the 15 people that this administration submitted to us for our votes, we immediately said that more than half a dozen, as many as 10, all of whom are conservatives, would be acceptable. But we said that there were several who were on the end of the Richter scale, who would cause a confrontation. That is not to prejudge what the result of the confrontation will be.

I say to my friend from Kentucky that I respect his view on this. I acknowledge his having spent time considering and thinking about what the Framers meant and what the constitutional mandate for his body is, and I respect the different view he has from mine on this issue.

In conclusion, it is my view that the Framers envisioned the possibility of gridlock when you have a President of one philosophic disposition and when the Senate is controlled by the party of another. That is why they put in the words "with the advice of," in order to reach a compromise.

Mr. McCONNELL. I say to my friend that with reference to his earlier observations about the balance issue, that is a fairly new issue, I suppose. There were some of us who felt that the Court was unbalanced in the other direction a few years earlier, and there is nothing particularly inappropriate about seeking to move it back in a different direction.

Mr. BIDEN. I agree with that.

Mr. McCONNELL. Over the years, that has been a prerogative of the President of the United States.

With regard to what the Framers meant to do and how the Senate has interpreted that over the years, the Senator from Kentucky recalls from his research a few years back—and it is not quite as alive as it was when I was poring over the books in those early days of 1970 and 1971—it was pretty clear that there was no occasion—and if I am wrong on this, I would be happy to be corrected—there was no occasion upon which a majority of the Senate stated the reason for rejection as a philosophical doctrine, shall we say.

There were Members of the Senate who have all along the way said: "I choose to call philosophy relevant. Therefore, I vote 'no.'" But I do not think that on any of those occasions upon which nominees were rejected, a clear majority of the Senate, in unison, said, "We reject this person because his views are obnoxious." They tended to look for—and sometimes they found, as in the case of Judge Carswell—disabling features, lack of fitness, lack of character, lack of professional standards.

I say this with some trepidation, because, as the Senator well knows, by sticking to the standard I am advocating, I put myself in the position, maybe a couple of years from now, of having to choke it down and support a well-qualified nominee whose views I find completely inappropriate.

If, in the course of this debate on Judge Bork, a majority of the Senate adopts the view that philosophy is just as relevant for the Senate as it is for the President, then I would say the Senator from Kentucky is willing to adopt that new view. If that is going to become the majority view around here—and we will find that out as this

unfolds—then the Senator from Kentucky will probably adopt that new view. In the future, that will mean that a good portion of us, maybe a majority, at any given time, will stand up on any nominee who comes up and say, if he is too liberal for me or too conservative for the Senator from Delaware, "I am going to vote 'no.'"

And we are going to have an awful lot of contentious nominations and an awful lot of rejections. Really I do not think it is a sound way to go. I know it is not easy. I must say to my friend from Delaware I know it is not easy for a U.S. Senator who is generally liberal in persuasion to support a conservative nominee.

I must say if I put myself in the Senator's shoes or look down the road and see myself in the position of having to react to a nominee whose views I find offensive in terms of his leftish leaning, it would be tough, but I think the best standard for the Senate to adopt is to leave the philosophy to the President and to make certain that we get men and women as nominees up here who are men and women of conspicuous achievement, those who have published, those who have achieved great distinction in their fields, in the field of law, in the field of endeavor.

I think that is a lot safer ground for us to be on for the future than to simply adopt a philosophical inquiry and go down that road. That is my principal concern.

Mr. BIDEN. If the Senator will yield, I would like to make three points. No. 1, that although there is no time when as many as 25 have at one time said that they explicitly set out philosophy as a rationale for their vote—I may have miscounted; it is in the record and I will not take the time now to go through it—there are qualified nominees who were rejected for clearly political reasons. Rutledge was clearly qualified. He was one of the Framers of the Constitution. He had served on the Supreme Court. He was clearly qualified. No one suggested that he did anything that was inappropriate or unethical in any way. Yet a majority concluded he should not be the Chief Justice.

Mr. McCONNELL. If I may interrupt, on the Rutledge nomination, he did have a temperament problem that was widely viewed as relevant.

And when we are talking about the judiciary, and I might say harkening back again to my law journal article, judicial temperament, one of the standards I set out I thought was appropriate that the Senate ought to take a look at even though on this they may be cloaking it, I agree with my friend, I think some people over the years have looked for a problem because they really did not like the philosophy. They tried to find something wrong because they did not like the philosophy. At least they felt the need to find something relevant as a reason for voting "no."

Mr. BIDEN. I think that is fine. In the case of Rutledge they said the Jay Treaty. They said anybody who can be so vociferous against the treaty obviously has to be unstable and not have judicial temperament. That may be the case. They may have cloaked it another way.

Let me speak to the second point, and that is that somehow the Senator from Delaware or other Senators who do not share the view of President Reagan on a number of issues would not vote for conservative judges. The fact of the matter is I have already voted for two conservative Justices. No one suggests that Sandra Day O'Connor was a liberal. No one ever suggested she was. Clearly no one ever said Justice Scalia was a liberal. As a matter of fact he was offered as a intellectually profound conservative, and I voted for both of them.

So this is not a question of not being able to vote for a conservative nominee. I have already done this twice so far just in the last 5 years. This goes beyond that question without determining whether you should or should not vote for Judge Bork to become Justice Bork.

The fact of the matter is that when you have a judicial philosophy, assuming that Judge Bork does, that is so clearly going to fundamentally change the outcome of decisions on the Court on a whole range of issues, when you have as, Judge Bork apparently does, a view that has a very, very limited view of the ninth amendment and the right of privacy, when you have views he has, it is not inappropriate to say "I just cannot support such a person to the Bench at this moment."

Mr. McCONNELL. Will the Senator yield on that point?

Mr. BIDEN. Surely.

Mr. McCONNELL. Is the observation of the Senator then that it is OK to support a conservative but not too many of them?

Mr. BIDEN. The observation is that on occasion can be the case.

For example, if tomorrow the Senator from Kentucky were President of the United States and the entire Supreme Court resigned, for whatever reason, is the Senator from Kentucky suggesting that he would even contemplate, as conservative as he is, putting nine Judge Borks on the Court? I suspect he would say at some point the Senate would be able to say now wait a minute. It is one thing to have a conservative point of view on the Court; it is another thing to have nine Judge Borks. Conversely, if the Senator from Delaware were President, would it be appropriate for him if the entire Court, God forbid, had a horrible accident or resigned, to say I put nine Brennans on the Court?

Mr. McCONNELL. If that is a question to the Senator from Kentucky, let me respond I do not think there is anything in the Constitution about this balance concept that he has been talking about.

Mr. BIDEN. The Senator is correct.

Mr. McCONNELL. My view is that the balance is a philosophical matter and as the Senator from Kentucky has said earlier it is my judgment that the philosophical leaning of the nominee is the prerogative of the President.

So if the question is would the Senator from Kentucky support nine Judge Borks if we got them all up at one time if they met the standard of fitness, competence, and temperament and achievement we have the right to expect as a nominee for the Supreme Court, the answer would be yes. If any President sent up nine Harrold Carswells, the answer would be no. And so the Senator from Kentucky is saying once again it seems to me the relevant inquiry here is that we have a right to expect excellence——

Mr. BIDEN. That is correct.

Mr. McCONNELL [continuing]. In a Supreme Court nominee.

But as to whether his views tend to be liberal or conservative it seems to me that is the inquiry for the President.

Mr. BIDEN. That is the fundamental disagreement. I think the Constitution clearly and precedent clearly dictate a different result.

I would suspect that the Senator from Kentucky might have a different view if I found him—assuming there were one—an incredibly bright, well-written, honorable, card-carrying Communist, who wished to be on the Court, met every standard, had judicial temperament, never lost his or her temper, were in the position where he understood the Constitution thoroughly, said he would abide by it, agree to it, and was that well-written and scholarly. I imagine the Senator would say, "Whoa, wait a minute, I cannot accept the views that are embodied in the basic philosophy this person brings to the bench," would he not?

Mr. McCONNELL. I mentioned that issue again in my article which the Senator now agreed to read, and I appreciate that. I cited that as an example, about the only example I think certainly makes a philosophy relevant. Presumably there you would be talking about someone who would be in favor of violent overthrow of our system. So the Senator picked a case where I suppose one would have to concede his philosophy would be relevant inquiry.

I do not think the Senator is equating the Bork nomination is in any way that much outside the main stream of acceptable judicial thinking in our country, is he?

Mr. BIDEN. No; I am not. What I am responding to is the point the Senator cannot have, and the Senator acknowledges he does not clearly have, an absolute standard as long as someone meets the test of judicial temperament, intellectual excellence, and training. The point I am making is that the Senator himself acknowledges that there are occasions when in fact other relevant factors, including philosophy, even come in even from the Senator from Kentucky.

Mr. McCONNELL. I make this commitment: if any President of the United States, while the Senator serves in the Senate, sends up a Communist, I will oppose it so we can move that one off the table.

I might say to my friend, I think he would have been on firmer ground had he opposed the nomination of Judge Scalia. It seems to me that if we are to conclude that the philosophy is a relevant inquiry, if we are, it ought to apply to any conservatives. I think the Senator would have been on much firmer ground had he gone on and said this last year, by golly, I just think Judge Scalia is too far to the right, he is going to vote ways I do not approve of; therefore, I oppose him.

Mr. BIDEN. If the Senator will yield, what I suggested then and I suggest now is that the fact of the matter is that there are occasions, three occasions when in fact the U.S. Senate and individual Senators should, and I would argue must, consider the judicial philosophy of the nominee. One of those occasions is when that nominee, being placed on the Court, would fundamentally change the outcome of the Court rulings. I believe there should be conservative points of view represented on the court. I believe that brings about an intellectual dynamism that is required to the Court. I want that point of view represented on the Court. And I mean that sincerely. But I do not want that point of view, what I view as an extreme right position taken by Judge Bork on any issues, I do not want that to become law on the Court.

I do not want that to be the direction of the Court. But I do want it represented, assuming he meets the other criteria that the Senator has suggested. And I believe he does. I believe that he is honorable, that he is intellectually fit, that he is scholarly, that he has a background, et cetera. The fact of the matter is that if, in fact, placing a nominee on the Court is going to—for example, would the Senator, and this is more a rhetorical question he can answer; I do not expect him to—would the Senator vote for a nominee to the Supreme Court who argued still that Plessy versus Ferguson should be the prevailing law of the land, that Brown versus the Board of Education was incorrectly decided, that it was a wrong decision. Would he vote for such a person?

Mr. McCONNELL. I probably would not on the grounds that it would be foolish to throw out that many years of legal precedent. I had a question.

Mr. BIDEN. Let me ask another question.

Mr. McCONNELL. Since I have the floor.

Mr. BIDEN. If the Senator will yield, let me ask a second question and then I will yield. If the nominee who the Senator was about to vote on said that, in fact, stare decisis was a relevant concept when it came to the Supreme Court and that if any decision is incorrectly decided by the Court in the past regardless of the impact it would have on the decisions that had been made thus far, he would not feel compelled to abide by what had been precedent for the last 15 or 20 years, would the Senator then vote for such a nominee?

Mr. McCONNELL. It would seem to this Senator that, to the extent that a nominee's views amounted to incompetence, in terms of the judgment of how our court system works, it could raise what I believe is a relevant inquiry into his judicial ability.

You cannot simply ignore—I missed the last part of the question. Senator STEVENS had my attention.

Mr. BIDEN. I think it is important. I will repeat it because it relates to what you are suggesting there. There is no incompetence to suggest that the court incorrectly decided Brown versus the Board.

A lot of very brilliant people thought that was the wrong decision. It is not incompetent to suggest that.

Mr. McCONNELL. Incompetence is not the word, but I think for any nominee to argue that many years of precedent on a significant area might be irrelevant would certainly raise the question.

I do not know, based on this hypothetical, which way I would vote in that situation.

Mr. BIDEN. How about the circumstances where a nominee said that a decision like the Griswold case, where the State of Connecticut passed a law saying that you cannot advise married couples on the use of birth control, is against the law and if you advise a married couple on the use of birth control devices, you will be prosecuted.

That case was appealed to the Supreme Court. The Supreme Court ruled that the State of Connecticut cannot do that, because it violates the privacy of people in Connecticut.

That was in the mid-sixties. How about a nominee who came along and said that that was incorrectly decided; there is no right to privacy that exists within the Constitution and that "I would overturn those decisions"? How would you feel about voting for such a nominee?

Mr. McCONNELL. We can talk about hypotheticals all day.

Mr. BIDEN. That is not a hypothetical.

Mr. McCONNELL. You will have a chance to ask the nominee that question and I am sure you will. We will get back to this discussion in a moment, but the Senator from Alaska has some bills that have been cleared, I think.

Mr. BIDEN. I am willing to cease and desist.

Mr. McCONNELL. We can talk about hypotheticals all day. My friend from Delaware has talked about the need to keep the Court balanced and he is concerned about, as he puts it, unbalancing the Court to the right. I would hope the Senator, since he thinks this balance is so critical, would also oppose a nominee who might also someday unbalance the Court to the left and I will be listening during the course of the debate as to how we are going to achieve this mystical balance and keep the Court in perfect perspective from right to left. This standard by which we measure all these nominees will be something, maybe, that will evolve in the course of the hearings and the floor debate.

Mr. President, I have the floor and I am going—is the Senator from Alaska ready? Is the Senator from Alaska ready to proceed?

Mr. STEVENS. I would say, Mr. President, to my good friend from Kentucky, that when this dialog is ended the distinguished leader and I have some routine business to handle but we did not want to interrupt it in any way.

Mr. McCONNELL. The Senator from Kentucky has a meeting to attend and he is prepared to yield the floor and I am sure this debate will continue for many days in the future. I yield.

Mr. BIDEN. The Senator from Delaware will not continue the debate except to take 1 minute. The Senator from Delaware is not insisting there be a perpetual balancing in the court and has never argued that. The Senator from Delaware is suggesting that when the balance is going to change from one direction to another in a significant way, as everyone acknowledges this nominee will do—everyone acknowledges that—when that occurs each Senator then has an obligation to determine whether or not he wishes it to change in that direction. That is what the Constitution says we should do.

If he chooses that it should change, then he should vote for the nominee. But if he believes that in so changing the balance it will move the country in a direction with which he or she fundamentally disagrees, then the Constitution says they should vote no. That

is all. There is no mystical or mythical balance.

For, if you were to say that, it would mean the court could never change. It is just a matter of whether or not it changes in a way that each Senator thinks it should or should not change. I would suggest that the line of questioning that the Senator from Kentucky was raising is a valid one. If, in fact, you find yourself in a circumstance where there are precedents that a Justice would very well overrule—longstanding precedents—assuming he would say and he has written that he would overrule them and he would overrule them in a way that you do not like; then it seems to me every Senator should ask: Do I want that to be the case?

That is all I am saying. I thank my friend from Kentucky. I look forward to continuing discussions with him on this subject and I thank the Chair.

## EXTENSION OF TIME FOR MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that morning business be extended until 1 o'clock, that the distinguished Senator from Alaska have 3 minutes to introduce a bill; that the distinguished Senator from New Hampshire may have 5 minutes, and the distinguished Senator from Oklahoma may have 5 minutes. At the conclusion of those speeches, I ask unanimous consent that the Senate stand in recess until 2 p.m.

Mr. HUMPHREY. Mr. President, I would like to have 10 minutes, if I may, or be permitted to ask for an extension.

Mr. BYRD. Mr. President, I will change that so that the distinguished Senator from New Hampshire may have 10 minutes, 3 minutes to Mr. STEVENS, and 5 minutes to Mr. BOREN, and at the conclusion of the remarks the Chair recess the Senate until 2 p.m.

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

## DOCUMENTATION OF FOREIGN-BUILT FISH-PROCESSING VESSELS

Mr. STEVENS. Mr. President, I want to express my deep appreciation to the distinguished majority leader for agreeing to this procedure.

Mr. President, I send to the desk a bill and ask for its immediate consideration.

The PRESIDING OFFICER. The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (S. 1591) to temporarily restrict the ability to document foreign-built fish-processing vessels under the laws of the United States.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. BYRD. Mr. President, there is no objection on this side. It has been cleared and we are ready to proceed with its immediate consideration.

The PRESIDING OFFICER. Without objection, the bill will be considered to have been read the second time and the Senate will proceed to its immediate consideration.

The Senate proceeded to consider the bill.

Mr. STEVENS. Mr. President, I am offering an emergency bill designed to prevent the documentation of foreign-built fish processing vessels under the laws of the United States until March 1, 1988.

This issue is of critical importance to the U.S. fishing industry. Under current law, foreign companies can take advantage of the U.S. documentation laws and claim access to U.S. fisheries resources in contravention of the Magnuson Fisheries Conservation and Management Act. The Senate Commerce Committee and the House Merchant Marine and Fisheries Committee are in the process of developing legislation to correct the loophole in the documentation laws. Despite warnings from Members of Congress to refrain from documenting any foreign-built vessels until this issue has been resolved, a Korean company has submitted applications to have three vessels documented as United States fish processors.

The U.S. Coast Guard has informed me that it does not have discretion to deny an application if it has been properly filed. This amendment would prohibit the Coast Guard from approving any such application until the Senate and House have had time to carry the legislative effort to its conclusion.

Mr. President, this bill will suspend the right of the Coast Guard to issue certificates of reflagging for foreign-built vessels to become fish processors under the laws of the United States until March 1, 1988, so that both the House and the Senate can complete work on a very complicated bill dealing with this subject.

Mr. President, I appreciate the cooperation of all concerned.

The PRESIDING OFFICER. The bill is before the Senate and open to amendment. If there be no amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill (S. 1591) was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S. 1591

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* Notwithstanding Chapter 121 of Title 46 of the United States Code, the Secretary of the department in which the Coast Guard is operating shall not grant a certificate of documentation to any foreign-built vessel for use as a fish processing vessel. This restriction shall be effective until March 1, 1988. The Secretary may issue such regulations as the Secretary considers necessary to obtain information on the intended use of any vessel applying for a certificate of documentation in order to prevent the documentation of a foreign-built fish processing vessel.

Mr. STEVENS. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. BYRD. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. STEVENS. I thank the distinguished majority leader.

Mr. BYRD. I thank the Senator.

## ORDER OF PROCEDURE

Mr. BYRD. Mr. President, I wonder if the Senator from Colorado and I may proceed with a little business.

## THE CALENDAR

Mr. BYRD. Mr. President, I ask the distinguished acting Republican leader [Mr. ARMSTRONG] if the following calendar orders have been cleared on his side of the aisle: Calendar Order No. 250, Calendar Order No. 267, Calendar Order No. 276, and Calendar Order No. 289.

Mr. ARMSTRONG. Mr. President, if the distinguished leader will yield to me, I will be happy to respond that they have been cleared, and, at the right time, either now or later, I would like to take a few moments to explain why they have been delayed until now. But at this point they are cleared on this side.

Mr. BYRD. Very well. We could wait until later if the Senator wishes to speak. I do not want to delay the other Senators who are waiting.

Mr. ARMSTRONG. I would think it would take 1 or 2 minutes for me to explain the delay. I will be glad to do that now or return another time.

Mr. BYRD. Very well. If the Senator would like to explain it now, we will proceed with the explanation.

Mr. ARMSTRONG. I will be happy to.

Mr. President, there are about six or seven items of the Senate Rules Committee which were pending on the calendar which I asked that we withhold action on. At the request of the majority leader and subsequently the minority leader, I have cleared these four items which have just been listed.

The reason I asked that they be held up for a few days is simply to gently and in a friendly way make the point that there are two parties in the Chamber and that the Senators on both sides of the aisle have a right to be consulted about these things, and to express my concern about some actions which are occurring under the direction of the Rules Committee.

the completion of such a transfer, I believe it is important that the Senate address this matter promptly and I urge my colleagues to vote for this measure.

Thank you, Mr. President.

The bill was ordered to be engrossed for a third reading, read the third time, and passed; as follows:

S. 1194

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) the real property described in subsection (b) shall be transferred without compensation or reimbursement from the control and jurisdiction of the General Services Administration to the control and jurisdiction of the Veterans' Administration.

(b) The real property referred to in subsection (a) is a tract of land located in the NW ¼ of Section 39, Township 10 North, Range 3 East, New Mexico Principal Meridian, consisting of 5.081 acres, more or less, in Bernalillo County, New Mexico, such property being that same property that—

(1) was formerly part of the Veterans' Administration Medical Center, Albuquerque, New Mexico;

(2) was transferred to the State of New Mexico at no cost for use as a highway corridor in 1974; and

(3) was subsequently retransferred by the State of New Mexico to the General Services Administation at no cost.

The PRESIDING OFFICER (Mr. ROCKEFELLER). The Senator from New Hampshire is recognized for 10 minutes.

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

Mr. President, before I return to my remarks on the nomination of Judge Bork, I want to state my regret at what seemed to me to be a suggestion on the part of the Senator from Kentucky that the Senator from Colorado has somehow treated him unfairly in the colloquy that took place a moment ago. Surely, if a poll were conducted on both sides of the aisle few Senators would come out farther ahead than the Senator from Colorado in matters of fairness and graciousness and generosity. So I did not want the opportunity to pass by without stating that for the record.

## BORK NOMINATION

Mr. HUMPHREY. Mr. President, the chairman of the Judiciary Committee, Senator BIDEN, addresed the body earlier this afternoon to further expound on his views with respect to the Bork nomination. He said afterwards in an exchange with this Senator—perhaps earlier as well; I was not here for the entire speech—that he has reached an agreement with the ranking member of the Judiciary Committee, Senator THURMOND, to commit to a date of October 1 to report out the Bork nomination, provided that preceding period is sufficient to accommodate all of the witnesses plus 1 additional day.

That is very good news, indeed, and I thank the chairman of the Judiciary Committee for that commitment. It does not erase, of course, the fact that by selecting September 15, on which date the hearings are to begin, the chairman has set a new modern times record for delaying the onset of such hearings. Research done by the Congressional Research Service shows that over the last quarter century, the modern era telecommunications, the average time between the receipt of the nomination papers by the Senate and the beginning of nomination hearings by the Judiciary Committee has been 17.6 days.

In this case, in the case of Bork, under the timetable set up by Senator BIDEN, it will be 70 days, some four times the average, almost twice the delay of the previous record, which was 42 days in the case of Justice Scalia.

I think that such a delay is unnecessary and is unfair to the President and the nominee. It is unfair to our judicial system because of the effect the delay will have on the Court when it begins its new term. It is quite possible that we may have some 4-4 decisions, and in those cases justice will be delayed, if not completely denied.

So I regret that September 15 remains as the date, but I am grateful to the chairman for expressing his commitment to report the nomination by October 1.

Maybe this is a sign that the dust is settling. Maybe this is a sign that the rhetorical dust that was thrown up in the heated, partisan pawing of the earth is beginning to settle. I hope so.

I believe that when we begin to focus on the facts and the dust settles and we can discern the facts, a majority of the Senate will see that the nominee is extraordinarily well qualified to serve on the Supreme Court. Indeed, if one were to design a hypothetical candidate for a person ideally suited to the Supreme Court, it would closely match the actual—not the hypothetical—career and accomplishments of Robert Bork.

He received his law degree from the University of Chicago Law School, one of the most prestigious in the Nation. He served with the highest distinction as a professor of law at Yale Law School, where he held two of the most distinguished chairs at that institution. His scholarly legal writings have been both prolific and profound, reflecting an appreciation and respect for our written Constitution that is exactly what we need on the Court.

Robert Bork served in the third highest post in the Justice Department, to which he was confirmed by the Senate—that is, the post of Solicitor General of the United States—from 1973 to 1977, where he served as the Justice Department's chief litigator before the U.S. Supreme Court. His performance in that capacity was exemplary in every respect and further provides him with invaluable knowledge and understanding of and respect for the high court as an institution.

Later, as Senators know—many of whom were here at the time—Robert Bork was nominated and confirmed unanimously by this body to the D.C. Circuit Court of Appeals, generally regarded as the second-most important court in the country, second only to the Supreme Court itself. I repeat: Judge Bork, who is now the object of so much criticism and vitriol, was unanimously confirmed by the Senate of the United States to the second-most important court in this country.

Surely, Senators, particularly those who, like this one, were here in 1982, are not about to retract the votes they cast that year, are not about to admit that in the discharge of their responsibilities in connection with that nomination, they were careless or guilty of malfeasance in casting their vote unanimously for this man to occupy the second-highest court in the country.

Let me say further, Mr. President, that Judge Bork's performance on the D.C. court has been outstanding and fully compatible with the sound principles of judging cases which he expressed in his confirmation hearings.

I mentioned the facts, as opposed to the hot political rhetoric. Here are the facts.

He served for 5 years in that second most important tribunal. He has authored over 100 majority opinions, not one of which has been reversed by the Supreme Court. Such a record would be inconceivable if, as alleged by his opponents, Judge Bork was an ideological extremist on the fringes of the judicial mainstream.

I point out, further, with regard to his service on the Circuit Court of Appeals for the District of Columbia, that he voted with Judge Scalia, when they both served together, 98 percent of the time. Ninety-eight percent of the time, these two judges voted alike.

So I say to the Senator from Delaware, using his own words, Bork looks a lot like Scalia.

The Senator from Delaware seemed to indicate today that he now, once more, has an open mind, if I correctly interpret him, although one gets the impression that he has done a number of pirouettes on this issue, and he might be the envy of Mikhail Baryshnikov. In any event, one hopes he still has an open mind and that after participating in the hearings, the Senator from Delaware will recognize and realize that in fact—as I have just made the point—Bork looks a lot like Scalia; so now let us have the other part of the agreement, which is that we hope the Senator will support Bork.

With regard to the irresponsible charges that Judge Bork is an ideological extremist, let me cite a source that styles himself as a liberal Democrat, Lloyd Cutler, former White House counsel to President Carter, one of the most respected and knowledgeable lawyers in the Nation, who directly refuted the charges, saying in an article in the New York Times of July 16:

• • • Judge Bork is neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues. I base this assessment on a post-nomination review of Judge Bork's published articles and opinions, and on 20 years of personal association as a professional colleague or adversary. I make it as a liberal Democrat and as an advocate of civil rights before the Supreme Court.

Mr. President, this statement shows that the charges of ideological extremism raised against Judge Bork are nothing more or less than partisan political attacks.

I hope Senators will keep an open mind, as urged by the majority leader and the senior Senator from Arizona, both of whom are Democrats. The least we can expect is that Senators will keep an open mind until after the hearings and until the nominee has has a chance to utter at least a few words in his own defense, in the setting of committee hearings.

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

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

## ATTACK ON SENATOR METZENBAUM

Mr. BOREN. Mr. President, a few days ago, I read reports in the press about the attack that had been made on one of our colleagues, the Senator from Ohio [Mr. METZENBAUM]. According to these press reports, which were later discussed on the Senate floor, plans were being made to try to portray Senator METZENBAUM, for purely political reasons, as a person in sympathy with Communist causes.

Mr. President, while I was tied up in committee meetings, the discussion occurred on the Senate floor, and I did not want to let the matter pass without making some comments for the record about how I feel about these kinds of allegations and that kind of politics.

These kinds of distortions have absolutely no place in American politics. These kinds of attempts to assassinate the character of any public official deserve to be roundly repudiated, not only by every Member of the Senate but also by the American people.

It is well known that Senator METZENBAUM and I have had many heated debates on the Senate floor. Just a few weeks ago, we engaged in a debate on the plant closing policy. We were on opposed sides.

Time and time again, perhaps, I have had more debates with Senator METZENBAUM on the floor of the Senate than with any other Senator, especially with regard to energy policy. It is an understanding to say that we do not agree when it comes to matters pertaining to energy policy and several other issues. No one can accuse this Senator of being one who would try to apologize for Senator METZENBAUM or his behavior because we are always in agreement. It is well known that we have had honest differences of opinion.

Let me say this: As chairman of the Intelligence Committee, I have the privilege of serving with Senator METZENBAUM on that committee. His patriotism and his devotion to his country are daily demonstrated in his service on that committee. He keeps the secrets. He conducts himself in a manner always consistent with what he sincerely believes is in the best interests of the United States of America. He never hesitates to support those programs vital to our national security, which he believes will help enhance the strength of the United States of America and our ability to meet the threat from those who stand against us, including those in the Communist bloc.

And I simply could not let the matters pass having served as a colleague on the Intelligence Committee with Senator METZENBAUM, and having observed his dlligence, his patriotism, his commitment to this country, his desire to see everything done to protect its security against those in the Communist bloc and others, without raising my voice to condemn those who have made these false and despicable charges against the patriotism of a very fine man, an able public servant.

It is a part of our system that we will sometimes disagree. It is a part of our system, an appropriate part of our system as Senator METZENBAUM and I have engaged in days and days and hours of debate on those issues about which we have a differences of opinion.

I would fight to the last, as has been said many times by others in history, for the right of those who happen to disagree with me to hold their views and to express their views and to act upon them.

That is what this country is all about. That is the freedom that this Constitution reserves to us.

No one should impugn the motives and integrity of anyone else simply because he happens to disagree with you on the issues.

So, Mr. President, I am pleased to have had this opportunity to make these comments, and I have great respect for Senator METZENBAUM as a human being and I have great respect for his patriotism.

## BIPARTISAN CONSENSUS

Mr. BOREN. Mr. President, I would like to say one other word. There have been discussions over the past several days again commenting upon in the press yesterday. Efforts are under way to try to forge a bipartisan consensus in some of the critical areas of foreign policy, especially the area of Central America policy.

Mr. President, I commend leaders on both sides of the aisle for trying to make that effort. If there is any war that needs to be ended it is the war between the two ends of Pennsylvania Avenue.

We in the Congress and those in the executive branch work for the same people and the same cause.

I have read reports and I know from personal conversations as Speaker JIM WRIGHT, the Speaker of the House from Texas, is endeavoring to take lead in these matters.

Mr. President, our country has never been served better than in the days in which President Dwight Eisenhower, Republican, and Speaker Sam Rayburn, another Texas Democrat, worked together, met together, consulted together so that we could forge bipartisanship in foreign policy.

When they spoke to the world, they spoke to the world as America speaking, not as Democrats and not as Republicans, not the executive branch and not the legislative branch.

Mr. President, when I heard about these initiatives, and when I heard about what Speaker WRIGHT was trying to do to open consultation and cooperation between the two branches of Government, I wanted to publicly say that I salute his courage, I salute what he is trying to do for the sake of this country. As Sam Rayburn often said and Harry Truman often said if you want to be a good Democrat, you must first be a good American.

That should be true about the membership in either of our two great political parties.

Speaker WRIGHT is acting in that tradition. All Americans without regard to party should hope and pray that he will succeed in rebuilding that kind of trust and forging that kind of bipartisan coalition so necessary to our national interest.

Since I have been a Member of this Congress I have rarely seen initiatives that I think held more promise. I have rarely seen more courageous action by any individual that I have seen from Speaker WRIGHT. I salute him. I wish him well. I make it clear that as one

tion Act, it is clear that we have much work ahead of us. It is reassuring to know that in such efforts, we can count on the assistance of individuals such as Fred Brown who are dedicated to reclaiming abandoned mine lands.

## ADVISE AND CONSENT ROLE OF THE SENATE

Mr. SIMON. Mr. President, the Senate's calendar is ticking toward a momentous decision: whether to confirm Judge Robert Bork to be the next Associate Justice of the Supreme Court of the United States. Because Justice Lewis Powell was the swing vote on an increasingly divided Court, Judge Bork, if confirmed, could have the opportunity to cast the deciding vote on many of the most significant constitutional law issues of our day, issues affecting all Americans. Thus, the next Justice will determine whether a woman's right to choice in abortion will survive, whether affirmative action will be allowed, whether the protection of free speech will remain robust or muted, whether the traditional wall of separation between church and state stands secure or is breached. With so much at stake, it is essential that the Senate carry out its proper role in the appointment process and that the public understand that role.

There is a reason judicial nominees should receive the special scrutiny of the Senate. In contrast to the President's nominations to positions within his own executive branch, appointments to the judiciary are to a branch of Government that is supposed to be independent of the President and for a duration exceeding his own term of office. For the President to control such appointments unilaterally would be inappropriate, especially in a political system where checks and balances are so important. The Senate is an institution in some ways not as broadly representative as it should be: we have only two women; there are no blacks; no Hispanics. But the Senate is broadly representative of the country's political diversity. It does not defer to the President when it thinks his proposed budget or legislation will harm the country, and the same should be true with respect to his judicial nominees.

Given that basic perspective, what criteria should the Senate use in evaluating judicial nominees as part of its advise and consent role? A central feature of the Senate's role must be to evaluate the nominee's quality. By quality I mean several things. First, we must be concerned about a nominee's professional competence, which includes intellectual capacity and legal skills, as well as the nominee's experience—a factor which bears on the nominee's practical wisdom about the people and the world as well as more narrow professional skills. Second, we must be concerned about the nominee's integrity and moral character. Third, we must be concerned about the nominee's temperament: his or her openmindedness, judgment, consistency, and sense of fair play. Few, if any, of my Senate colleagues would disagree in the abstract with the notion that the Senate should evaluate quality factors. Finally, the nominee must have a balanced and sound understanding of the meaning of our Constitution and the Supreme Court's role in our society.

This last criterion is likely to be a critical part of the upcoming confirmation process. Some say that the Senate has no role to play in assessing a nominee's views. But if a nominee's views and philosophy are taken into account by the President—and in this instance the President has made clear that they have been—surely the Senate should also examine and weigh those views. Judge Bork's legal views and philosophy are highly relevant to how he would perform the job for the simple reason that a Justice on the Supreme Court has considerable leeway in interpreting the law and also has the raw power to overrule prior cases. A judge must fill in gaps in the law and must resolve ambiguities about what the law is, and in doing so inevitably draws upon his or her starting point views and outlook. This is true of all judges, and it is especially true of Supreme Court Justices, whose leeway in giving meaning to the majestic general commands of the Constitution is particularly great, and who must resolve conflicts among lower courts on a daily basis.

A Senator who considers only whether a judicial nominee will follow the law is ignoring the fact that the law to be followed is often not clear, and that judicial decisions are often affected by a judge's individual legal views. To contend that a Senator may not properly consider those views amounts to a contention that things highly relevant to the job—things that make a good or bad judge—may not be considered.

A Justice who is sensitive to civil rights and civil liberties will approach the decision of cases very differently from one who is not. A Justice who shares Justice Powell's view that precedent "demands respect in a society governed by the rule of law" will act very differently from a judge with a mission to change the law. To assess Judge Bork—or any nominee—in light of how that person will actually act as a Justice is not politics, as some have suggested; rather, it is the Senate's responsibility.

Carefully assessing a nominee's views is especially important in the current context. With Justice Powell's resignation, a new appointee will be able to affect the actual outcome of cases in many of the most sensitive and controversial areas of American life. The point here is not that the balance of the Supreme Court must always stay precisely the same. But the Supreme Court cannot be a pendulum, swinging back and forth, recognizing constitutional rights and then disavowing them. And most important, we in the Senate have a responsibility to assure that the Court balance does not shift in a direction that we believe is wrong and harmful to the Nation. Our constituents elected us to do no less, and our duty to uphold the Constitution requires that we do no less. The Senate cannot avoid responsibility for the consequences of this appointment, and every Senator knows that.

And so the Senate is about to raise the curtain on a historic and critically important debate. Every American has a stake in the outcome; every American's life will be influenced by it. And in this year in which we honor the bicentennial of our national charter, every American is more likely than before to appreciate that the Supreme Court is more than a dispenser of justice—it is also a symbol of justice in this Nation. Every American has a right to enter that courtroom and find a judge who is fair and openminded, one who is willing to judge, not prejudge, every case on its merits. And every American should be able to look upon each new appointee, once the Senate has given its consent, and have reason to believe that "this person will be fair, this person will be just." Let the Senate so honor its calling in these confirmation proceedings that these words can be spoken by our fellow citizens.

## SENATORIAL ELECTION CAMPAIGN ACT

The PRESIDING OFFICER. Under the previous order, morning business is closed and the clerk will report the unfinished business.

The assistant legislative clerk read as follows:

A bill (S. 2) to amend the Federal Election Campaign Act of 1971 to provide for a voluntary system of spending limits and partial public financing of Senate general election campaigns, to limit contributions by multicandidate political committees, and for other purposes.

The Senate resumed consideration of the bill.

Mr. BYRD. Mr. President, the Senate has been debating campaign financing reform legislation for several weeks. This legislation was first called up on June 3. It was reported by the Committee on Rules and Administration on May 14. It was reported out unanimously by Democrats with no Republican votes in support thereof. As the debate has proceeded off and on, we have shown repeatedly that a

| | | |
|---|---|---|
| Specter | Symms | Warner |
| Stafford | Thurmond | Weicker |
| Stennis | Trible | Wilson |
| Stevens | Wallop | Wirth |

NAYS—17

| | | |
|---|---|---|
| Adams | Fowler | Mikulski |
| Baucus | Harkin | Proxmire |
| Bingaman | Kennedy | Rockefeller |
| Byrd | Kerry | Sanford |
| Chiles | Levin | Sasser |
| Ford | Metzenbaum | |

NOT VOTING—2

| | |
|---|---|
| Gore | Hatfield |

So the nomination was confirmed.

Mr. BYRD. Mr. President, I ask unanimous consent that the motion to reconsider be laid on the table.

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

Mr. BYRD. Mr. President, I ask unanimous consent that the President be immediately notified of the confirmation of the nomination.

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

## LEGISLATIVE BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate return to the consideration of legislative business.

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

The majority leader.

## UNANIMOUS CONSENT REQUEST—S. 328

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar Order No. 132, S. 328, a bill by Mr. SASSER and others to require the Federal Government to pay interest on overdue payments. And why should it not?

The PRESIDING OFFICER. Is there objection?

The Republican leader.

Mr. DOLE. Mr. President, reserving the right to object, and I hope we do not have to object, I would just as soon take up the bill. I think there are two Senators, maybe one on this side, who might be talking, maybe one on the other side, about one amendment. The distinguished Senator from Indiana [Mr. QUAYLE] I think is working with the distinguished Senator from Michigan [Mr. LEVIN] on an amendment, and he indicated to me he does not think there has been enough time to gin up support for that particular amendment. But I have suggested that if he wishes to object that he should do so.

Would it be the intention of the majority leader if there is an objection to move to the consideration of that matter?

Mr. BYRD. It would be my intention if there is an objection, and I hope there will not be—if Senators have problems with amendments this is the place to work them out—in response to the Republican leader I would ask unanimous consent to take up the State Department authorization bill.

The PRESIDING OFFICER. Is there objection?

Mr. HEINZ. Mr. President, reserving the right to object, and I do not intend to object, I would like to ask the majority leader, there are some remarks—and I cannot characterize them totally as brief; they will run between 5 and 10 minutes—I would like to make on a subject unrelated to the bill the majority leader intends to call up, but I would like to make those remarks, if possible, before the debate on that measure begins.

Could that be accommodated?

Mr. BYRD. Yes, I think that could be accommodated. I would like, if we could first, to get something up, and then as soon as we get it up, we will try to accommodate the distinguished Senator.

Mr. HEINZ. I withdraw my objection.

The PRESIDING OFFICER. The Republican leader.

Mr. DOLE. Mr. President, we cannot locate the Senator from Indiana right now. I do not want to frustrate the efforts of the majority leader, but I feel constrained to object at least for the moment.

It is my understanding he is conferring with Senator LEVIN, trying to get together with Senator LEVIN on one amendment. I understand every other thing has been disposed of. There is no objection on either side.

So at least for the time being, I object.

The PRESIDING OFFICER. Objection is heard.

The majority leader.

## UNANIMOUS CONSENT REQUEST—S. 1394

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar Order No. 173, S. 1394. This is the State Department authorization bill.

The PRESIDING OFFICER. Is there objection to the request?

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The Republican leader.

Mr. BYRD. Mr. President, I withdraw my request for the moment while the distinguished Republican leader is making some inquiries.

In the meantime, I ask unanimous consent that the distinguished Senator from—where is the Senator from?

Mr. LEAHY. Vermont; the beautiful green hills of Vermont.

Mr. BYRD. Now, where have I heard that before?

The green hills of West Virginia.

Mr. HEINZ. Which are just adjacent to southwestern Pennsylvania; I think that it is probably the other way around.

Mr. LEAHY. Mr. President, if the Senator will let me say, we are getting on dangerous ground when we start talking about those green hills. I recall about this time a week ago, we got into a half an hour discussion about beautiful green hills.

I might tell the distinguished Senator from West Virginia, I have gotten all kinds of mail from people who tell me now their most difficult choice is whether to go to West Virginia, having heard him tell how beautiful it was there, or Vermont, having heard me tell how beautiful it was there.

Mr. HEINZ. The Senator is treading on very dangerous ground because between West Virginia and Vermont is beautiful Pennsylvania.

Mr. LEAHY. I suggest they go to all three, because the States are so beautiful.

I would ask the majority leader if he might yield to me for 7 or 8 minutes for a statement.

Mr. BYRD. Mr. President, I ask unanimous consent that the distinguished Senator from Vermont may proceed for not to exceed 10 minutes and the distinguished Senator from Pennsylvania may proceed for not to exceed 10 minutes and that, in the meantime, if the distinguished Republican leader returns and is able to clear our going to the State Department authorization bill, that I may be recognized to get the Senate on track and then these gentlemen may continue and complete their remarks.

The PRESIDING OFFICER. Is there objection to the unanimous consent request? Hearing no objection, it is so ordered.

The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, I thank the distinguished majority leader for his usual courtesy and help.

## NOMINATION OF ROBERT BORK

Mr. LEAHY. Mr. President, all of us are getting inundated with mail on the nomination of Judge Robert H. Bork to be a Justice of the U.S. Supreme Court, and much will be said about it. But I wanted to make a couple of points before we leave on recess.

For when the Senate returns from its August recess, it is going to turn to one of the most important and most difficult of its constitutional responsibilities. The Senate's consideration of the nomination of Robert Bork is going to test our fidelity to the obligations that the Constitution imposes on us. The American people are going to be watching closely to see that we meet that test.

I am speaking for a limited purpose here today, Mr. President. I am not here to announce how I am going to vote on the nomination. I am not here to try to persuade other Senators on

how they should vote. Among other reasons, I do not know how I am going to vote. I have not yet decided.

My purpose is simply to present the views of one Vermont Senator on how the Senate ought to go about performing its constitutional duty with respect to this extraordinarily important nomination.

When the Constitution was written 200 summers ago, the framers of the Constitution intended there to be two players in judicial nominations: the President and the Senate. And they intended very clearly that the roles that they were going to have would be of equal responsibility. The 100 Members of this body, just like the President, have been elected by all the people of this country and all of the people have the right to expect that each of us will approach our role with equal care and equal concern for the importance of the decision at hand.

The President has made his decision. He has played his role in the constitutional drama of selecting a new Justice of the Supreme Court. Now it is time for the U.S. Senate. Our job is neither to rubber stamp the President's choice nor to make the nomination a litmus test of our partisan relationship to the President. Our job is to make our own independent judgment about whether Robert Bork is the right person for this crucial position.

And we must look at a number of factors. Everyone agrees that his professional competence, integrity, and character are important factors. The harder question seems to be whether ones ideology is the proper subject for the Senate's consideration. I believe it is.

It makes no difference to me, as one Senator, whether Judge Bork is Democrat, Republican, liberal, or conservative, how he has voted in past elections, or how he would vote on controversial issues if he were a legislator.

And if by "ideology" we mean the judicial philosophy that Judge Bork would bring with him to the Supreme Court—his approach to the Constitution and to the role of the courts in discerning and enforcing its demands—then we are talking about an issue that goes right to the heart of the Senate's role.

Let us remind ourselves why this question of judicial philosophy is so important. The authors of our Constitution and of the Bill of Rights recognized that certain fundamental liberties cannot safely be entrusted entirely to the good intentions of the legislative and executive branches. For that reason, the drafters and ratifiers of the Constitution established an independent judiciary. They wanted it to serve, as James Madison said, as "an impenetrable bulwark against every assumption of power in the legislative or executive."

Time and again throughout our history, when the other branches of Government were unwilling and unable to protect these fundamental rights, Americans turned to the courts, and ultimately to the Supreme Court, to bring the written words of the Constitution to life.

Mr. President, that essential role of the Supreme Court is the cornerstone of our constitutional system. It has helped to liberate black Americans from the shackles of official segregation. It protects not only the right to vote, but the right to have every vote counted equally. And in cases too numerous to mention, it enforces the constitutional commands that fence Government out of aspects of our private lives in which it has no legitimate business.

The preservation and vitality of this role of the Supreme Court as the ultimate arbiter of our constitutional rights and responsibilities is the standard by which the judicial philosophy of this nominee must be measured.

The President has described Judge Bork as "an intellectually powerful advocate of judicial restraint." Those words "judicial restraint, mean a lot of different things to a lot of different people. What they mean to Judge Bork—how they are embodied in his judicial philosophy—is the issue before the Senate.

All the circumstances leading up to this nomination make it very clear that the President gave great weight to judicial philosophy when he decided to nominate Judge Bork. The President did not just nominate the best lawyer or judge he could find. He made it very clear that he nominated a skilled and experienced lawyer and judge who also happens to be a prominent and forceful advocate of a particular judicial philosophy—a philosophy that President Reagan says he shares.

I have not heard a single convincing argument that one actor in the process of advice and consent may legitimately consider a nominee's judicial philosophy but the other cannot.

The President is perfectly within his rights to consider the philosophy of a person that he nominates. But we, every one of the 100 Members of the Senate, have just as much of a right to consider that same judicial philosophy when we determine whether we are going to consent to this nomination. We are equal partners in it. And if the President wants a particular judicial philosophy in the judges he nominates, the equal partners in this process, the U.S. Senate, can also say we want a particular judicial philosophy in those people we are willing to confirm.

Now, Mr. President, there is a lot to know about Judge Bork. He has written extensively in law review articles and opinions of the court of appeals. In fact, I asked my staff, "Would you please bring me the materials that Judge Bork has written so I can read them?" The 3,000 or so pages that they presented to me changed my recess plans quite a bit. I have already called my wife and said: take that shelf full of books in our farmhouse in Vermont—you know that history of World War I that I keep saying that I am going to read—and clear them out because we have got something that takes up a lot more room and something I am going to have to read.

It is a whole series of binders which are going to be put up in a couple of boxes that will travel with me to Vermont this weekend.

I look forward to the relative quiet of the recess so I can take advantage of the solitude of my tree farm in Vermont and give this critical written record of Judge Bork's judicial philosophy the careful attention it deserves.

Because what I read there will determine to a great deal how I am going to vote on this nomination. I have heard from hundreds and hundreds of people, not only in Vermont but throughout the country. They have written me letters. They have called me on the telephone. They have come up to me in civic and social events in Vermont to offer their views.

All are deeply concerned about the outcome of this confirmation process. Many express opinions that are extraordinarily thoughtful and thought-provoking, and I appreciate their advice. They have given me much to think about that will help me as my own views take shape in the weeks ahead.

The time we choose new Justices of the Supreme Court is a moment which joins the interests of all three branches of the Government established by the people. It is a moment when the guardianship of the Constitution has to be safely conveyed. It is a moment that explains a great deal about the way the American system of government works.

At this moment in history it seems to me that our system is working exactly the way the authors of the Constitution intended.

Of course, the framers could not imagine life in 1987. They could not imagine all the changes in our life, in our laws, in science, in society. The controversy over the nomination of Robert Bork is no exception.

We all have read about the massive war chests that are being raised by both the proponents and opponents of this nomination. America's mailboxes already are filling with the computer printed copies of the call to arms. The proponents inspire their troops with the battle cry that the success of the Reagan revolution depends on the outcome of this struggle. The opponents rally their forces around a banner pro-

claiming that the fate of decades of expanding constitutional rights and perhaps even those rights themselves hang in the balance.

Well, of course the stakes are high. But I would say to those on one side who say that everything that the President stood for will fall if Judge Bork is not confirmed, and those on the other side who say the Constitution will fall if he is: Wait a minute. Quiet down. Watch the hearings. Listen with the rest of us.

Do what so many of us are going to do during the August recess. Study the record and then rely on the Senate's ability to rise to the occasion.

Of course the stakes are high. This is the most critical Supreme Court nomination in many years. But the Senate's ability to rise to the occasion might be better served by moderating the apocalyptic rhetoric that thus far has played an excessive role in the public debate. As the din of clashing interests reaches an uncomfortable volume, it will get harder and harder to find the space and time for the quiet reflection and searching analysis that is needed if the Senate is to give a responsible answer to the ultimate question: Will it consent to this nomination?

Those clashing interests will be heard. They will be heard in full and fair hearings by the Senate Judiciary Committee. Their advocates will be heard on this Senate floor, where I believe the fate of this nomination ultimately will be decided. But ultimately it will, I hope, be decided on the basis of whether, on all the evidence available to us, the Senate believes that Robert Bork is the right choice for this most important post.

Alexander Hamilton wrote of the constitutional process of advice and consent that "it is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union." As I play my part, as 1 of 100 Senators, in the execution of this plan, I will seek to make a judicious choice. Because the post of Justice of the Supreme Court is one of the most important of the "offices of the Union," my responsibility to the Constitution demands no less.

The PRESIDING OFFICER. The time of the Senator from Vermont has expired. The Chair recognizes the Senator from Pennsylvania.

## STEEL INDUSTRY PENSION PLANS

Mr. HEINZ. Mr. President, I rise to address an issue that only nominally affects a particular industry, but in fact affects practically every industry. I refer to a crisis that we face today with pensions in the steel industry in this country.

As most people know, the industries have recent financial woes and those financial woes have led, in turn, to serious underfunding in some steel pension plans. As a result, that underfunding is now threatening the future of the Pension Benefit Guaranty Corporation, the PBGC, as we refer to it, an authority, an agency that insures all the ERISA sanctioned pension plans in the United States.

As one measure of the threat to the PBGC, the administration has asked us to raise revenues this year in order to save the Pension Benefit Guaranty Corporation from insolvency and perhaps extinction. Since 80 percent, fully 80 percent of that agency's current deficit, and I might add much of its potential future deficit, comes solely from steel pension plans, I believe the best solution is to tackle the steel pension problems head on. As soon as the Senate reconvenes after the recess that we expect next week, I will introduce legislation that will help the steel industry keep its promises to its own retirees and even more importantly, protect the pension benefit guarantees program of benefit guarantees to other industries.

Steel's pension problems are the direct result of the industry's recent financial troubles. Domestic steel producers have been forced to cut production in response to declining demand and a flood of cheap foreign steel. In the last 6 years, steelmaking capacity has been reduced by 27 percent and steel employment has been cut in half. Over 250,000 steel workers have left the industry since 1981, many of them on early retirement. This huge, unanticipated flow of workers into early retirement has dramatically eroded funding in many of the steel pension plans. Today, more than $6.3 billion in steel pension benefits guaranteed by the Pension Benefit Guaranty Corporation [PBGC] are not funded.

This crisis came to a head last year when two of our largest steel producers—LTV and Wheeling-Pitt—filed for bankruptcy and dumped $2.8 billion in unfunded pension liability on the PBGC—tripling—in 1 year—the deficit the PBGC had been accumulating over its previous 12 years. Let me observe that this could be just the beginning for the PBGC. The steel companies that turned to chapter 11 bankruptcy to cut their costs are blazing a trail that other steel companies may be forced to follow. A bankruptcy filing by just one other steel producer would add another $2.5 billion to PBGC's deficit.

Legislation the Congress is now considering may make this problem worse. The administration has asked us to respond to PBGC's problems by raising its employer-paid premiums and tightening minimum funding standards for pensions. While the latter change may help prevent steel's problems from developing in other industries, they could make matters worse in the steel plans. The former—namely, raising premiums and doubling required pension contributions for the steel companies—could easily force the more troubled companies into bankruptcy. Merely exempting the steel plans from these tougher rules will not improve the funding of these plans. In both cases, PBGC would remain at risk, and we could be back next year trying to double the PBGC premium.

We cannot afford to merely scratch our heads over this problem—we need to tackle it head on. The remaining steel companies have to be given a chance to reduce their costs without going through chapter 11. They need to be encouraged to keep the promises they have made to their workers and retirees. And we need to avoid saddling the PBGC with $6 or $7 billion of steel pension liabilities that will be financed by all the other nonsteel employers in the United States.

The legislation I will introduce next month would provide an opportunity for steel companies to refinance their pension liabilities, meet their obligations to retirees, and stay out of chapter 11. In developing this legislation there are five principles that I have followed, and which I believe any reasonable approach to this problem should follow.

First, as I have said, companies that are going to restructure should be able to do so without having to file for bankruptcy. Bankruptcy requires companies to dump the lion's share of their total liabilities and not just reduce their costs enough to become profitable. It is an all or nothing proposition. All the obligations to retirees and creditors are dumped by companies in bankruptcy and none by others. The least efficient and most financially troubled producers are helped first. The most efficient producers then find it getting harder to compete. Assistance to the companies should be related to their costs and not to the aggressiveness of their bankruptcy lawyers.

Second, any solution should give retirees better benefit protection than they now get in chapter 11. I find the huge cutbacks in retiree benefits absolutely the worst result of a reliance on bankruptcy. Right now, retirees are paying most of the cost of a shutdown when companies go into bankruptcy. As little as one-third of steel retirement benefits may actually be insured by the Federal Government. The rest is owed to the retirees as unprotected health or supplemental pension benefits and is totally at risk when companies go into bankruptcy. A final settlement may leave retirees with only 20 cents on every dollar owed them. To the extent the Federal Government plays a role in restructuring, it should

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The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. D'AMATO. Mr. President, I rise to introduce legislation designating the U.S. courthouse in Uniondale, NY, as the "John W. Wydler U.S. Courthouse."

Senator MOYNIHAN joins me in introducing this bill, and asking that it be held at the desk and pass by unanimous consent.

If there was one man responsible for making the courthouse in Uniondale, Long Island a reality, it was Congressman John Wydler.

Mr. President, those of us who knew and loved Jack Wydler received very sad news earlier this week. The Congressman, who retired in 1981 after serving 18 years in the House died on Tuesday.

Senator MOYNIHAN and I seek the passage of this bill today in the hope that the Congressman's surviving family and friends, and the entire Long Island Community, can know by the time of his funeral tomorrow that the courthouse he created will be named after him.

John Wydler served his country with honor and distinction all his life. During World War II he was a sergeant in the Army Air Corps in the China-Burma-India Theater. He was a brilliant student and practitioner of the law, and an extraordinary public servant.

He graduated Phi Beta Kappa from Brown University, and received his law degree from Harvard Law School.

From 1953 to 1959, John Wydler was an assistant U.S. attorney in New York. He was also a member of the New York State commission investigating school construction irregularities.

In 1962, he was elected to the 88th Congress. He became a leading Member of the House, particularly on the Science and Technology Committee.

Truly, there can be no more fitting and appropriate name for us to give the Uniondale Courthouse than that of John W. Wydler, the man who made it possible.

Thank you, Mr. President.

Mr. MOYNIHAN. Mr. President, in these closing moments before adjournment, I wish to pause and ask for the Senate's consideration of a bill Senator D'AMATO and I join together in introducing, namely, legislation honoring John W. Wydler.

On Tuesday past Jack Wydler died suddenly in Washington. A former colleague and fellow New Yorker, Jack served both his State and the Congress with distinction. We have today the opportunity to remember him and remind his friends in Garden City, Long Island of his outstanding service as senior member of the New York Congressional delegation serving 18 years in the U.S. House of Representatives before retiring in 1980. The U.S. courthouse in Uniondale, NY stands ready as a tribute to Jack. I ask that the Senate today adopt this bill designating the U.S. courthouse at Uniondale and Hempstead Avenues, for which Jack was most directly responsible, the "John W. Wydler Courthouse."

The PRESIDING OFFICER. The bill is open to amendment. If there be no amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, was read the third time, and was passed as follows:

S. 1642

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. DESIGNATION OF BUILDING.

The United States Courthouse located at the intersection of Uniondale Avenue and Hempstead Turnpike in Uniondale, New York, shall be known and designated as the "John W. Wydler United States Courthouse".

SEC. 2. LEGAL REFERENCES.

Any reference to such building in any law, map, regulation, document, record, or other paper of the United States shall be deemed to be a reference to the "John W. Wydler United States Courthouse".

Mr. BYRD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. WILSON. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

## RECOGNITION OF THE MINORITY LEADER

The PRESIDING OFFICER. The Republican leader is recognized.

Mr. DOLE. Mr. President, I believe my time has been reserved, is that correct?

The PRESIDING OFFICER. That is correct.

Mr. DOLE. I thank the distinguished Presiding Officer.

## BRINGING THE BORK NOMINATION TO A VOTE

Mr. DOLE. Mr. President, I was pleased to hear yesterday that Senator BIDEN has no intention of bottling the Bork nomination up in committee. But the delay that has already occurred will cause problems.

I will not dwell on the point raised by others—that the Bork nomination will have been delayed in committee longer than any other in the past 25 years—but I will point out that the schedule proposed by Senator BIDEN seems almost certain to cause the Supreme Court to open its term on October 5 with one justice missing.

Under even the best of circumstances, an eight-person Court creates the potential for great confusion in the law. A tie vote on a matter of enough importance to merit the Supreme Court's attention is never satisfactory.

More significantly, however, the delay here will force the Court to proceed short-handed at perhaps the most critical point in its term. On the first Monday in October, the Court announces its decisions, reached the week before, on hundreds of cases that "ripened" over the summer. Last year, for example, the Court opened its term on October 6 by disposing of 941 separate cases. Most of these decisions involved the crucial question of whether the Court was going to hear the cases at all.

In addition, the Court will immediately begin to hear argument, and decide some of the term's most important cases. Among the issues the Court will face during the first 2 weeks of its term are the constitutionality of New Jersey's "moment of silence;" the applicability of the first amendment to school newspapers; the scope of the "government contractor's" defense to tort liability; and the permissibility of denying entry visas to members of the Communist Party.

Under even the most optimistic projections, the Supreme Court will now have to confront those issues shorthanded.

Adding to this problem is, of course, the prospect of a filibuster. I have heard some talk that Judge Bork's opponents will try to postpone an "up-or-down" vote on the nomination indefinitely. I certainly hope that talk is wrong.

Since the adoption of the closure rule in 1917, there has been only one successful filibuster of a Supreme Court nominee. That, of course, was the nomination of Abe Fortas to be Chief Justice in 1968, a precedent that has been thrown up frequently by Judge Bork's opponents as justifying, in their minds, just about anything.

The Fortas filibuster did not, however, leave the Court short handed. Chief Justice Earl Warren submitted his resignation to President Johnson "effective at your pleasure," and remained on the Court throughout the debate over Justice Fortas' elevation. Indeed, Chief Justice Warren did not actually retire from the Court until June 23, 1969, well into the Nixon administration.

Here, unlike the Fortas case, we are faced with the prospect of an eight-Justice Court unless, and until, this body decides upon the Bork nomination. This should be reason alone to complete debate promptly, and to vote yea or nay on the nomination itself.

In other words, after considerable debate, lengthy debate, whatever,

there ought to be an up-or-down vote. Just as I recall there was an up-or-down vote in the Haynsworth nomination and Haynsworth was rejected. To my mind that was a mistake. Just as there was an up-or-down vote on the Carswell nomination several years ago. I voted for the confirmation of that nominee. I think in that case I was mistaken. But in any event, there ought to be an up-or-down vote.

In the period before this body had a cloture rule, there were cases where the Senate simply refused to act on a Supreme Court nomination. During the Presidency of John Tyler, five nominations were submitted to this body between January 1844 and February 1845; one was rejected, one was postponed, two were withdrawn, and one was simply not acted upon.

President Millard Fillmore had a similar experience in 1852-53, when one nomination was postponed and two were not acted upon.

The Senate refused to act on one nomination of President Andrew Johnson; it rejected one of President Grant's; and he withdrew two others. President Rutherford B. Hayes had one nomination that was not acted upon.

What the country expects, however, is not that the Senate will emulate these sorry 19th-century squabbles, but rather that we will live up to our responsibility under the Constitution to consider and vote upon the President's nomination to bring the Supreme Court up to full strength.

I propose that we prepare ourselves to do this with dispatch once the nomination emerges from Senator BIDEN's committee. In my opinion, the American people will not tolerate a filibuster that leaves the Court short handed and justice ill served.

Mr. President, I reserve the balance of my time.

Mr. BYRD. 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. 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.

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## ORDER OF PROCEDURE

Mr. BYRD. Mr. President, I ask unanimous consent that there be a 2-minute time limitation on the resolution which I send to the desk; and the distinguished Republican leader is here with me.

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

## ESTABLISHMENT OF A SENATE CENTRAL AMERICAN NEGOTIATIONS OBSERVER

Mr. BYRD. Mr. President, I ask that the Senate proceed to the immediate consideration of a resolution, which I now send to the desk on behalf of myself and Senator DOLE.

The PRESIDING OFFICER. The clerk will report the resolution.

The legislative clerk read as follows:

A resolution (S. Res. 273) to establish a Senate Central American negotiations observer group.

Without objection, the Senate proceeded to consider the resolution.

Mr. BYRD. Mr. President, this resolution is based largely on the observer group resolution that we passed some several months ago dealing with the Geneva negotiations. It would be bipartisan, be equally staffed, and would be made up of three Members on each side for the Senate.

This would provide the funding necessary.

The PRESIDING OFFICER. Is there further debate on the resolution?

Mr. DOLE. Mr. President, I would only say this. This is a matter that in my view involves the two leaders. I want to commend the distinguished majority leader. It was his idea. I think it is a very good one, and I am prepared to act on the resolution.

The PRESIDING OFFICER. Is all time yielded back?

Mr. BYRD. I yield back any time I may have.

The PRESIDING OFFICER. There being no further debate, the question is on agreeing to the resolution.

The resolution (S. Res 273) was agreed to, as follows:

S. RES. 273

Resolved,

SHORT TITLE

SECTION 1. This resolution may be referred to as the "Central American Negotiations Observer Group Resolution".

ESTABLISHMENT

SEC. 2. (a) There is established a bipartisan group of Senators to be known as the Senate Central American Negotiations Observer Group (hereafter in this resolution referred to as the "Observer Group"), which shall consist of eight Senators as follows:

(1) the Majority Leader and Minority Leader of the Senate, each serving ex officio; and

(2) six Senators appointed by the President pro tempore of the Senate as follows:

(A) Three Senators appointed upon the written recommendation of the Majority Leader from among Members of the majority party.

(B) Three Senators appointed upon the written recommendation of the Minority Leader from among the Members of the minority party.

(b)(1) The Chairman of the Observer Group shall be designated by the Majority Leader from among the individuals recommended for appointment under subsection (a)(2)(A).

(2) The Co-Chairman of the Observer Group shall be designated by the Minority Leader from among the individuals recommended for appointment under subsection (a)(2)(B).

(c) Any vacancy occurring in the membership of the Observer Group shall be filled in the same manner in which the original appointment was made.

DUTIES

SEC. 3. The duty of the Observer Group shall be to act as a group of official observers as part of the United States delegation to any and all negotiations with the governments of the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua to which the United States is a party and to any multilateral negotiations or discussions dealing with the question of peace in Central America to which the governments of such countries are invited to participate.

STAFF; TRAVEL

SEC. 4. (a) The Observer Group is authorized, from funds made available under section 6, to employ such staff (including consultants at a daily rate of pay) in the manner and at a rate not to exceed that allowed for employees of a standing committee of the Senate under paragraph (3) of section 105(e) of the Legislative Branch Appropriation Act, 1968 (2 U.S.C. 61-1(e)), and to incur such expenses as may be necessary or appropriate to carry out its duties and functions.

(b) The Chairman and Co-Chairman shall jointly appoint appropriate staff personnel to serve the Observer Group, including clerical staff as deemed necessary. The staff appointments shall be made in writing to the Secretary of the Senate.

(c) The Majority Leader and the Minority Leader may each designate one staff member as liaison to serve the Observer Group, and such personnel may be referred to as leadership staff. Funds necessary to compensate leadership staff shall be transferred from the funds made available under section 6(b) of this resolution to the respective account from which such designated staff member is paid.

(d) All foreign travel of the Observer Group shall be authorized solely by the Majority and Minority Leaders, upon the recommendation of both the Chairman and Co-Chairman. Participation by staff members in authorized foreign travel by the Observer Group, access to all official activities and functions by the Observer Group during such travel, and access to all classified briefings and information made available to the Observer Group during such travel, shall be limited exclusively to delegation members with appropriate clearances. No travel or other funding shall be authorized hy any committee of the Senate for the use of staff, other than delegation staff, in regard to the activities described in this subsection, without the written authorization of the Majority and the Minority Leader to the chairman of such committee.

(e) Of the Members of the Senate, only Senators appointed as members of the Observer Group may participate in official travel and activities of the Observer Group. In the event that either the Majority Leader or the Minority Leader does not travel on an official trip of the Observer Group, he may designate one other Senator not a member of the Group to travel and participate in the activities of the Observer Group in his stead.

ACCESS TO AND STORAGE OF DOCUMENTS

SEC. 5. (a) The Observer Group should make arrangements with the Executive Branch to provide, on a confidential basis, access to the record of any dialogue or negotiations that may take place relating to peace in Central America.

(b) Classified and other sensitive materials associated with this Observer Group shall be stored under the administration of the Secretary of the Senate in the Office of Senate Security.

FUNDS

SEC. 6. (a) Such sums as are necessary from the contingent fund of the Senate, out of the Account of Miscellaneous Items, shall be made available to pay the expenses of the Observer Group, upon vouchers approved jointly by the Chairman and Co-Chairman (except that vouchers shall not be required for the disbursement of salaries of employees who are paid at an annual rate).

(b) In addition, such sums as are necessary from the contingent fund of the Senate, out of the Account of Miscellaneous Items, shall be made available for the salaries and expenses of leadership staff designated in section 4(c) (except for expenses incurred for foreign travel).

(c)(1) Such sums as are necessary may be expended by the Observer Group, with the prior approval of the Committee on Rules and Administration, to procure the temporary services (not in excess of one year) or intermittent services, including related and necessary expenses, of individual consultants, or organizations thereof, to make studies or advise the Observer Group.

(2) Such services in the cases of individuals or organization may be procured by contract as independent contractors or, in the case of individuals, by employment at daily rates of compensation not in excess of the per diem equivalent to the highest gross rate of compensation which may be paid to a regular employee of a standing committee of the Senate. Such contracts shall not be subject to the provisions of section 3709 of the Revised Statutes (41 U.S.C. 5) or any other provisions of law requiring advertising.

(3) The Observer Group shall submit to the Committee on Rules and Administration information bearing on the qualifications of each consultant whose services are procured pursuant to this subsection, including organizations, and such information shall be retained by the Observer Group and shall be made available for public inspection upon request.

Mr. BYRD. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. DOLE. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BYRD. I thank the distinguished Republican leader.

This will allow both parties in the Senate to have the advice and counsel of independent observers, made up from Members of the two parties; observers who will give us their independent analysis based on their observations. They will not be expected, of course, to negotiate. But they will be observers and the two leaders and two parties will expect to be advised by independent observers as to the good faith of the negotiations and as to the state of play, and the success, and the progress of the negotiations.

I think our experience under the Geneva-observer approach has been a good experience and the administration has been laudatory of their efforts.

Secretary of State Shultz has been commendatory of the efforts of our observers. Senator STEVENS, Senator NUNN, Senator PELL, the other Senators on both sides have been very diligent and devoted to their work and have, I think, been most helpful. Not only to Senators on both sides in having an understanding of what is going on over there but also have been helpful to our negotiators.

Mr. DOLE. Mr. President, if the majority leader will yield?

Mr. BYRD. Yes; I yield.

Mr. DOLE. It is also consistent with what I believe is certainly an appropriate bipartisan effort on the so-called peace initiative; the effort to see if there is not some way to negotiate a settlement, not just in Nicaragua but all of the countries in Central America. I think it is timely and the majority leader will recall he did raise it to the President and Secretary of State. I think Secretary Shultz, who had probably some reservations early on about observers in Geneva, has come to recognize it has been very productive and very helpful to, not only his efforts, but the efforts of the administration.

Mr. BYRD. Yes; that was my observation, Mr. President.

In this resolution as in that resolution the two leaders will be ex officio members and in the event either leader cannot attend a meeting then that leader is authorized by the resolution to appoint a Senator to go in his, the leader's, stead.

That would be the only authority given, however, to substitute Senators for those that are identified in the resolution.

Mr. President, I have not utilized my time under the standing order. It was reserved for me. I yield to the Senator from Ohio.

The PRESIDING OFFICER (Mr. BREAUX). The Senator from Ohio is recognized.

## THE BORK NOMINATION

Mr. METZENBAUM. Mr. President, I rise today to follow some of those speaking about the Department of Defense authorization bill and the inability to bring it to the floor. But that is not the only measure we cannot move on in the Senate—campaign election reform is not moving, Grove City is not moving, reauthorization of the independent counsel statute is not moving, State Department authorization is not moving, catastrophic health care legislation is not moving, two Persian Gulf resolutions are not moving. For some reason that I cannot quite define, our colleagues on the opposite side of the aisle are not prepared to permit the majority to move on these other important pieces of legislation as well.

Let me say that I do not rise to make a major issue of that fact but, rather, to mention it in conjunction with the comments which have been made on the pace of the Bork nomination.

There has been a considerable amount of discussion about whether we are moving rapidly enough with respect to the Bork nomination.

Some argue we are moving too slowly. Frankly, I find that rather absurd. This is the most important nomination that this body will deal with this session, maybe many sessions before or after. It will have an impact upon our children and our grandchildren. It could literally change the course of the Constitution's interpretation for years to come.

So when some say we are really moving too slowly, let me say that I think just the opposite may be true. We need time to dig into the facts, the background, the history, the statements of this nominee. He has spoken at great length on many important, constitutional issues; he has been a prolific writer; he was involved in the Saturday Night Massacre. He has not been one to hold his tongue, and I do not criticize him for that. But those of us who sit on the committee which must pass judgment on this nomination have a tremendous responsibility to review Judge Bork's voluminous record with fairness and with care. And, frankly, that takes time.

As a matter of fact this Senator has actually taken issue with the chairman of our committee on when the committee hearings would begin. I wanted the hearings to start 1 day later, but, no, the chairman had given a commitment to the ranking minority member to begin on a particular day and said he felt obliged to keep that commitment regardless of what inconvenience it might cause some of us who are on the committee.

Then I wanted to avoid a hearing on a Monday when the Senate would not be in session. But, no, the chairman said, "I am not willing to do that either."

This Senator thinks that there is sort of a push, a drive, a determination that I see with respect to the Bork nomination, that I do not see with respect to passing legislation here on the floor of the Senate. The people who are talking about moving the Bork nomination are the very same people who are not permitting the legislative calendar to move forward rapidly enough.

With respect to the Bork nomination, history shows us that there were many cases where the Court has had

less than full membership for several months or longer.

Some express a concern that he may not be on the Court on the first day of the fall term. I consider that concern to be rather inconsequential in light of the complexity and importance of the confirmation process in this particular instance.

Another false issue is that the Senate cannot take the nominee's views on the Constitution into account, that we cannot take into account what he has said, what he has written, about the Constitution.

I find it rather unbelievable that the President would make such an argument. His own chief of staff, Howard Baker, argued just the opposite when he was a Member of this body and opposed the nomination of Abe Fortas to be Chief Justice. When the present White House chief of staff was in the Senate, and a well-respected Member of this body, he said, regarding the Fortas nomination:

If the Senate believes, for whatever reason, that it is not desirable that the appointments be confirmed, then it has the constitutional responsibility to reject them. For the Senate to do otherwise would be an abdication of its constitutional responsibility to advise and consent, a responsibility that was intended to be real and not nominal.

I agree with what Senator Baker said at that time, and I would hope he would make that same speech to the President of the United States so that the President may acknowledge the responsibilities of those of us in the Senate in connection with the Bork nomination.

It is obvious that Judge Bork was picked for his views. That is the President's right. But the President's argument that the Senate is playing politics if it then considers those views is the pot calling the kettle black. It is also, I might say, a misreading of the Senate's constitutional role and history with respect to Supreme Court nominations.

The framers intended that the Members of the Senate have a full role in judicial appointments. As a matter of fact, one draft of the Constitution provided that the Senate alone would have the power to appoint judges.

The final provision was a compromise dictating that the President and the Senate should share this power equally.

Many distinguished Senators on the other side of the aisle, including the very distinguished ranking Republican member of the Judiciary Committee, have in the past recognized that the Senate can and must consider the views of the appointee. My good friend Senator THURMOND said, in setting out his reasons for opposing Abe Fortas' nomination:

It is my contention that the power of the Senate to advise and consent to this appointment should be exercised fully * * *.

To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer and a man of good character is to hold a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent have prescribed.

Senator THURMOND was correct when he said that then; those views are equally correct today.

It is important to make clear that the issue is not disagreement on Judge Bork's personal philosophy or on policy questions. The issue is how Judge Bork approaches the Constitution, how he interprets the Bill of Rights.

What would Americans think if the Senate totally ignored how a prospective Supreme Court Justice felt about the Bill of Rights, or about the 14th amendment?

Frankly, I am prepared to say that I have not taken a final position on this nomination. But I find some of Judge Bork's views, statements, and decisions deeply troubling.

For instance, how does Judge Bork stand on the right of privacy? From what he has said, he appears to reject any constitutional right to privacy.

He has criticized Supreme Court decisions recognizing the right to privacy as unconstitutional.

He was recently asked by Time magazine if he found a right to privacy anywhere in the Constitution. His unequivocal reply was, "I do not."

Do these views mean he would allow the Government unlimited power to regulate the most private aspects of our personal and family lives, aspects that do not harm and are of no legitimate interest to anyone else?

Judge Bork also has expressed a very narrow view of protected speech. At one point, he said "only explicitly political speech is protected."

Does that mean literature unrelated to politics or government is unprotected? That James Joyce's "Ulysses" is unprotected?

That Hemingway's novels are unprotected? That Melville's "Moby Dick" is unprotected? What about paintings? What about poetry? Where does Judge Bork stand on whether these very important forms of speech are protected by the first amendment?

I am also concerned with Judge Bork's views on protection of minorities. At one time or another, he has opposed public accommodation laws. He has objected to a court decision striking down a poll tax. He has criticized the Supreme Court decision guaranteeing one man, one vote. He has even objected to decisions upholding the Voting Rights Act.

And what about the very much talked about area of original intent? This concept is frequently tossed around by those who advocate judicial restraint. But what does it mean?

Does it mean that your own constitutional views are consistent with those of the framers, but views of your opponents are not? Is it a principled theory of constitutional jurisprudence, or is it an expedient device for interpreting the Constitution the way you want to interpret it to maximize the power of the majority and minimize the freedon of the individual?

Does Judge Bork really believe we can go back 200 years and look into the heads of the framers of the Constitution and determine precisely how they would have expected their views to apply to the problems of today's living? Is that really what original intent is all about?

Unfortunately original intent often seems to be used as a smokescreen for political and ideological agendas. When used in that way, it sheds more heat than light on the issue; it becomes a convenient tool for attacking any decisions you do not like. Those who use original intent to attack a decision they do not like say, well, the framers would not have thought about that, they would not have liked that; therefore, the decision is inconsistent with their intent; therefore the decision is unconstitutional.

Come now. Can anyone really make that claim?

Judge Bork claims he is faithful to original intent; but in the case of statutory interpretation, his statements often directly contradict the intent of Congress. Is the original intent of Congress not important or relevant to him?

In the field of antitrust, Judge Bork provides one of the clearest examples. He says the antitrust laws are only concerned with economic efficiency, not with transfer of wealth from consumers to monopolists or price fixers.

No one can read the legislative history of those laws and come fairly to that conclusion.

Our antitrust laws are stated in very general terms in the statute, and the Supreme Court has had the principal role in interpreting them. Would a Judge Bork, as Justice Bork, reinterpret the antitrust laws in a way that the Congress which passed them would not recognize? Would he reinterpret them in a way that would do great harm to consumers and to our economy?

We also have to look at Judge Bork's conduct in connection with the "Saturday night massacre." Why would the Attorney General and the Deputy Attorney General refuse to fire Special Prosector Archibald Cox, but Mr. Bork would agree to do the job?

Judge Bork says he made no promise not to fire Cox and that he was holding the Department of Justice together to prevent massive resignations; but the fact is that the Court found his firing of Archibald Cox to be illegal. It is troubling that he was willing to

ignore the law when the President asked him to.

Finally, I want to ask today, what are the real views of the nominee? Frankly, I find some shifting of those views, and that is disturbing to me. The record shows that at one time, he holds one controversial view and later, he recants, or softens, or fails to take responsibility for that view. Everyone is entitled to change his mind, but there is still a legitimate question as to why one does so.

In 1983, Judge Bork wrote an article opposing the Public Accommodations Act. He found the principle that Congress could require hotels and restaurants to serve blacks to be one of "unsurpassed ugliness"—unsurpassed ugliness. He recanted that view when he was up for confirmation to be Solicitor General in 1973. He said then he no longer agreed with his prior view.

He wrote in 1971 that the first amendment "does not cover scientific, educational, commercial, or literary expressions * * *. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection". But when he came up for appointment to be Solicitor General and later to the court of appeals in 1982, he failed to take responsibility for this statement. Judge Bork said that at the time he was merely "engaged in academic exercise," in "theoretical argument, which I think is what professors are expected to do."

Now, on the eve of Senate consideration of him for Supreme Court, Judge Bork, viewed as one of the most conservative jurists in America, says, "I don't consider myself to be a conservative." And the administration, which is behind him would try to package him as a centrist.

Is this an honest evolution of Judge Bork's views, or is it merely a convenient way for him to accommodate to the times to the Senate confirmation process?

I hope that the real Robert Bork will stand up before the Senate and tell us who he is, what he is, what he has said, then, each of us in this body will be able to decide whether or not his views comport with what we think are the proper views of a nominee to the Supreme Court of the United States.

In the final analysis, each of us is guided by our conscience, by what is best for the country, by our own conception of the Constitution. Each of us owes the people of this country an independent decision on the suitability of Judge Bork for the Supreme Court. I want to know how he views the Constitution's guarantee of liberty and equality for all Americans.

And I want to know how he views the Court's traditional role in preserving those guarantees for all the people of America.

I look forward to exploring these questions at the hearings and to an independent decision by the Senate on this important, potentially historic, nomination.

Mr. President, I want to publicly express my appreciation to the majority leader for according me sufficient time to conclude my remarks.

Mr. BYRD. I thank the Senator.

## SENATE SCHEDULE

Mr. BYRD. Mr. President, I have been listening to what has been said during the period for morning business, which has lasted now almost 4 hours. I have listened with regard to the statements anent the Department of Justice authorization bill and the remarks concerning the Bork nomination.

### THE BORK NOMINATION

With respect to the Bork nomination, I stand in the same place and in the same mood and I am of the same opinion, still, as I was when I last spoke briefly on that subject.

I have not made any determination one way or the other as to how I will vote on the Bork nomination. I will take my time and I will carefully, very carefully, study this nomination: the Bork rulings, opinions, and statements; the correspondence from my constituents—mail, telegrams, phone calls; personal contacts. I am going to give this nomination fair, careful, and due consideration. Between myself and God, I do not know at this moment how I will vote.

So the early polls and the early nose-counts, while they are to be expected—and I can see nothing wrong with that—should put me down as a question mark as one Senator; because within my own mind, my own conscience, and my own heart, I am a question mark at this point.

I think that the ultimate question, in my judgment, is going to be is he good or bad for America? Is he good or bad for our constitutional system of tripartite Government? Is he good or bad for our system of checks and balances? What is his view as to stare decisis? What is his view as to the role the Supreme Court should play? Should the Court be a traveling constitutional convention? Should it be a lawmaking body? Or should it only interpret the laws and the Constitution, the laws to be written by the Congress of the United States? How does he view the proper role of the Court to be?

So there are various questions I will want to resolve. I want to hear him answer as to where he stands on these questions.

Now, as to the timing, let me say that if I understood the distinguished chairman of the Judiciary Committee correctly, the hearings are to begin on September 15, and I believe that the chairman, Mr. BIDEN, has also indicated that his target is to vote in committee by October 1. I have heard both sides and some complaints from both sides of the question. Some say that is too soon, some say that is too slow.

Mr. President, I do not think that is too much of a delay, nor do I think it is speeding up too much. It seems to me that is about right, considering all the circumstances. The nomination was sent up to Congress 1 month ago today, as I understand it, on July 7.

We have an August break that is supposed to begin at the conclusion of business today, and that will depend upon what progress the conferees make and continue to make on the debt limit extension.

This August break is by law. It can be repealed and waived by law, of course.

The chairman has scheduled the Bork hearings to start on September 15, and this means that when the Senate returns on Wednesday, the 9th, the hearings will begin the following Tuesday, September 15.

Mr. President, in light of all the circumstances, that is not an inordinate delay.

I would suggest that those Senators who are most interested in expediting the work on the nomination should also be interested in expediting the work of the Senate on legislation. There are some very major pieces of legislation that yet have to be disposed of, and I have iterated and reiterated a litany of legislation, time and time again, as to what those pieces of business are.

The Department of Defense authorization is still going to have to be disposed of. I have no intention of calling up the DOD appropriation bill until the DOD authorization bill is disposed of.

The campaign financing reform bill is a very important piece of legislation. It goes to the heart of this institution, the legislative branch of Government. It goes to the heart of faith in the legislative branch. It is important, and we are going to have some more cloture votes on that.

The reconciliation measure is something that cannot be avoided.

I am going to make an effort to call up the Grove City legislation.

Mr. President, we also have 13 appropriation bills. There are eight appropriation bills that have come over from the House of Representatives already. We all know that, customarily, appropriation bills originate in the House—not by the Constitution but by custom. I note, in looking at the calendar, that actually nine appropriation bills have now come over from the House—one, the Labor-HHS-Education appropriation bill, having been received in the Senate only yesterday.

So there are nine appropriations bills already here, and hearings have been conducted in the Senate subcommittees on these. But it will take a little time for them to be marked up in committee and reported out to the floor.

We will have a busy time down the road in dealing with these several appropriations bills.

It is my intention and hope that the Senate can indeed send to the President's desk these bills rather than send to his desk one mammoth continuing resolution.

So, we have these and many other important pieces of legislation, including catastrophic illness.

Therefore, those who wish to expedite action on the Bork nomination should help the leadership to expedite action on these bills.

Now, the House has no part in the Bork nomination. That is a matter for the Senate only under the Constitution. The role of advice and consent is given by the Constitution only to this House, the Senate, and it seems to me the logical approach should be that we dispose of the legislation as much as we can before we go to the Bork nomination because legislation when disposed of here in so many instances has to go back to the House, there have to be conferences thereon, and the House has to stay around to dispose of that legislation.

Now, it would be, I think, not very reasonable to come back here and, before we dispose of these major pieces of legislation, we start to debate the Bork nomination. That may take quite a while. I hear that there may be a filibuster and I see nose counts around as to cloture votes, and all that. I am not signing on either way on that yet.

But what I am saying is, it does not seem to be a very reasonable approach to have that nomination come up and take 2 or 3 weeks of the Senate's time, while we delay legislation on which the House has a role under the Constitution. The House has no role in the advice and consent process.

So it is important that we dispose of the legislation first as much as we can do so.

I urge Senators to help the leadership to move the legislation forward. Let us clear the decks so that when we get to the Bork nomination we can have a debate that is meaningful, that is informative, informative not only to the people but also to ourselves as to the qualifications of this nominee and as to the merits or demerits of confirmation of the nominee.

I implore those who have their feet in cement and who are stiff-jawed about the DOD authorization bill, campaign finance reform, catastrophic illness, and other measures, to let the Senate get on with debate and action on these measures. Let us clear the decks and then we can have the kind of debate that the country should observe and that the Senate is entitled to engage in on the Bork nomination.

I do not think calumny should be heaped on the chairman of the Judiciary Committee, Mr. BIDEN, by those who maintain that there is an inordinant delay here and that it is a calculated delay.

It seems to me, as I say, the Judiciary chairman has moved about right. He is not going too fast and he is not going too slow. At the rate we are getting legislation passed here—I am talking about the major legislation—at the slow pace we are seeing on major legislation that has to be disposed of before we go out sine die this year, if the slow pace continues, the Bork nomination is going to be delayed. Once the committee reports it out, if the committee votes on October 1 and reports that out, the Senate is not going to be ready for it. Why? Because the Senate will not have disposed of the measures I have been talking about one way or the other: The DOD authorization bill; let us get it up. Those who have amendments, offer them. Campaign financing reform bill; let us get cloture on it. Let us get it up. Those who have amendments, offer them.

This delay strategy, in holding back these bills, is pushing them back, back, back into September and then October.

The House is going to see no reason why it should stay around here while the Senate debates the Bork nomination.

I urge, I implore, I beseech, I importune Senators who are holding back and who will not let the Senate work its will on these measures to let the Senate go ahead with these measures so that the Senate, indeed, will be ready at a reasonably early time to take up the Bork nomination and have the kind of debate that it is entitled to.

I want to see this Senate, the full Senate, make the decision on Mr. Bork. Mr. Bork is entitled to a decision by the full Senate, and if anyone is under the impression that there is a strategy here of delaying this nomination and pushing it over into the next year, there is no such plan, and would have no appeal to this Senator whatsoever. It is entirely alien to my thinking. This Senate in this session should debate and dispose of that nomination one way or the other.

I compliment the chairman, Senator BIDEN. Those who would criticize him should stop and think. I hope they will read my remarks and weigh them. I feel that my remarks represent a reasonable even-handed approach both to the legislation and to the nomination.

And I hope that those who continue to delay will come to their senses, sober up a little bit, and come to an understanding that the thing that may delay the Bork nomination is the very action that they themselves now may be engaging in by delaying action on legislation, delaying action on DOD, delaying action on the catastrophic illness bill, delaying action on the campaign financing reform bill, on prompt payment legislation, and on the State Department legislation.

I hope that, Mr. President, my remarks will be interpreted as positive and helpful on all sides.

Mr. President, what is the situation now as to morning business?

## CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER (Mr. GRAHAM). The time for morning business has expired.

Mr. BYRD. Mr. President, I believe I have the leader's time reserved to me; do I not?

The PRESIDING OFFICER. The leader has reserved his time.

Mr. BYRD. Mr. President, I thank the Chair. I now claim that time.

## ARMS TO THE AYATOLLAH

Mr. BYRD. Mr. President, the select committee investigating the Iran-Contra affair has now completed 3 months of public hearings, during which the committee acquitted itself in a distinguished manner. These historic hearings refreshed our country's tradition of open Government and demonstrated that the best way to get to the bottom of controversial activities is to air the facts fully, dispassionately, and carefully—and to let the chips fall where they may.

As the closing statements of the distinguished Senators on the panel indicated, the story which unfolded under the rigorous prodding and hard work of the committee, is a disappointing one, a disturbing one, a disquieting one. It is a story of arrogance, contempt for the law, disdain for the functions and structure of our Government, and of circumvention of the checks and balances which are the tried and true test of our constitutional system.

From the outset it was clear from the testimony of General Secord, and particularly the testimony of the operational figures who pursued the arming of the Ayatollah, that the principal strategy of these men was to avoid informing the Congress.

It is clear to me that laws were circumvented and loopholes vigorously pursued. It is not possible to legislate integrity, good faith, comity, among the branches of Government. It is not possible to legislate high character. No one can write mutual trust into a statute. Trust has to be earned through integrity.

James McKay is investigating Meese's ties to Wedtech Corp., a New York defense contractor under criminal investigations by state and federal authorities. And just last week, the director of the government ethics office said flatly that Meese broke the law when he failed to get ethics office approval to invest $60,000 in a limited blind partnership, a partnership set up by a former director of Wedtech. Some of the money might have been invested in Wedtech.

It's appalling that the nation's top law enforcement official should allow himself to fall into such difficulty. But it's not the first time for Edwin Meese. It took him 13 months to win Senate confirmation as attorney general, the longest of any Cabinet nominee in U.S. history. There were political problems, mainly from Meese's role as point man for President Reagan's early attempts to dismantle civil-rights legislation. But of greater concern was Meese's ethical standards and his fitness for office.

The confirmation process included a five-month investigation by an independent counsel into Meese's background: his giving government jobs to at least five people who loaned him large amounts of money; his failure to report some personal loans, including one from a company that got special treatment from the administration; his knowledge of the theft of papers from then-President Carter so that candidate Reagan could prepare for a televised debate.

The investigation found many ethical lapses, and records so tangled that the full truth could not be found. But it listed "no basis" for criminal prosecution—hardly a resounding vote of confidence for an attorney general candidate.

Meese's standard at the time was that if an action was not illegal, then it was ethical. That apparently is the standard adopted by the Reagan administration, which explains its current troubles in public trust and its ongoing ethical problems.

Meese said after his 1985 confirmation that the process had given him "a much higher level of sensitivity" to even the "appearance" of impropriety. It's now obvious that that "sensitivity" remains unchanged. A U.S. attorney general should have a higher notion of public service.

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[From the Toledo Blade, July 13, 1987]

THE INCREDIBLE MR. MEESE

Attorney General Edwin Meese is something else. Any public servant with even a modicum of a sense of propriety would have long since resigned a position of trust in the U.S. Government. But here he is, involved in three current special investigations into possible wrongdoing, still holding grimly onto office, and offering whatever excuse comes to mind to fend off criticism.

It defies credulity, in fact, that Mr. Meese has the gall to criticize the Office of Government Ethics for not reminding him that he was violating federal law. That was his defense when the OGE disclosed that the attorney general and his wife had made more than $35,000 in ultra-fast profits on an investment of between $50,000 and $60,000 in a so-called blind partnership.

The law says that government officials must make annual financial statements as to income from a trust or other financial arrangements unless they have entered into a "blind trust," which requires the approval of the office. Mr. Meese did not seek OGE approval of his partnership.

In attempting to answer the accusations, Mr. Meese maintained that he had complied fully with federal laws and accused the office of having violated federal law itself by failing to notify him that he had not made the proper disclosures as required. In other words, the OGE had neglected to tell the attorney general—the leading figure of justice in the United States—of his own shortcomings in disclosing income information.

It was left to Fred Wertheimer, president of Common Cause, to pin the tail on the donkey. "It is unbelievable," he commented, "that the attorney general of the United States should be claiming that this is the fault of the OGE when the statute makes it absolutely clear to him what he has to do to comply with the law." Just so.

In fairness to the American voters who put the Reagan administration into office and kept it there, Mr. Meese should tender his resignation forthwith. He will not do that, of course, because he is constitutionally incapable of that sort of gesture and President Reagan has made it clear that he will not force the issue. The chances are excellent that Mr. Meese will stay in office until the bitter end next year.

In the meantime, however, all investigations involving the attorney general—his role in the Iran-contra affair, his financial shortcomings, his possible role in a scam involving a defense contractor called Wedtech—should proceed full steam ahead. The law applies to everyone, especially the man in charge of the Justice Department of the United States.●

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## INFORMED CONSENT: IOWA

● Mr. HUMPHREY. Mr. President, the letter which I submit today to be printed in the RECORD is from a concerned woman in Iowa. Her testimony of the need for informed consent before abortions are performed constitutes another of the hundreds of pleas which this alphabetical series of informed consent letters is intended to bring before the Senate. These women share scars left by abortion and seek to prevent other women from suffering the same fate.

I urge my colleagues to support mandatory informed consent before abortions are performed. This is the best way to ensure that women will make intelligent choices with regard to abortion.

I ask that this letter from a woman in Iowa be inserted in the RECORD.

The letter follows:

STONY CITY, IA,
*March 4, 1987.*

DEAR SENATOR HUMPHREY: Since the age of 12 I used various forms of birth control made available through the local Planned Parenthood Clinic. For several years, I used "the pill," without my parents knowledge or consent. However, I was immature about sex and contraception as most young teenagers, and I didn't take the pills on any kind of consistent schedule. The liberal theme of the day was "carefree sex", and that irresponsible attitude carried over into my irregular use of contraceptives.

I inevitably became pregnant in my senior year when I was 17. I have the father narrowed down to one of two men. I didn't care for either of them, and never consider marriage an option.

Because of the atmosphere generated by Planned Parenthood concerning pregnancy and abortion, I never once gave thought to carrying the pregnancy full term for the purpose of raising a child or putting it up for adoption. Actually, I never thought of myself as "with child," it was more like I goofed and was in need of an extreme measure of birth control.

Planned Parenthood was there to arm us during the sexual revolution, bandage us up if we got hit, and then push us right out into the front lines again.

I remember that day when I entered the clinic building. I took the pregnancy test, waited 20 minutes and was informed it was positive. The counselor asked me "Do you want a baby?" "No" I replied. Her next statement was a referral to the county hospital for an abortion. There was no "counseling." No alternative or choice was brought up.

Today, I am finally at peace with myself and the world concerning my abortion. I now know the Lord and all His mercy and forgiveness. I also know that my 13 year old nameless, faceless, fatherless child is in heaven with the Lord and Savior.

It wasn't until I became involved with conservatives and Christians that I became aware of the other side of the abortion issue. Being out there involved with sex, drugs and rock 'n' roll I never came across any material or information contrary to the pro-abortion stand. What little pro-life activity there was, was very subtle.

I now have three beautiful children. My worry is that in their attendance of public school-based clinics. It is hard for a parent to tell their child not to believe, what the schools they themselves are sending them to, are teaching.

As I see it, we have two things going for us. First, it's been more than a decade since *Roe vs. Wade* and knowledge and statistics we've gained since sex ed. was started, proves that it's only done more damage than good. Teen pregnancies are up, abortions up and gaining momentum.

The second and most important thing we have for us is that God is still on the throne and prayer changes things.

TERESA FOWLER MEESTER.●

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## THE JUDICIAL RECORD OF JUDGE ROBERT H. BORK

● Mr. CRANSTON. Mr. President, yesterday the Public Citizen Litigation Group released a 150-page report, "The Judicial Record of Judge Robert H. Bork." This report is based upon a review and analysis of more than 400 reported cases in which Judge Bork participated as a member of the U.S. Court of Appeals for the District of Columbia Circuit. The report focuses upon the 144 opinions he wrote and the 56 split decisions in which he participated in.

Mr. President, this detailed examination of Judge Bork's actual decisions reveals some fascinating data. I ask that a summary of this report be printed in the RECORD at the conclusion of my remarks.

This analysis concluded that Judge Bork's votes cannot be explained by the consistent application of judicial restraint or any other judicial philosophy.

Rather, Mr. President, it appeared that Judge Bork's vote could be predicted with almost 100 percent certainty simply by identifying the parties to the lawsuit.

The report found that Judge Bork voted against workers, individuals, and public-interest organizations, and in favor of the executive branch, in 26 out of 28 administrative law and constitutional split decisions. On the other hand, Judge Bork voted against the executive branch in eight out of eight administrative law decisions where a business entity was the adverse party.

The report discusses Judge Bork's record of consistently voting to deny access to the courts for individuals, applying antitrust laws in a manner that would be detrimental to consumers and small businesses, and narrowing rights under the first amendment.

It also highlights the fact that in several cases, Judge Bork's colleagues have been extremely critical of Judge Bork for "misinterpreting Supreme Court precedent, for substituting his policy judgments for those of the Congress, and for going beyond the facts of a particular case."

Mr. President, the Public Citizen Litigation Group has never before, since its founding in 1971, taken a position on a nomination to the Federal bench. Their thorough examination of Judge Bork's record on the court of appeals, however, led this organization to oppose his nomination on the grounds that "he does not have the dispassionate, judicial detachment that is essential for a Supreme Court Justice, but instead adheres to a remarkably categorical political philosophy under which workers, consumers, and individuals are the losers and the Government and corporations prevail."

Mr. President, as debate on the Bork nomination begins, it is extremely important that his record be examined carefully. Some of the administration's supporters have strenuously attempted to characterize Judge Bork as a "principled" believer in judicial restraint. Critics, on the other hand, have concluded that his judicial philosophy changes depending on who appears at the courthouse door.

The comprehensive analysis of Judge Bork's decisions released by the Public Citizen Litigation Group sheds some important light on this debate. I recommend a careful reading of this document by every Member of the Senate.

The document follows:

EXCERPT FROM "THE JUDICIAL RECORD OF JUDGE ROBERT H. BORK," PUBLIC CITIZEN LITIGATION GROUP

INTRODUCTION

On July 1, 1987, President Reagan nominated Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States. The nomination was instantly controversial because in recent years the man Judge Bork would replace—Associate Justice Lewis F. Powell, Jr.—has been the swing vote in many 5–4 cases.

Both his supporters and opponents have argued that Judge Bork should be evaluated on the basis of his record. An important source of data is Judge Bork's performance as a member of the United States Court of Appeals for the District of Columbia Circuit, popularly known as the "D.C. Circuit." Many legal observers consider this court to be second only to the Supreme Court in terms of influence, primarily because it hears a large number of important cases involving the federal government that can affect people across the nation.

Judge Bork has served on the D.C. Circuit for over five years. Prior to his nomination, he had participated in approximately 400 cases in which there were published opinions, and he had written 144 majority, concurring and dissenting opinions. Shortly after the nomination was announced, the Public Citizen Litigation Group undertook a detailed examination of these cases.

The Public Citizen Litigation Group lawyers were aware of Judge Bork's decisions in cases involving their own clients and knew that in cases involving public interest organizations and government, Judge Bork had regularly sided with the executive branch.[1] Recognizing, of course, that this experience was not necessarily an accurate reflection of his overall record, we undertook a study of all his pre-nomination cases, to discern if any common themes or trends could be identified.

This analysis focuses on Bork's role in those cases where the judges disagreed with each other. We identified 56 "split decisions" in which Judge Bork participated—those cases in which one or more judges disagreed with the majority on how the case should be resolved and filed a dissenting statement. Judge Bork's votes in split decisions are significant for several reasons. First, it is likely that these votes made a difference in the outcome. In addition, although most D.C. Circuit cases are decided by a unanimous three-judge panel, the cases in which judges disagree publicly tend to be the more controversial cases, some of which will ultimately reach the Supreme Court for resolution. Finally, these are the "tough cases" because by definition split decisions are cases in which at least one judge disagreed with Judge Bork.

A. SUMMARY OF FINDINGS

An analysis of Judge Bork's record on the D.C. Circuit demonstrates that:

Judge Bork's performance on the D.C. Circuit is not explained by the consistent application of judicial restraint or any other judicial philosophy; instead in split cases, one can predict his vote with almost complete accuracy simply by identifying the parties in the case;

In split cases where the government is a party, Judge Bork voted against consumers, environmental groups, and workers almost 100% of the time and for business in every such case;

In 14 split cases, Judge Bork denied access to the courthouse every time; among the many losers was the United States Senate, which, according to Judge Bork's dissent, could not bring a case of major constitutional significance to the federal courts;

Judge Bork has expressed a desire to reformulate broad areas of antitrust law, and to narrow the constitutional protections of individuals;

Judge Bork is far less a friend of the First Amendment than some have suggested, as evidenced by four cases in which he voted against the First Amendment claims of political demonstrators;

On several occasions, Judge Bork's colleagues have been extremely critical of him for misinterpreting Supreme Court precedent and going beyond the facts of a particular case.

Judge Bork is widely credited as being a proponent of judicial restraint, a judicial philosophy that in administrative law cases requires courts to defer to the executive branch. Our analysis of his decisions, however, found that Judge Bork generally adhered to this philosophy only in cases brought by individuals or organizations other than a business (referred to as "non-business cases").

In the field of administrative law, Judge Bork adhered to an extreme form of judicial restraint if the case was brought by public interest organizations. His vote favored the executive in every one of the 7 split decisions in which public interest organizations challenged regulations issued by federal agencies. These cases included environmental issues, the regulation of potentially carcinogenic colors in foods, drugs, and cosmetics, the regulation of television and radio licensees, and a requirement that family planning clinics notify parents of teenage girls who sought birth control information and devices. The single non-business general regulatory issue on which Judge Bork voted in favor of the individual involved challenges by President Reagan and Senator Kennedy to a decision of the Federal Election Commission regarding the treatment of campaign expenses.[2]

Judge Bork also deferred to the executive branch in labor cases brought to benefit employees, where he voted for the government in 4 out of 5 cases in which the court split.[3] And in cases brought under the Freedom of Information Act ("FOIA") and related statutes, he voted for the agency and against the requester in all 7 of the cases in which the court split, even though Congress has made it clear in the statute that no deference is to be accorded the executive branch agencies in those cases.

In the area of constitutional law, the doctrine of judicial restraint has a similar meaning: it requires judges to be reluctant to find new rights in the Constitution or to expand existing ones. Once again, in civil rights and civil liberties cases brought by individuals, Judge Bork adhered to this philosophy. In the 6 split decisions where the government was a party, he voted against the individual every time. The pattern in criminal cases was the same; Judge Bork voted for the prosecution in the 2 split criminal decisions. Indeed, he voted against the criminal defendant in 23 of the 24 criminal cases in which he participated on the D.C. Circuit.

[1] A list of the Public Citizen Litigation Group cases in which Judge Bork has participated appears in the appendix.

[2] None of the cases were brought by the "conservative" public interest organizations such as the Heritage Foundation.

[3] In the single vote that favored employees' interests, Judge Bork voted to remand that case to the Merit Systems Protection Board after upholding a worker's discharge on the merits, so that the agency could explain its reasons for a strictly procedural ruling in favor of the executive.

A summary of Judge Bork's votes in split decisions involving the federal government and a party other than a business appears below:

JUDGE BORK'S VOTES IN SPLIT DECISIONS IN CASES AGAINST THE EXECUTIVE NOT BROUGHT BY BUSINESS

| | Public interest group, worker, individual, FOIA requester, candidate | Executive |
|---|---|---|
| Administrative law: | | |
| General regulatory cases | 1 | 7 |
| Labor cases | 1 | 4 |
| Freedom of information cases | 0 | 7 |
| Constitutional law | 0 | 6 |
| Criminal law | 0 | 2 |
| Total | 2 | 26 |

However, Judge Bork did not consistently adhere to the principles of judicial restraint. To the contrary, when a private corporation or business group (referred to as a "business interest") sued the government, he was a judicial activist. Thus, in the 8 split decisions where a business interest challenged the government, Judge Bork voted for the business every time. Five of these are rate-making cases where the court's decisions directly affected the cost of services provided to consumers, and 3 are labor cases in which the losers were workers. The other victory by a business interest reversed the Department of Agriculture's so-called "junk food rule," which prohibited the sale of soft drinks and other products in competition with nutritious meals being served in school lunch programs.

Judge Bork's votes in split administrative law cases in which a business interest was a party appear in the table below:

JUDGE BORK'S VOTES IN SPLIT DECISIONS IN ADMINISTRATIVE LAW CASES BROUGHT BY BUSINESS

| | Business | Executive |
|---|---|---|
| Federal Energy Regulatory Commission, Interstate Commerce Commission, Department of Agriculture cases | 5 | 0 |
| Labor cases | 3 | 0 |
| Total | 8 | 0 |

The only split case in which a business interest asserted a constitutional right is *Jersey Central Power & Light Co.* v. *FERC*, 768 F.2d 1500 (1985) and 810 F.2d 1168 (1987) (*en banc*), which also raised administrative law issues. Judge Bork's opinions in favor of Jersey Central in this case, as well as his position in several other cases, suggest that he is much more willing to find a constitutional violation where business is asserting a property interest, such as a taking of property without just compensation, than when individuals are seeking constitutional protection for their non-economic rights.

Not only did Judge Bork consistently rule against individuals and public interest organizations on the merits, but in many cases he did not even let them through the courthouse door. Thus, in 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 against prison inmates, social security claimants, Haitian refugees, handicapped citizens, the Iranian hostages, and the homeless. Judge Bork did not reach the merits in any of these cases; rather, he refused to decide the claims raised. And in one case, he affirmed a decision of the Nuclear Regulatory Commission denying the Attorney General of Massachusetts an opportunity to participate in a proceeding concerning the safety of a nuclear power plant in Massachusetts.

The most significant expression of Judge Bork's views on access are contained in his dissent in *Barnes* v. *Kline*, 759 F.2d 21 (1985). There Judge Bork voted to preclude the United States Senate, the House of Representatives, and 33 Members of Congress from litigating an issue of major constitutional importance (whether the President had effectively exercised the pocket veto), even though the President's attorney had conceded that the plaintiffs could sue. According to Judge Bork, the courts are not available to resolve major constitutional controversies between the President and Congress; instead, those issues must be decided in the political arena.

Judge Bork's opinions in Barnes and other standing cases strongly suggest that, if he were on the Supreme Court, he would vote to deny standing in a large variety of cases challenging executive action, including many cases brought by public interest organizations. Because his theory of standing is grounded on his own interpretation of Article III of the Constitution, only a constitutional amendment could alter the result. A summary of Judge Bork's votes on access cases appears below:

*Judge Bork's votes in split decisions in cases involving access to the courts*

| | |
|---|---|
| Granted access | 0 |
| Denied access | 14 |

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 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, when 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 had sued the government, or voted in favor of the claims of business which sued the government.●

## FAMILY SECURITY ACT OF 1987

● Mr. SIMON. Mr. President, I rise in strong support of the Family Security Act of 1987, a bill introduced by my colleague, Senator MOYNIHAN. The main purpose of this bill, S. 1511, is to replace the half-century-old Aid to Families with Dependent Children [AFDC] Program. This is a comprehensive program that amends title IV of the Social Security Act. The Family Security Act of 1987 targets family responsibility, expanded opportunities in education and training, as well as benefit improvement, program innovation, and organizational renewal at every level in the Federal system. Senator MOYNIHAN is a recognized expert on the family and Federal income-support policy.

In recent years, the Federal Government has worked closely with States to improve methods of collecting child support payments. Many States, such as my own State of Illinois, have been successful in ensuring that children receive the support they are entitled to from the noncustodial parent, thereby reducing the dependency these families have on Federal or State welfare programs.

S. 1511 takes the next logical steps to ensure that, within reason, parents who can take care of their children's financial needs will do so. Given the number of families who must rely on Government assistance, parents who can afford to provide for their children must meet this responsibility. This bill strikes the right balance between the needs of our children and the rights of both the custodial and noncustodial parent. While I do not believe that we should approach child support enforcement in a punitive manner, the Federal Government must provide strong leadership to the States in ensuring that court-ordered child support agreements are met and enforced. In my view, this is a key component to this welfare reform legislation.

While this bill addresses the issue of child support enforcement, it also provides a job opportunity and basic skills program. Therefore, parents with dependent children who are eligible for the Child Support Supplement Program can receive the education, training, and employment that will help them avoid long-term dependency on public assistance programs. I am concerned about the permissive nature of these essential programs. If the States elect not to provide basic education and work programs for participants, there is little likelihood that the cycle of welfare dependency can be broken. Without the tools of employability—the ability to read, write, and compute, as well as some work skills—workfare won't work.

The Family Security Act of 1987 requires the direct involvement of the family in lifting the family, whatever their economic or social status, from dependency to self-sufficiency. That is a role that a compassionate government should play. This bill takes the steps necessary to change our present welfare system to one that encourages family responsibility and, hopefully, a measure of self-respect.●

## TRIBUTE TO NORMAN B. LEVENTHAL

● Mr. KERRY. Mr. President, I wish to recognize Norman B. Leventhal of Newton, MA, who was recently presented the Man of the Year Award by the Boston Latin School—an honor he

on the problems inherent in longer and longer, and bigger and bigger campaigns. We have had an opportunity to ponder the value of compromise. Now is the time to act.

I was delighted to hear that the honorable junior Senator from Kansas has decided that the compromises reached in the effort to bring this bill to the floor are at last enough. The good Senator has reserved the right to oppose portions of the bill. She has reserved the right to speak against it if further change is not obtained.

But, I think it highly significant that my colleague from the other side of the aisle has found enough movement by the bill's sponsors to support bringing the matter to the floor for a vote. We will be voting on that issue today. Shall this body permit forward movement on legislation which resolves an issue of vital importance to the American people? Given the compromises reached, and the outstretched hand offered, will not my colleagues from the other party permit this bill to reach the floor for a vote? Let it come out, and if certain portions of the vehicle seem ineffective or inappropriate, then argue for amendment on a case-by-case basis.

We have shown a willingness to compromise, and have gone more than half way. I urge the Members of this body to allow S. 2 to reach the floor, and to permit the Congress to vote on this issue which I know is as important to their constituents, as much as it is vital to the people of Nevada.

Thank you.

The PRESIDING OFFICER. The Senator from Utah.

## THE NOMINATION OF ROBERT H. BORK

Mr. HATCH. Judge Robert Heron Bork's résumé—excellent trial lawyer, renowned law professor, Solicitor General, and Federal appellate judge—speaks for itself. In fact, President Reagan's best strategy for confirmation is Judge Bork himself. Particularly in his areas of academic expertise, constitutional and antitrust law, Judge Bork is unrivaled.

Accordingly, the longer he testifies before the Judiciary Committee, the more persuasive and reasoned his philosophy of judicial restraint will sound. If you are looking for a secret weapon in the upcoming confirmation struggle, it is Judge Robert Bork.

Judge Bork's superb qualifications, however, highlight a tragic irony of this proceeding. Despite his demonstrated capabilities—never reversed by the Supreme Court in 423 appellate cases—he has still been subjected to an unprecedented ideological inquisition. The real tragedy is not any smirching of Judge Bork's reputation because he is likely to surprise his detractors. Nor is the real tragedy any delay in the Supreme Court's docket. The real tragedy is the potential implication of this inquisition on the independence and integrity of the Federal judiciary.

Federal judges are not politicians and ought not to be judged like politicians. If we do so, we strip the judicial office of all that makes it distinct amongst the separated powers.

Unfortunately the vicious attacks on Judge Bork's record have already fallen into a familiar pattern. Questions are raised in politically inflammatory terms. The nominee is accused of favoring literacy tests or poll taxes, or racial covenants. In fact, the record shows that the judge has taken no position on the social or political merits of these questions, but only raised legal questions about the source of constitutional authority in those areas. In each case, the judge is supported by numerous Justices, judges, and scholars. This is what I mean about injecting politics into judicial matters. We have come to expect this type of distortion in political campaigns, but can you imagine what might happen if judges had to worry about the political implications of their decisions?

The greatest irony is that some fine legal scholars, who should appreciate the distinction between legal and political issues, are assisting the onslaught against Judge Bork.

And that bothers me a lot. It causes me a great deal of concern. Because if we politicize this Court, I think we are going to see a lot of problems in this country well into the future.

In particular, I would like to comment about the errors and omissions in the response prepared to the White House analysis of Judge Bork's record, which Senator BIDEN has issued.

In a recent trip to Utah, constituents stopped me and asked what I thought was the most important branch of the Government: the executive, legislative, or judicial branch. There is no clean-cut answer, of course. I mean, which is the most important leg of the three-legged stool? One weak leg, and you have an unbalanced stool. This is why the nomination of a U.S. Supreme Court Justice is so important. I am concerned about politicizing this process.

In particular, I do not question Senator BIDEN for the scholarship in the article or in the matters that he published. But I do question the people who pass themselves off as fair and objective law school professors who are anything but fair and objective.

So, Mr. President, at this time I ask unanimous consent that I may put into the RECORD at this point my analysis of the so-called Biden report on Judge Bork's record.

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

### ERRORS AND OMISSIONS IN THE "RESPONSE PREPARED TO WHITE HOUSE ANALYSIS OF JUDGE BORK'S RECORD"

The Response Prepared to White House Analysis of Judge Bork's Record commissioned by Senate Judiciary Committee Chairman Joseph Biden (hereafter the "Biden Report") contains numerous errors, mischaracterizations, and omissions. More than seventy of the most significant errors are described in this report.

#### SECTION I—THE BIDEN REPORT'S SUMMARY

1. The *Biden Report* states that "members of the D.C. Circuit charged Judge Bork with attempting to 'wipe away selected Supreme Court opinions in the name of judicial restraint' and with 'conducting a general spring cleaning of constitutional law.'" The charges are taken from a *dissenting opinion, Dronenburg v. Zech*, 746 F.2d 1579, denying rehearing of 741 F.2d 1388 (D.C. Cir. 1984). A majority of the D.C. Circuit evidently did not feel that Judge Bork's opinion did anything of the sort, since it let the opinion stand. Carter appointee Judge Ruth Bader Ginsburg wrote separately in order to explain specifically why she felt there was nothing improper about Judge Bork's opinion, and stated that the dissenters' use of the term "bends 'judicial restraint' out of shape." 746 F.2d at 1581 n. 1.

2. The *Biden Report* fails to include any of the subsequent history of the case in which those charges were made, which demonstrates that they were baseless:

A year and a half later, in *Bowers v. Hardwick*, 106 S. Ct. 284 (1986), the Supreme Court reached the same conclusion that Judge Bork arrived at in the opinon the dissenters were criticizing, ruling 5–4 that the Constitution does not protect private homosexual conduct. It specifically noted, as a reason for construing its prior privacy decisions narrowly, that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made law having little or no cognizable roots in the language or design of the Constitution."

Finally, Justice Powell specifically stated in a concurrence in that case that "there is no fundamental right, i.e., no substantive right under the Due Process Clause, to engage in" private homosexual conduct. 106 S. Ct. at 2847.

3. The *Biden Report* fails to indicate that the opinion of Judge Bork to which the judges were referring refused to find a constitutional right to engage in private homosexual conduct, a right whose existence the Supreme Court also had not recognized at the time.

4. The *Biden Report's* claim that "Judge Bork has repeatedly rejected *[Griswold v. Connecticut,]* the decision upholding the right of married couples to use contraceptives" is misleading. Judge Bork has never ruled on a case involving married couples' use of contraceptives. Nor has he stated or indicated anywhere that if he had to decide such a case as a lower court judge, he would do anything other than follow the relevant Supreme Court case. Nor has he stated that he would overrule that case as a Supreme Court Justice.

5. Judge Bork has merely criticized the Supreme Court case's *reasoning* and declined to extend that reasoning to new areas such as homosexual rights. That is a very common approach for judges to take toward precedents with which they disagree. See, e.g., *Shearson American Express v. McMahon*, 107 S. Ct. 2332 (1987). It is a lawyer's profession to recognize the difference be-

tween disagreeing with a case's reasoning and declining to extend that reasoning, on the one hand, and disregarding or overruling it, on the other. But the *Biden Report's* use of the verb "reject" in instances such as this, where all Judge Bork has done is either criticize or at most refuse to extend a precedent, could lead a reader to believe that in all those instances Judge Bork would also disregard or overrule the precedent. Thus, the report's selection of a verb that confuses the two questions is hard to understand. See also *Biden Report* 3 ("Judge Bork has repeatedly and consistently rejected the right to be free from governmental interference with one's private life"); *Biden Report* 4 ("Judge Bork has rejected many of the Supreme Court's leading antitrust decisions"); *Biden Report* 4 ("In the area of church-state relations, Judge Bork has rejected several Supreme Court decisions").

6. The *Biden Report's* characterization of Judge Bork as some kind of antitrust radical is unfounded. *Biden Report* 3-4. As noted in a letter signed by 15 past chairmen of the American Bar Association's Antitrust Section, Judge Bork's seminal work, *The Antitrust Paradox*, has been relied on in opinions written or joined by all nine of the current Supreme Court Justices.

7. The *Biden Report's* statement that "Judge Bork's writings show that he would protect only speech that is tied to the political process, and that he would not protect artistic and literary expression such as Shakespeare's plays, Rubens' paintings, and Barishnikov's ballet" is flatly incorrect. As Judge Bork stated in his Worldnet interview:

"there is a spectrum . . . 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, into moral speech and scientific speech, into fiction and so forth."

8. The *Biden Report's* reference to "Judge Bork's willingness to overturn numerous landmark Supreme Court decisions," *Biden Report* 5, is utterly without basis. Judge Bork has never stated that he would overturn any Supreme Court cases—as the *Report* tacitly recognizes earlier ("Judge Bork . . . has never said that the Supreme Court should not overturn its prior decisions establishing and extending the right to privacy," *id.* at 3).

9. The *Biden Report's* claim that "Judge Bork's extensive record shows that he has opposed virtually every major civil rights advance on which he has taken a position, including such issues as the public accommodations [sic] bill, open housing, restrictive covenants, literacy tests, poll taxes, and affirmative action" is utterly unfounded. The facts show that it was Judge Bork, who briefed and argued and won, among others, *Runyon v. McCrary*, 427 U.S. 160 (1976), a case significantly extending the civil rights laws' coverage of private conduct, and *Lau v. Nichols*, 414 U.S. 563 (1974), a case establishing the illegality of conduct with no discriminatory intent but only discriminatory effects. The individual who won many major civil rights advances can hardly be considered opposed to ". . . virtually every major civil rights advance on which he has taken a position."

10. The *Biden Report* fails to indicate that in every instance the *Biden Report* cites as evidence for its claim except for the 1963 Public Accommodations bill (with respect to which, as the *Report* recognizes, Judge Bork later changed his mind) Judge Bork in no way disagreed with the policy ends sought to be accomplished by the proponents of the civil rights measures. Moreover, there is nothing in Judge Bork's life that in any way suggests any form of bigotry.

11. Instead, what Judge Bork has done is criticize the reasoning of several decisions. The *Biden Report's* analysis of these criticisms is misleading because it fails to indicate that they are part of a broad scholarly consensus on those cases. With respect to *Shelley v. Kraemer*, 334 U.S. 1 (1948), the racial covenants case, and *Reitman v. Mulkie*, 387 U.S. 369 (1967), the open housing case, for example, Professor Tribe stated in *American Constitutional Law* that "[t]o contemporary commenators, *Shelley* and *Reitman* appear as highly controversial decisions" and that "the critical consensus has it [that] . . . the Court's finding of state action [is not] supported by any reasoning which would suggest that 'state action' is a meaningful requirement rather than an empty formality." See also *id.* at 1157 n. 37 ("The standard critique of *Shelley* is definitively stated in Wechsler, 'Toward Neutral Principles of Constitutional Law,' 73 Harv. L. Rev. 1, 29-31 (1959). The *Reitman* opinion has been criticized even by defenders of its result.")

SECTION II—ESTABLISHING THE CONTEXT

12. The single major distortion in this section is that the effect of a Bork appointment would be to permit "a determined President . . . [to] bend [the Court] to political ends that he can not achieve through the legislative process."

The *Biden Report* cites no instance of how Judge Bork's appointment would have that effect.

Even if its apocalyptic claims regarding Judge Bork's willingness to reverse prior constitutional cases were true, as they are not, the authors of the *Report* know full well that the only effect would be to *permit* the political process to decide questions that the courts have placed beyond its reach. For example, even if *Roe v. Wade* or *Griswold v. Connecticut* were reversed, the effect would *not* be that abortion or access to contraceptives would suddenly become illegal. Rather, Congress or the states would have to pass laws to that effect.

13. Thus even accepting its premises, the *Biden Report's* claim that a Bork appointment would permit the President to accomplish his social agenda through the Supreme Court is extremely misleading. All it could possibly do is allow the President and the Congress to fight out these issues in the political arena.

SECTION III—JUDGE BORK'S RECORD OF JUDICIAL RESTRAINT

14. The *Biden Report* claims that Judge Bork's perfect record of nonreversal by the Supreme Court is "uninformative." (*Biden Report* at p. 14) Thus, it misleadingly—dismisses five years and hundreds of opinions and votes that are incontestably the best evidence of Judge Bork's measure as a Justice. As Lloyd Cutler has said, Bork's opinion in *Ollman v. Evans* alone "tells us far more about how Bork would perform as a justice than his professorial writings ten to twenty-five years ago."

15. The *Biden Report's* rationale for its remarkable exclusionary rule—that "[a]s an intermediate court judge, the nominee has been constitutionally and institutionally bound to respect and apply Supreme Court precedent"—fails to acknowledge the challenge and difficulty of an appellate judgeship. Without doubt *all* lower court judges are "constitutionally and institutionally bound" to apply the Supreme Court's precedents; the real question is whether they are willing and able to fulfill that obligation. Many of Judge Bork's colleagues on the U.S. Courts of Appeals have been repeatedly reversed by the Supreme Court for ignoring or misreading binding precedent; *e.g.*, the five occasions on which the Supreme Court overruled D.C. Circuit majority opinions and adopted Judge Bork's dissents.

16. Contrary to the *Biden Report's* conclusion, Judge Bork's impeccable record of nonreversal shows his respect for *stare decisis* and his skill at conscientiously applying existing Supreme Court caselaw to facts. This faithful application of law and precedent over his entire tenure as a judge augurs well for his service on the Supreme Court and renders the *Biden Report's* account of his record misleading.

17. The *Biden Report* (p. 15) does not fully report the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986). The *Report's* claim that the *Vinson* Court unanimously rejected the reasoning of Judge Bork's dissent leaves out the most telling facts. As even the *Report* concedes, "[t]he Court did agree with Judge Bork on the evidentiary issue." Examination of the opinions makes clear that the Court agreed with the substance of Judge Bork's reasoning on liability, as well. It is the *Biden Report*, not the White House position, which supplies a "factually inaccurate and misleading description" of *Vinson*.

18. The *Biden Report* (at p. 16) mischaracterizes Judge Bork's position in *Planned Parenthood Federation v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983), in which he agreed with the majority in rejecting the claim of statutory authority advanced by the Reagan Administration, which premised its family-notification requirements on a 1981 amendment to Title X. Judge Bork's disagreement with the majority belies the *Biden Report's* claim that his opinion was "anything but deferential and non-activist": he would have followed the Supreme Court's well-settled rule in *SEC v. Chenery* by remanding to the agency for articulation of alternative bases for its holding. It is difficult to understand how Judge Bork's proposal to remand to the agency for further consideration is less "deferential" to its administrative expertise than the majority's final and conclusive ruling, which left no further scope for agency consideration. It is misleading to suggest that Judge Bork's deference to the agency was somehow "activist."

19. The *Biden Report* apparently attempts to diminish the significance of Judge Bork's perfect record of nonreversal by the Supreme Court by emphasizing that the Supreme Court has until recently never granted review for one of Judge Bork's majority opinions (*Biden Report* at p. 17). The report apparently implies that one therefore cannot assume anything about the quality of his opinions—which is akin to saying that you can't judge whether someone is law-abiding because he has never been arrested and tried. If Judge Bork were writing activist opinions that departed from the law, the losing litigants would appeal. The fact that fewer than one in ten of the losing litigants in his cases sought Supreme Court review is a sign of the strength of his opinions, not an indication that they can be discounted. The same inference should be drawn from the fact that until this term the Supreme Court never chose to grant review of any of his opinions: the Court's writ of certiorari (literally, to make more certain) is principally used to rectify what the Justices perceive as

important errors in lower court opinions. Their failure to grant review for his opinions is a significant compliment, not a slight.

20. The *Biden Report* employs a double standard on this point, because it argues later that many of Judge Bork's opinions have been important and radical departures from binding precedent. *If Judge Bork's record were really the parade of horribles that the report claims, it would be inconceivable that the Supreme Court would not grant certiorari and reverse him.*

21. The *Biden Report's* disingenuousness is particularly apparent because it glosses over without mention the fact that none of the more than 300 majority opinions joined but not authored by Judge Bork over his five years on the bench has ever been reversed—a remarkable and highly unusual testimonial to his legal judgment. Similarly, the *Biden Report* ignores the fact that although Judge Bork rarely dissents (he has been in the majority of his court 94% of the time) his dissents carry great weight with the Supreme Court, which has repeatedly adopted his rationales over the holdings of the majority.

22. The *Biden Report* further attempts to exclude the most probative evidence of Judge Bork's suitability by distorting his own statements about his cases. The report cites Judge Bork's statement that the ideological divisions on his court make no difference in 9/10's of all his cases, then goes on to give the following grossly inaccurate summary of his remarks: "According to Judge Bork, therefore, 90% of his cases on the D.C. Circuit are non-ideological and, consequently, non-controversial." (*Biden Report* at p. 17). Aside from putting words in the Judge's mouth, the authors' assumption that only ideologically charged cases are difficult, controversial, or worthy of the public's or the Supreme Court's attention says a great deal about their own distorted view of the law—a view that enables them to assert, and apparently to believe, that Judge Bork's "circuit court record says nothing about his suitability for the Supreme Court. . . ." (*Id.*)

23. In fact, Judge Bork's statements about the irrelevance of ideology to his work on the court show his own professionalism, and they echo the professionalism of his colleagues on the bench across the political spectrum—an attitude towards the law strikingly at odds with that shown in the *Biden Report*. Judge Bork's colleague Judge Harry Edwards, a Democratic appointee, has written that "efforts to tag judges as 'liberal' or 'conservative' are fundamentally misguided," citing as evidence of this the remarkable degree of agreement on decisions between himself and Judge Bork. And Chief Judge Patricia Wald, another Democratic appointee, wrote a blistering critique of lawyers who "simplistically characterize" judges as "liberal" or "conservative," warning lawyers "not [to] try to handicap old myths about nonexistent fueds or rumors about philosophic differences between us." It is a warning the authors of the *Biden Report* should reread.

24. The *Biden Report* short-changes the similarity between the judicial philosophies of retiring Justice Lewis Powell and Judge Bork. It incorrectly claims that no similarity can be discerned in the fact that Justice Powell and Judge Bork voted substantially the same way in nine of the ten cases that went before the Supreme Court, because "a careful analysis . . . shows that Judge Bork and Justice Powell both wrote opinions in only two [of the cases]." (*Biden Report* at p. 18). This so-called "careful analysis does not explain why we should disregard the fact that the two jurists joined in substantially the same conclusions—whether they actually wrote or not—in nine of ten cases.

25. Neither President Reagan nor Judge Bork has ever claimed that Justice Powell's jurisprudence is identical to that of Judge Bork. It is the opponents of Judge Bork who argue that Lewis Powell's successor should be required to replicate his jurisprudence—a jurisprudence that, in many areas, these same opponents have scathingly criticized in the past. Judge Bork's proponents have merely pointed out that he is a fairminded proponent of judicial restraint—a judicial conservative, not a political one. Lloyd Cutler, President Carter's Counsel, has written that while all judges pay lip service to judicial restraint, "few rigorously observe it. Justices Oliver Wendell Holmes, Louis D. Brandeis, Felix Frankfurter, Potter Stewart, and Lewis F. Powell, Jr., were among those few, and Judge Bork's articles and opinions confirm that he would be another." The President himself has merely stated that "[i]t's hard for a fairminded person to escape the conclusion that if you want someone with Justice Powell's detachment and statesmanship, you can't do better than Judge Bork"—a demonstrably true statement.

26. The *Biden Report* fails to take account of the evidence which indicates that even beyond the question of general judicial temperament and craftsmanship, however, there are broad convergences between the jurisprudence of these two judges. Justice Powell, for example, has been a leading architect of the reinvigoration of the doctrines of standing and justiciability for which Judge Bork has been so roundly criticized. And Justice Powell cast the decisive vote in *Hardwick v. Bowers*, which reached the same result that Judge Bork propounded in *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984)—that the Constitution and Supreme Court precedent did not vouchsafe a right to practice homosexual sodomy. (*See also*, Nos. 1-3 above).

27. In criminal jurisprudence Justice Powell, like Judge Bork, has been a leading exponent of the truthseeking function of criminal trials. For example Justice Powell has repeatedly, over more than a decade, rejected the arguments that capital punishment is *per se* unconstitutional. Similarly, Judge Bork has repeatedly refuted these same arguments in print. Just last term, Justice Powell cast the decisive vote in the *McClesky* case, a 5-4 decision that rebuffed an equal protection challenge which would have effectively ended capital punishment.

28. The *Biden Report* fails to acknowledge another interesting parallel between Justice Powell and Judge Bork: Justice Powell, like Judge Bork, was vituperated by leftist feminist and civil rights organizations and spokesmen during his confirmation hearings for the Supreme Court.

Congressman Conyers on behalf of the Black Caucus testified that Powell was "inconsistent with the kind of jurist [who] . . . is desperately needed for the Court in the 1970's and 1980's." (Senate Hearings on the Confirmation of Louis Powell, 1971).

Henry L. Marsh III, testifying on behalf of the Old Dominion Bar Association of Virginia, stated that Powell's confirmation in the face of his "record of continued hostility to the law, his continual war on the Constitution, would . . . demonstrate to us that this Senate is not concerned with the rights of black citizens in this country." (*Id.*)

Wilma Scott Heide, the President of the National Organization of Women, testified that Powell's confirmation would mean that "justice for women would be ignored or further delayed which means justice denied." (*Id.*)

Catherine G. Rohraback, President of the National Lawyers' Guild, testified that nominees Powell and Rehnquist "would be incapable of dealing fairly and impartially with issues arising out . . . the struggle of blacks, other third world people, women and other oppressed groups for social, political and economic equality." She stated that Powell had defended "unconstitutional" wiretapping, and that "[i]n his political views, Mr. Powell does not 'bend' or 'twist' the Constitution, to use the President's language. Rather, he totally ignores it." (*Id.*)

Paul O'Dwyer, a prominent New York liberal attorney, testified that Justice Powell and his fellow nominee William H. Rehnquist had been "eloquent spokesmen for wiretapping and other insidious governmental techniques designed to stifle dissent and to challenge personal liberties guaranteed by the Constitution and the Bill of Rights. . . ." He told the Judiciary Committee that in national security cases "Mr. Powell claim[s] that the President is above the law, the Constitution, and the fourth amendment. . . ." On the Supreme Court, O'Dwyer said, Powell "would be but [the] echo" of the executive branch. (*Id.*)

The charges brought by these groups against distinguished judicial appointees are as false with respect to Judge Bork as they were with respect to Justice Powell.

29. The *Biden Report* distorts Judge Bork's opinion in *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984). In *Dronenburg* Judge Bork reviewed Supreme Court precedents on the right to privacy and concluded that they did not encompass a constitutionally-protected right to practice homosexual sodomy. Although the Supreme Court later reached precisely the same conclusion in *Hardwick v. Bowers*—a decision in which Justice Powell concurred—the report misleadingly claims that "Judge Bork's theory of lower court constitutional jurisprudence in *Dronenburg* . . . has never been expressed or endorsed by the Supreme Court." (*Biden Report* at p. 18). The *Biden Report* goes on to cite from the dissent in *Dronenburg* to prove that Judge Bork's opinion was judicially 'unrestrained'—a peculiar way to prove the point, since both a clear majority of Judge Bork's own court and the Supreme Court shared his 'activist' and 'unrestrained' view of this area of the law. It is interesting that Professor Archibald Cox's new book *The Court and the Constitution* took *Dronenburg* as a paradigmatic case and noted that while the author "would give the Court a somewhat larger and more creative role," Judge Bork's opinion in the case "stated the conservative judge's reasons clearly and persuasively."

30. The *Biden Report* inaccurately implies that the criticisms contained in the majority opinion in *United States v. Meyer*, No. 85-6169 (D.C. Cir. July 31, 1987) are in some way directed at Judge Bork personally, rather than at the jurisprudence of the almost one-half of the D.C. Circuit that jointly issued a dissent to the majority's reversal of course. Though the report asserts that Judge Bork is the "head of the faction" seeking rehearing en banc of the cases, there is not a scrap of evidence in the opinions—either majority or dissent—to suggest that this is the case or that the majority was specifically stigmatizing Judge Bork's

jurisprudence (*Biden Report* at p. 19). The report's attempt to depict a broadside fired at virtually half the D.C. Circuit as a personal critique of Judge Bork's jurisprudence is unsupported by any evidence.

31. The *Biden Report's* characterization of Judge Bork's view of the privacy cases as "indicative of [his] willingness to discard the text, history and tradition of the Constitution in order to achieve the results he desires" is Orwellian (*Biden Report* at pp. 20-26). It suggests that Judge Bork personally "desires" outlawing contraceptives [*Griswold*], mandatory sterilization of criminals [*Skinner*] and workers [*American Cyanamid*], denial of divorced parents' visitation rights to children [*Franz*], outlawing of the teaching of foreign languages [*Meyer*] or of parochial schools [*Pierce*]. The *Biden Report* does not produce one shred of evidence that this is the case. These suggestions overlook the distinction between politics and the law. No one would suggest, for example, that Justice Frankfurter dissented in *Screws v. United States* because he "desired" racist murders.

32. The *Biden Report* assertions about Judge Bork's personal policy views are also contradicted by the many instances on which Judge Bork has, on legal grounds, opposed laws that further policies of which he affirmatively approves, such as a balanced budget amendment. Thus, Judge Bork's legal views of cases tell us exactly nothing about his policy preferences, indicating that he is willing to set them aside in deciding legal issues. As the revered civil libertarian Justice Hugo Black wrote in dissenting from *Griswold*, "I like my privacy as well as the next one, but I am nevertheless compelled to admit that a government has the right to invade it unless prohibited by some specific constitutional provision. . . ."

33. The *Biden Report* quotes Judge Bork's legal criticisms of *Roe v. Wade* but attempts to dismiss as irrelevant the fact that they were expressed in testimony opposing the "Human Life Bill"—conservative legislation to strip the courts of jurisdiction to hear abortion cases (*Biden Report* at p. 20). It is unclear why an alleged result-oriented activist—as they claim Judge Bork is—would have so many scruples about the legislature trampling on the Constitution and so few about the courts doing so. This fact rebuts the *Biden Report's* charge that Judge Bork's only concern is "to achieve the results he desires." (*Id.*)

34. The *Biden Report* could cause confusion about the holding of *Oil, Chemical and Atomic Workers International* v. *American Cynamid Co.*, 741 F.2d 444 (D.C. Cir. 1984) by juxtaposing it with *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), a constitutional law case (*Id.* at 21). In fact, *American Cynamid* was a straight statutory construction issue which had nothing to do with constitutional law, much less the right to privacy or *Skinner*.

35. the *Biden Report's* presentation of Judge Bork's legal views on *Meyer* v. *Nebraska* and *Pierce* v. *Society of Sisters* obscures the fact that his views are thoroughly representative of scholarly opinion (*Biden Report* at pp. 22-23). The opinions in these cases were written by conservative Justice McReynolds, of whom one authority on the Court has written that "[p]olitically and jurisprudentially . . . [he] came to embrace a philosophy of reaction to progress second to none, and in his personal demeanor on the bench was a disgrace to the Court [because of his anti-Semitism and racism] . . . . Certainly, [he] deservedly earned the all but unanimous condemnation of the Court experts, who have rated him at the top of their brief list of failures." (Abraham, *Justices and Presidents* 176, 177-78 (2d ed. 1985)). The *Report* also fails to indicate that *Meyers* was dissented from by Oliver Wendell Holmes.

36. The *Biden Report* inaccurately states that Judge Bork "ignores the famous dissent of Justice Brandeis" in *Olmstead* v. *United States*, 277 U.S. 438 (1928), in which Justice Brandeis discussed the protections of privacy afforded by the Fourth and Fifth Amendments as being "intended to secure conditions favorable to the pursuit of happiness," including "the right to be left alone—the most comprehensive of rights and the right most valued by civilized man." (*Biden Report* at p. 25). In fact, Judge Bork's jurisprudence is firmly based on the insight of Brandeis' *Olmstead* dissent, which sought to apply the guarantees of the Fourth Amendment to wiretapping—a technology nonexistent at the time of the Constitution's adoption. Judge Bork incorporated this expansive view of original intent into his most famous opinion, *Ollman* v. *Evans:*

"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. "The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy." (750 F.2d at 995).

37. More generally, Judge Bork recognizes that the Constitution contains a right to privacy—not the generalized, judge-made, open-ended "right" scathingly criticized by Justice Black and others, but the specific guarantees of the Fourth Amendment, fairly read to accommodate the changes wrought by two centuries. It is the authors of the *Biden Report*, not Judge Bork, who have failed to take Justice Brandeis' teaching in *Olmstead* properly into account.

38. The *Biden Report* is again misleading in its claim that Judge Bork's views are "fundamentally at odds with those of Justice Harlan." (*Biden Report* at p. 25). Judge Bork has repeatedly expressed his admiration for the views of Justice John Marshall Harlan, whose scholarly and conservative outlook on the law has led many eminent lawyers and scholars to class Judge Bork with him jurisprudentially. Justice Harlan's views of the Due Process Clause of the Fourteenth Amendment, which were based on the "ordered liberty" test propounded in *Palko* v. *Connecticut*, were not the basis for the Court's decisions in *Griswold* and *Roe*. It is thus out of context for the authors of the report to criticize Judge Bork for his respectful disagreement with this aspect of Justice Harlan's jurisprudence, given the wide areas of agreement stated by these two jurists.

39. The *Biden Report* misrepresents the mainstream view of the 9th Amendment in criticizing Judge Bork's refusal to use that Amendment to create new law (*Biden Report* at p. 26). Characteristically, the authors present their own extremist ideology as if it were governing precedent. They neglect to mention that the Supreme Court has *never* upheld a claim under the 9th Amendment. As with *Dronenburg* and antitrust law, the *Report* pillories Judge Bork for taking positions which are in the mainstream of American jurisprudence and which have been authoritatively stated by the Supreme Court.

40. The *Biden Report* distorts Judge Bork's view of the Bill of Rights, maintaining that he seeks "the 'narrowed' definition of individual rights that the framers feared." (*Id.* at p. 27). This is nonsense. Judge Bork's record as Solicitor General and as an appellate court judge establishes his devotion to the Bill of Rights. And he is no exponent of "narrow" interpretations: as he told the Judiciary Committee in 1982 prior to his unanimous confirmation to the Court of Appeals, judicial imperialism is a better term than activism for courts that have "gone too far and lost [their] roots in the Constitution," because *"a court should be active in defending those rights which the Constitution spells out."* ("Confirmation of Federal Judges," *Hearings Before the Judiciary Committee*, 1982, at 14) (Emphasis supplied.)

41. The *Biden Report* distorts Judge Bork's views of standing. Contrary to its claims that Bork has taken a "very narrow," "crabbed," "novel and unprecedented" view of standing, Judge Bork's views of standing are thoroughly in the mainstream. It is the *Report* that is advocating "novel" legal views. Justice Powell has taken the lead in reinvigorating the doctrines governing access to the courts in his opinions in *U.S. v. Richardson*, *Warth v. Selden* and *Simon v. Eastern Kentucky Welfare Rights Organization*. His views—repeatedly attacked by liberal commentators—are indistinguishable from Judge Bork's.

42. The *Biden Report* misrepresents Judge Bork's opinion in *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983). In *Vander Jagt*, the supposedly political and reactionary Judge Bork voted to reject a suit by House Republicans against the Democratic leadership—a fact that sheds light on the *Report's* claims about his "activism." Unmentioned by the *Report* is the fact that the Supreme Court in *Allen v. Wright* quoted approvingly and at length from Bork's "novel" opinion in *Vander Jagt* to reach its conclusion. Clearly it is Judge Bork who is in the mainstream on access cases, and the authors of the report who are outside it.

43. The same is true of the *Biden Report's* distortions of Bork's antitrust record. As was stated in a letter from 15 past chairmen of the ABA's Antitrust Section, "Judge Bork's writings in this area have been among the most influential scholarship ever produced . . . [N]o one has helped promote [the mainstream view of antitrust] more than Judge Bork." The chairmen's letter points out that Judge Bork's leading work on antitrust, the *Antitrust Paradox*, has been referred to in 75 decisions of the Supreme Court and the courts of appeals in the ten years since its publication, and has been cited in opinions written or joined by all nine present Justices of the Supreme Court.

44. The *Biden Report* misrepresents Judge Bork's decision in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986). Far from "promot[ing] his extreme views . . . [and] [s]ingle-handedly repudiating numerous Supreme Court cases to the contrary," as the *Report* claims, Judge Bork conscientiously parsed conflicting Supreme Court precedent to follow the latest expression of the Court's views. Whatever else the *Report* could have called Bork's efforts in *Rothery*, they were not "single-handed": his opinion was joined *in toto* by Carter appointee Ruth Bader Ginsburg, while fellow Carter appointee Judge Wald "concur[red] in the result and much of the reasoning of the panel's opinion."

SECTION IV—SPECIFIC QUESTIONS

*Civil rights*

45. The *Biden Report* claims that Judge Bork's dismay over the possibility that a male-only draft might be challenged under the Equal Protection Clause indicates that he is skeptical as to whether *women* are protected under that provision. (*Biden Report* at 49). To the extent this obviously off the cuff statement indicates much of anything, it indicates instead that he is skeptical whether *men* are protected under that clause, since the likely plaintiff in such a suit would not be a woman seeking to be drafted, but a man objecting to being drafted.

*See also* Nos. 9-12 above.

*Freedom of the press*

46. The *Biden Report* misreads Judge Bork's record on the First Amendment. The *Biden Report* claims that "Judge Bork has cast doubt on leading Supreme Court decisions limiting governmental prior restraints on speech." It relies for that purpose on an ambiguous statement in an unpublished speech Judge Bork gave at the University of Michigan. It omits any discussion of Judge Bork's only case on point, *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984). In that case, Judge Bork ruled that a D.C. regulation barring deceptive advertisements was invalid on the ground that it constituted a prior restraint, rather than limiting himself to the ground preferred by Judge Starr that the advertisement at issue was not deceptive. Especially given that the narrower ground was clearly available, Judge Bork's conscious decision to rely on the broader one as well is a much clearer indication of his commitment to the bar on prior restraints than the Michigan speech is an indication of any reservations about it. The *Biden Report*'s failure even to mention the case in this context practically inverts Judge Bork's record in this area.

47. The *Biden Report*'s claim that "Judge Bork has sharply criticized key Supreme Court decisions limiting the power of government to punish publication," coupled with the evidence it cites for that claim, almost speaks for itself. The "sharp critici[sm]" to which it refers is from the same Michigan speech, and consists of the statement that "one may doubt that press freedom" required the release of the name of a rape victim or information from a secret inquiry into judicial misconduct.

48. The same can be said of the *Biden Report*'s attempt to contrast Judge Bork's position regarding reporter's claims to a First Amendment right to refuse to disclose confidential sources with Justice Powell's view on the matter. Actually, Justice Powell wrote an opinion noting that it was a hard question, to be decided case by case, but that generally there is no such right in the absence of harassment by state authorities. Judge Bork wrote an article stating that it was a close question that could be decided either way.

49. The *Biden Report's* claim in the text of the full report that Judge Bork would restrict First Amendment protection to "speech that relates to the political process" is simply misleading (as opposed to the claim in the executive summary that he would not protect literary and artistic speech, which is incorrect). As Judge Bork's *Worldnet* interview made clear, in his view the First Amendment provides some protection for "moral and . . . scientific speech" and "fiction and so forth," although probably not pornography. While the interview indicates that he would not extend as much protection to speech that is not expressly political as to speech that is, it says nothing about how much protection he would extend to the former. Since Judge Bork's *Ollman* opinion would provide more protection for political speech than present law, there is ample room for him to protect speech that is not expressly political less than political speech and still protect it at least as much as the Supreme Court. While Judge Bork also indicates that "pornography and things approaching it" probably are not protected, there is no basis whatsoever for the *Report's* conclusion that he would include among such things a Rubens painting or an Alvin Ailey Troupe Performance, or that his views on pornography are any different from the Supreme Court's.

*Bork on the establishment clause*

50. In its discussion of Judge Bork's views on the Establishment Clause, the *Biden Report* misconstrues his views on the clause generally and about particular cases. The *Report* states that Judge Bork *"has endorsed* the view that the framers intended the Establishment Clause to do no more than ensure that one religious sect should not be favored over another" (*Biden Report* at p. 57). (Emphasis supplied.) In fact, Judge Bork has never "endorsed" a particular view of the Establishment Clause—at most he has observed that:

"The establishment clause *might have been read* merely to preclude the recognition of an official church, or to prevent discriminatory aid to one or a few religions . . . Instead [it has] been interpreted to give [it] far greater breadth and severity." ("Religion and the Law," *University of Chicago*, Nov. 13, 1984, at 1-2).

51. The *Biden Report* is misleading in describing Judge Bork's views on the leading prayer in school case, *Engel v. Vitale*, 370 U.S. 421 (1962). The report does not give sufficient weight to Judge Bork's statement to the *Washington Post* that he has not taken a position on the constitutionality of school prayer. Instead, the report concludes, based on a letter sent to Judge Bork discussing a speech he made at the N.Y.U. Law School, that Judge Bork has "rejected" this case (*Biden Report* at p. 57. See also Appendix B, *Biden Report*).

52. The *Biden Report* excludes substantial evidence that supports Judge Bork's claim that he has not addressed the issue:

No text of Judge Bork's address at N.Y.U. is available. The written notes from which he spoke make no mention of *Engel.* The relevant portion states:

"I want to draw your attention to two other features of non-I[nterpretivist] judicial review—the *nationalization* of a single set of moral values and what I call the *gentrification* of the Constitution.

*Roe v. Wade* is the classic case of each.

The dramatic expansion of const[itutional] rights under E[qual] P[rotection] clause, substantive version of D[ue] P[rocess] Cl[ause], 1st Amendment—nationalizes moral and social values although there is no national consensus."

No other person present at the event recalls Judge Bork criticizing the *Engel* case.

Judge Bork made no mention of how he would vote on the school prayer cases in the two other significant occasions on which Judge Bork discussed his view of religion and the law: (1) an address at the University of Chicago on November 13, 1984 and (2) an address at the Brookings Institution Seminar for Religious Leaders on September 12, 1985 (*See* Washington Post, letter to the editor from Rabbi Joshua Haberman, August 6, 1987).

53. In alleging that Judge Bork criticized *Engel v. Vitale* in the 1982 N.Y.U. Law School speech, the *Biden Report* relies entirely upon the recollection of one attendee, Dean Norman Redlich. The report cites a letter sent by Dean Redlich to Judge Bork shortly after the address. However, the text of the Redlich letter does not substantiate the *Biden Report* claim that "Dean Redlich took issue with Judge Bork's assertion that the Court had strayed from 'interpreting' the Constitution in *Engel* and that the decision was therefore, in Bork's terms, 'non-interpretivist.'" (*Biden Report* at 57). Rather, the letter included the following passage:

"I do not understand why you lumped together the issues of school prayer, busing, and abortion, although I recognize that at one point in your remarks you said you were concentrating on *Roe v. Wade.* The present attack on the courts derives from all three issues and you failed to distinguish among them. I agree that *Roe v. Wade* can be attacked as non-interpretavist [sic]. *Engel v. Vitale,* however, was an interpretation of the establishment clause. The attacks on that decision were no less strident because it was interpretivist. The result, not the method, sparked the criticism." (Dean Redlich Letter at p. 1).

It appears more likely, however, that Judge Bork focused on *Roe v. Wade* as his example as a non-interpretivist decision, and discussed school prayer only as an issue which, as a factual matter, had sparked political opposition to the courts. This political opposition created a climate in which jurisdiction-stripping legislation, which Judge Bork opposed, was being seriously considered. This observation is one which Judge Bork has made in other speeches as well. This reconstruction of his spoken remarks is supported by Dean Redlich's letter, which described Judge Bork's reference to *Engel* in the context of "the present attack on the courts" since Judge Bork had never before criticized the decision in *Engel.*

54. The *Biden Report* misconstrues Judge Bork's criticism of the three part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In his speech at the University of Chicago Judge Bork stated that his criticism of *Lemon* is that the three part test "is not useful in enforcing the values underlying the establishment clause." (*University of Chicago* speech at pp. 4-5) He points out that the Supreme Court itself has not always applied the test (*Id.* at 6-7). Contrary to the premise stated in the *Biden Report,* Judge Bork's remarks about *Lemon* are not a criticism of the viewpoint that the government should be entirely neutral towards religion. Rather, they are a comment that the test is flawed in its ability to promote another value—strict separation of religion from all government action, a value the court precedents do not support.

55. The *Biden Report* is at best incomplete and at worst misleading in its omission of the fact that Judge Bork's criticism of the *Lemon* test is well within the mainstream of American legal scholarship. Judge Bork himself states that his thoughts are not original, but can be found in Dean Jesse Choper's writings (*University of Chicago* speech at p. 5). In addition, Senator Daniel Patrick Moynihan and others have criticized the Supreme Court's jurisprudence on the Establishment Clause by citing numerous contradictory and inexplicable results:

A state may lend to parochial school children geography textbooks that contain maps of the United States, but the state may not lend maps of the United States for use in geography class.

A state may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class.

A state may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them non-reusable.

A state may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or Natural History Museum for a field trip.

A state may pay for diagnostic services conducted in the parochial school, but therapeutic services must be given in a different building.

Speech and hearing "services" conducted by the state inside the sectarian school are forbidden, but the state may conduct speech and hearing diagnostic testing inside the sectarian school.

Exceptional parochial school students may receive counselling, but it must take place outside the parochial school, such as in a trailer parked down the street.

A state may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects.

Religious instruction may not be given in public school, but the public school may release students during the day for religious classes elsewhere, and may enforce attendance at those classes with its truancy laws.

56. The *Biden Report* accurately reports that Judge Bork has criticized *Aguilar v. Felton*, 473 U.S. 402 (1985). But the report's description of the case fails to indicate that the decision has been roundly criticized both by other members of the Supreme Court and the legal academic community. In *Aguilar* the Court struck down public funding for non-religious programs which supplied state-employed special education teachers for deprived children who attended parochial schools. In *Aguilar* there was a valid secular motive of providing remedial help to underprivileged children, and there was no hidden subsidy of religion (since the program was optional and not otherwise offered by the schools). Indeed, the sole reason the Court found the program violated the establishment clause was *that the system of monitoring that New York City had adopted in order to ensure that the program was not unconstitutionally religious in content constituted excessive entanglement of church and state.* It is small wonder that Judge Bork cited *Aguilar* as illustrative of why he believes "present doctrine is so unsatisfactory." As he noted in his Brookings speech, "it has been suggested that the program struck down in *Aguilar* might become constitutionally permissible if the teachers were placed in trailers *outside* the schoolhouse, with the children coming to them rather than the other way around. Odd as it may seem, precedent supports the idea that the crucial issue is whether the publicly-funded teachers physically entered the private building." This echoes a point made by Justice O'Connor's dissent: "Impoverished children who attend parochial schools may also continue to benefit from Title I Programs offered off the premises of their schools—possibly in portable classrooms just over the edge of school property." *Aguilar*, 105 S. Ct. at 3248 (O'Connor, J., dissenting.)

SECTION V—BORK'S ROLE IN WATERGATE AND "NADER V. BORK"

57. The *Biden Report* contains serious errors and omissions in its discussion of Judge Bork's role in firing the first Watergate Special Prosecutor, Archibald Cox. By focusing exclusively on the court case, *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973), the report ignores Judge Bork's substantial role in securing the appointment of a second special prosecutor and in ensuring that the Watergate prosecution would continue after Professor Cox was fired.

58. The *Biden Report's* discussion of *Nader v. Bork* is seriously misleading because it conceals the fact that the decision by Judge Gesell was later vacated upon the order of the D.C. Circuit Court of Appeals (*See* Unpublished Order, U.S. Court of Appeals for the D.C. Circuit, August 20, 1975, amended October 22, 1975). Thus, the *Biden Report* fails to indicate that the decision is of no legal precedence whatsoever. The Court of Appeals held that the case was moot.

59. The *Biden Report* fails to indicate that the significant reason that Judge Gesell dismissed the cause of action by Ralph Nader was because he was not an injured party (366 F. Supp. 104). The person who could claim he was injured, Archibald Cox, refused to join the suit. He stated at his press conference that precipitated the firing that "Of course there are ways of firing me." Later Professor Cox testified to Congress that he believed the President, through the Attorney General had the authority to discharge him (*See* "Senate Hearings on the Special Prosecutor," October 31, 1973, at p. 102).

60. The *Biden Report* implies that the Watergate Special Prosecutor was established pursuant to a special act of Congress (*Biden Report* at p. 61). Rather, the office was created by Attorney General Elliott Richardson pursuant to his general statutory authority to create positions in the Justice Department (*See* 28 U.S.C. § 508-510). In fact, these statutes specifically allow the Attorney General to transfer functions among different officials at the Department of Justice. While Attorney General Richardson had promised the Senate that he would create an independent prosecutor during his confirmation process, this action could not create special statutory authorization for the position.

61. The *Biden Report* implies that the opinion in *Bork v. Nader* is significant because it declared the discharge of Professor Cox to be illegal. The opinion itself recognizes that the relevent Supreme Court case (*Humphrey's Executor*) relied heavily upon the fact that in that case Congress had expressly legislated to restrict the President's ability to remove a government official. As discussed above, there is no such Congressional Act with respect to the Watergate Special Prosecutor.

62. The *Biden Report* mischaracterizes the issues of "whether the firing [of Professor Cox] itself was lawful" as the "threshold question" in the *Nader* case. Since the independence granted to the Watergate Special Prosecutor was derived solely from the Attorney General's regulations, the White House paper correctly analyses the question of whether these regulations were validly rescinded as the threshold question and determines that they were.

63. The *Biden Report* fails to inform the reader that Judge Bork's position that the delay in rescinding the Attorney General's regulations (from Saturday night when Professor Cox was fired until Tuesday, the next working day) was widely supported. Professor Cox himself referred to the delay as a "technical defect." (*See* "Senate Hearings on the Special Prosecutor," October 31, 1973, at p. 102).

64. The *Biden Report* misstates the grounds upon which Judge Gesell found the rescission of the Attorney General's regulations arbitrary and unreasonable. Judge Gesell's opinion relied upon the fact that a new special prosecutor was appointed three weeks later under substantially identical regulations to conclude that the rescission of the initial regulations was an arbitrary and unreasonable act, done solely to replace Professor Cox, which could not be done under the terms of the regulations (386 F. Supp. at 109). Although the *Biden Report* quotes this passage, the report then manufactures from whole cloth the rationale that the firing was arbitrary and unreasonable because of the circumstances leading up to the discharge (*i.e.*, that Professor Cox had decided to defy President Nixon and go to court for the White House tapes). The *Biden Report* uses this novel argument to bootstrap its conclusion that the firing would have been illegal even if the rescission of the regulation had been completed before the discharge.

SECTION VI—STARE DECISIS

65. The *Biden Report's* discussion of Judge Bork's views on *Stare Decisis, i.e.*, the adherence to prior precedent, in constitutional law is fundamentally flawed by a complete lack of understanding of the theories Judge Bork has articulated on precedent. Repeatedly the *Biden Report* equates criticism by Judge Bork of a prior decision with the conclusion that he would overrule the decision once on the Supreme Court. (This conceptual error is not only logically fatal to the authors' arguments about *Stare Decisis*, but also permeates the discussion of cases in Appendix B).

66. The *Biden Report* fails to recognize Judge Bork's complete views on *Stare Decisis*. First, the *Biden Report* omits Judge Bork's statement to the Senate Judiciary Committee during his confirmation hearings for the D.C. Court of Appeals in 1982, when he was asked by Senator Baucus, "While I have you here . . . do you have any general guiding principles as to when a Supreme Court judge should adhere to the principle [of Stare Decisis] in looking at, revisiting Supreme Court cases?" Bork responded:

"Well, yes. I think it is a parallel to what [Professor] Thayer said about the function of a judge when he is reviewing a legislative act for constitutionality. He said he really ought to be absolutely clear that it is unconstitutional before he strikes down the legislative act, if not absolutely clear, awfully clear.

I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn a prior decision unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious." ("Confirmation of Federal Judges," *Hearings Before the Judiciary Committee*, 1982, at 14)

67. The *Biden Report* fails to take into account that Judge Bork has articulated a two part method of determining when a given precedent should be overtuned. The *Biden*

*Report* merely recites (in an incomplete quote on p. 70) the second and ultimate determination that Judge Bork has repeatedly stated must be made before a prior constitutional decision is overturned:

"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 wrong*" ("A Talk with Judge Robert H. Bork," *District Lawyer* 29 at 32. *See also* "Bork on Judicial Restraint," *Manhattan Report* 14 at 15) (Emphasis added.)

The remainder of the *Biden Report* ignores this second test in its analysis of cases that Bork might some day overturn.

68. The *Biden Report* does not cite to a single instance where Judge Bork has stated that any prior Supreme Court decision should be overturned in support of its allegation that "The Record Strongly Suggests That Judge Bork, If Confirmed, Would Vote To Overturn A Substantial Number of Supreme Court Decisions." (Biden Report, p. 68). Instead, the report relies upon circumstantial conclusions drawn from flawed legal reasoning.

69. The *Biden Report* is misleading when it states that "On several occasions, Judge Bork has expressed a clear willingness to overturn precedent." The *Report* then quotes out of context to say that "an originalist judge would have no problem whatever in overruling a non-orginalist precedent" (Remarks, First Annual Lawyers Convention of the Federalist Society, cited at p. 66 of the *Biden Report*). What the *Biden Report* fails to indicate is that this remark was part of Judge Bork's explanation that a judge must *first* determine that the precedent was wrong. As part of the same remarks Judge Bork then goes on to explain that in some instances a judge should not overturn clearly incorrect precedent, because it is too damaging to social and economical institutional arrangements that have grown up as a result of the decision.

70. The *Biden Report* fails to note that Judge Bork was booed at the Federalist Society conference for stating that he would not overturn the commerce clause precedents. (*Washington Post*). This indicates that Bork is well within the mainstream of legal thought since some members of the legal profession believe his position on *stare decisis* is *too deferential* to prior decisions.

71. The *Biden Report* also creates a misleading impression that Bork is not in the mainstream of legal thought when he states that courts can overturn constitutional precedent more easily than common law or statutory precedent (*Biden Report* at p. 67). This position has long been commonly accepted by most constitutional scholars. It was first stated by Justice Brandeis:

"*Stare Decisis* is usually the wise policy . . . This is true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action practically impossible, this Court has often overruled its earlier decisions." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-408 (1932).

This error is all the more surprising since one of the reviewers of the *Biden Report*, Professor Laurence Tribe, has noted this rationale:

"For most of us, the proper role of precedent in constitutional adjudication will be found at the end of a middle road. The nation needs and deserves to have a steady hand at the Constitution's wheel, but the Supreme Court occassionally must overrule its earlier cases because legislative correction of a *constitutional* decision is all but impossible." (Tribe, L., *God Save This Honorable Court* at p. 102 (1985)) (Emphasis in the original.)

72. The *Biden Report* attacks Judge Bork because he may consider overturning *Roe v. Wade* and the right of privacy cases. This attack is inconsistent with even liberal judicial philosophy, again as expressed by Laurence Tribe, one of the reviewers of the report:

"On the other hand, those candidates [for the Supreme Court] who would, for example, refuse even to consider modifying, say, *Roe v. Wade*, . . . simply *because* they are established precedents, are equally unsuited for a seat on the Supreme Court, and should be voted down by any Senator who views constitutional principles as subject to reexamination when circumstances so require." (*Id.*) (Emphasis in the original.)

73. By quoting out of context from Judge Bork's interview with Philip Lacovara in the *District Lawyer*, the *Biden Report* creates the false impression that Judge Bork's views on all constitutional issues will not change when he is on the bench. The *Biden Report* highlights Judge Bork's general answer (that "[M]y views have remained about what they were. . . . So when you become a judge, I don't think your viewpoint is likely to change greatly," *Biden Report* at p. 65) without indicating that the answer was made to a very specific and limited question:

"Q. Before you ascended to the bench, and indeed in lectures and writings even since that time, you have been among the people who have challenged the role of what you and they have called the "imperial judiciary." Has your view of the possible usurpation of political functions by courts changed since you ascended to the bench? Either become stronger or perhaps more diffuse?" *District Lawyer Interview* at p. 31)

74. The *Biden Report* incorrectly uses a statement by Judge Bork in the *District Lawyer Interview* regarding a candidate's published record as evidence that the *White House* is disingenuous in suggesting that there is a distinction between a candidate's judicial opinions and his writings as an academic. (*Biden Report* at p. 65) Judge Bork was not involved in selecting the criteria used by the White House or the Justice Department in selecting him as the nominee, and his prior description of the process sheds no light on what distinctions were made by the Executive Branch.

75. Additionally, the *Biden Report* quotes Judge Bork out of context to imply that a nominee's academic writings are on an equal footing with his prior judicial decisions. Judge Bork was responding to a question that implied that appellate court judges are under stress because they know that their decisions are reviewed by the Department of Justice in selecting Supreme Court nominees. He responded that he had not observed anything which would corroborate such a concern. In the passage cited in the *Biden Report* Judge Bork merely stated that there should not be any concern about reviewing *opinions*. In fact, Judge Bork believes that it is very difficult to determine how a future Supreme Court Justice will vote, "predictions of what new judges will do being so perilous." ("Judicial Review and Democracy," *Society*, Nov/Dec. 1986, at p. 6) (The authors of the *Biden Report* must certainly have been aware of this fact, since they quote from the same paragraph in the *Society* article. *See*, No. 76 below).

76. The *Biden Report's* discussion of Judge Bork's views on the appointment power fails to substantiate the report's claim that they indicate "That He Would Overturn Many Landmark Supreme Court Decisions." (*Biden Report* at p. 66) The report misquotes from Judge Bork's review of a biography of Felix Frankfurter. The quote is part of a discussion of Frankfurter's rejection in the 1920's of proposals to eliminate judicial supremacy. The unedited quote reveals this:

"Perhaps Frankfurter was right about the inadvisability of formal mechanisms for checking the Court, though; since none have been tried, that is hard to say. But his hopes for legal education after fifty years certainly seem misplaced. Today, in fact, it is probably true that most professors of constitutional law teach and write from an activist perspective. What the solution should be is no more clear now than it was in 1921. If it is not to be a new constitutional mechanism, the *answer [to 'judicial excesses'] can only lie in the selection of judges, which means that the solution will be intermittent depending upon the President's ability to choose well and his opportunities to choose at all.*" ("'Inside' Felix Frankfurter," *The Public Interest*, Fall Book Supplement, 1981, at 110). (Emphasis to show the edited quote in the *Biden Report* at p. 66)

A full and careful reading of the passage makes it clear that Judge Bork was not discussing overruling prior cases at all. Rather, he was discussing the appointment power as the only way of affecting the Court's style of judicial reasoning and rejecting (in the immediately preceding paragraphs) such proposals as the use of the Exceptions Clause to strip the Supreme Court of jurisdiction over controversial constitutional issues.

77. The insertion of the phrase "to 'judicial excesses'," which the *Biden Report* claims to be quoting from the previous page indicates that the report attempted to use the quote from the Frankfurter book review to distort Judge Bork's position. The phrase is taken from a theoretical discussion of constitutionally provided checks on the Supreme Court's power:

Amending the Constitution is not a general solution to *judicial expansionism;* there are too many serious judicial excesses to make amendment a feasible tool of correction." (*Id.* at p. 109) (Emphasis to show the edited quote in the *Biden Report* at p. 66)

Indeed, Judge Bork then goes on to say: "The only safeguard we have at the moment is the self-discipline and capacity for self-denial of our judges." (*Id.*)

78. The other quotes cited in the *Biden Report* also conceal that Judge Bork's comments about the appointment of judges are all in the context of theoretical discussions of what checks there are in the Constitution of judicial power. An examination of the full context of the quote from Judge Bork's testimony before the Senate reveals this fact. After a series of questions about Judge Bork's opposition to proposals to strip the Supreme Court of jurisdiction to hear a Federal constitutonal question, Senator Baucus continued to question him:

"Senator BAUCUS. Could you tell me your view of whether the constitutional amendment process as outlined in Article V of the Constitution is sufficient to enable the country and the Congress to respond to what it regards as improper Supreme Court decisions?

Mr. BORK. I think there is a real dilemma, Senator. I think in a variety of areas the

Court over a period of years has reached results that were not intended by the framers of the Constitution or by the framers of various amendments. I think to that degree the Court has stepped into areas that do not belong to it. It is that form of judicial activism or judicial imperialism that the chairman asked me about.

I do not think there is an adequate way of checking the Court provided in the Constitution, and I think the reason for that is that the framers never anticipated judicial review could become the enormous power that it has become. There was no court at the time that had any power resembling that.

*The only cure for a Court which oversteps its bound that I know of is the appointment power,* and in addition to that the power of debate, political rebuke, and I hope one day a better understanding by the profession and by the judges of what the limits of judicial power are." ("Confirmation of Federal Judges," *Hearings Before the Judiciary Committee,* 1982, at 7.) (Emphasis to show the edited quote in the *Biden Report* at p. 66)

79. Similarly, the *Biden Report* quotes out of context from Judge Bork's writings on structural restraints in the Constitution on judicial power:

"Moreover, jurisdiction removal does not vindicate democratic governance, for it merely shifts ultimate power to different groups of judges. *Democratic responses to judicial excesses probably must come through the replacement of judges who die or retire with new judges of different views.* but this is a slow and uncertain process, the accidents of mortality being what they are and prediction of what new judges will do being so perilous. ("Judicial Review and Democracy," *Society,* Nov/Dec. 1986, at p. 6) (Emphasis to show the edited quote in the *Biden Report* at p. 66)

80. The *Biden Report* misquotes Judge Bork's discussion of the evolution of constitutional law in this century to imply that he would overturn a substantial number of Supreme Court decisions reached over the last thirty years. Compare the *Biden Report* excerpt:

" '[T]he Court . . . began in the mid-1950's to make . . . decisions for which it offered little or no constitutional argument. . . . Much of the new judicial power claimed cannot be derived from the text, structure, or history of the Constitution.' " (*Biden Report* at p. 68 quoting from "Judicial Review and Democracy," *Encycolopedia of the American Constitution,* Vol. 2, at 1062 (1986).) (Emphasis added in the *Biden Report.*)

With a full review of the comment in its proper context, which reveals that Judge Bork was not discussing *stare decisis* at all:

"Nevertheless, if *the Court* stopped defending economic liberties without constitutional justification in the mid-1930's, it *began in the mid-1950's to make* other *decisions for which it offered little or no constitutional argument.* It had been generally assumed that constitutional questions were to be answered on ground of historical intent, but the Court began to make decisions that could hardly be, and were not, justified on that basis. Existing constitutional protections were expanded and new ones created. Sizable minorities on the Court indicated a willingness to go still further. The widespread perception that the judiciary was recreating the Constitution brought the tension between democracy and judicial review once more to a state of intellectual and political crisis.

*Much of the new judicial power claimed cannot be derived from the text, structure, or history of the Constitution.* Perhaps because of the increasing obviousness of this fact, legal scholars began to erect new theories of the judicial role. These constructs, which appear to be acepted by a majority of those who write about constitutional theory, go by the general name of the noninterpretivism. . . ." ("Judicial Review and Democracy," *Encyclopedia of the American Constitution,* Vol. 2, at 1062 (1986).)

Mr. HATCH. Mr. President, I think that those who read the response to his record submitted by Senator BIDEN, who will take the time to read my analysis of the errors and omissions in that response, will be appalled at the professors who have participated in the vilification of Judge Bork in, I think, one of the most reprehensible ways I have found since I have been here.

It bothers me a lot, because it is my understanding that my friend and someone for whom I have a lot of regard, Robert Tribe, has rubberstamped that report. It is his scholarly effort out of the past, and I hope it is not a presage to the scholars we have in the future. I think he should read these a little more carefully than he did in this particular instance.

Mr. President, I yield the floor.

## THE DISARMAMENT DELUSION—PAST AND PRESENT

Mr. HELMS. Mr. President, less than 2 weeks ago in a letter published by the New York Times, former Secretary of State Dean Rusk admitted that the dismantling of U.S. Jupiter missiles in Turkey, following the United States-Soviet October missile crisis of 1962, was a quid pro quo for the withdrawal of Soviet missiles from Cuba. In the words of former Secretary Rusk:

> It was clear to me that President Kennedy would not let the Jupiters in Turkey become an obstacle to the removal of missile sites in Cuba.

There is no longer any doubt, as historians have discovered over the past decade, that a definite linkage existed between the removal of the Soviet missiles from Cuba and the removal of the Jupiters from Turkey.

It is important to note, Mr. President, that the Turkish Government desired that the 15 Jupiter missiles remain on Turkish soil. Like the present West German Government, the Turkish leaders only allowed the withdrawal of those missiles under strong American pressure. Then, as now, there was no NATO decision made to have the missiles removed. In fact, symbolically and practically, the removal of the Jupiter missiles in 1962, as with the impending withdrawal of the Pershing 1A missiles, represented a NATO defeat or at least a serious undermining of the political and military NATO deterrent.

The real truth of the matter is, to rework the famous statement of Secretary Rusk, that we stood eyeball to eyeball with the Soviets, and then we put on a blindfold. We did send a signal to the Soviets, but that signal was not the one generally associated with the October missile crisis. The signal was, in effect, an admission that enough pressure on the United States from the Soviet side will result in the United States comprising, withdrawing, and giving in. The message to our allies then, as now, was loud and clear. It is not accidental, Mr. President, that after the alleged Cuban missile Crisis, the Soviet Union attained parity with the United States in the nuclear arms arena.

The Kennedy administration had gained a media triumph as a result of the Cuban missile crisis, although the United States had actually engaged in a private trade—a trade that seriously weakened the nature of the United States deterrent. Subjected to a public humiliation by the American Government, the Kremlin leaders resolved never to let that situation reoccur. In the decade following the Cuban missile crisis, United States nuclear superiority was lost. The Soviets pulled even or surpassed, American nuclear capabilities, and thus set the stage for the next delusive arms control agreement—the ABM Treaty of 1972.

It is still difficult for me to understand what the Nixon administration was trying to accomplish with SALT I. President Nixon confided to a New York Times columnist in 1974 that "[t]he Soviets now have three times the missile strength [ICBM] of ourselves. * * *" Within a very short time, "they will pass us in submarines carrying nuclear missiles." He further conceded that a major Soviet goal in securing the SALT I Agreement was "to limit our ABM defensive systems because they knew our technology was better." And the United States, according to Nixon, needed to limit the Soviet offensive weapons, the ones that really count, "because they were moving faster than we were." This tied in with the Kissinger philosophy of when push comes to shove, the United States is likely to be pushed around, so that we should compromise and accommodate instead of standing firm and resolute.

Secretary Kissinger believed America to be in decline on the global scene and negotiated accordingly. We did slide backward because of such beliefs and the consequent actions associated with them.

I have already pointed out in great detail, Mr. President, the expanding number of Soviet violations of the SALT I and other arms control treaties. As I have stated numerous times on this floor, there is a repeated pattern of Soviet arms control violations.

those rights. Lynch mobs have on occasion prevailed, and for long periods State, local, or Federal governments denied basic rights to segments of our population.

And yet, Mr. President, in the darkest of times, and at the most hysterical of moments, there was always a calm bulkwark for our liberties. That rampart was the U.S. Supreme Court.

Aberrations occurred, of course, in our history. There was the infamous Dred Scott decision declaring blacks to be noncitizens, and Plessy versus Ferguson which upheld the segregation doctrine. But by and large, the Court could be relied upon to protect the innocent individual or group against the tyranny of the majority.

It could be relied upon; that is, until December 7, 1941. When the air and naval forces of the Japanese empire struck suddenly and without warning at Pearl Harbor, our Nation was shocked, outraged, and furious. And rightfully so.

Cries for revenge immediately rang out. Demands were made that Japan be punished for her attack. And rightfully so.

What was not right, what could not be justified, was the wellspring of ugly racism which burst to the surface in the Western United States. Over 100,000 American citizens of Japanese origin were dragged from their homes by the forces of the Government and interned in concentration camps.

No examination was made of their loyalty; no distinction was invoked between legitimate enemy aliens and innocent citizens. That the action taken was blatantly racist is demonstrated by the fact that the same actions were applied neither to Americans of German origin nor to those whose families came from Italy.

One wonders if anyone in Government considered the incongruity of applying to citizens of Japanese origin the same tests of parentage and grandparentage that Hitler was applying in his despicable war of extermination against European Jewery.

There stood between those citizens and their oppressors in and out of government only that one bulwark of our liberties; the Supreme Court. The Court failed the test miserably. It permitted the forced relocation and internment of American citizens on a purely racial basis over the dissent of only one Justice. That one Justice, Robert Jackson, who was later to prosecute war criminals at Nuremberg, demonstrated the importance of one judge as the conscience of a nation.

One of the citizens forced from his home is a friend of mine, Wilson Makabe, who lives in Reno, NV. Wilson's response to that degradation and humiliation was magnificent. He enlisted in the U.S. Army. He enlisted from his new home, which was a concentration camp. When he went home on leave from his military base, he had to visit his family also in a concentration camp. Before that American soldier could go home to visit his father and sisters in their barracks, he was subjected to searches by his fellow GI's who were their guards.

Wilson fought with the famous 442d with many people, including Senators INOUYE and MATSUNAGA. He fought in Italy. He lasted on the battlefield less than 30 days before he was so badly shot up they had to ship him back from the front in a body cast up to his arms. They took his leg off, eventually, and sent him home.

He got off the boat and called one of his brothers. That is when he learned he had a welcome home present. The neighbors had set fire to his family's home in California. It was burned to the ground.

Mr. President, we as a Congress are now considering a piece of legislation to apologize and offer reparations to survivors of this dark chapter in our history. Apologies and reparations, of course, are not enough. They will not be enough. But they are at this time all we can do.

I will vote for this legislation and so, I am sure and most hopeful, will the majority of my colleagues. Before we vote on this legislation, though, Mr. President, I want to say something to my friend Wilson Makabe. I want to say thank you, Wilson, and I am sorry.

Mr. President, I yield the remainder of my time.

The ACTING PRESIDENT pro tempore. The Senator yields the floor.

Does the Senate note the absence of a quorum?

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

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

The assistant legislative clerk proceeded to call the roll.

Mr. WARNER. 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.

## THE BORK NOMINATION

Mr. RUDMAN. Mr. President, Senator THURMOND, in his opening statement at the hearings on the nomination of Judge Bork to the Supreme Court, gave a brilliant exposition on the role of the Senate in the confirmation process. In addition, he gave the best statement in support of Judge Bork that I have heard to date. Although I will not make a final decision as to how I will vote on Judge Bork's confirmation until after the hearings have concluded, I believe Senator THURMOND's statement should be read by anyone interested in this matter.

Accordingly, I ask unanimous consent that the text of his statement be printed in the RECORD.

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

STATEMENT BY SENATOR STROM THURMOND

Mr. Chairman, today, the Committee begins consideration of the nomination of Judge Robert H. Bork to be Associate Justice of the United States Supreme Court. This is the fourth Supreme Court nomination that this Committee has considered in the past six years. (In fact, I might say that it is the 20th such nomination that I have had the opportunity to review during my 33 years in the Senate.) On earlier occasions, I have set forth the qualities I believe a nominee to the Court should possess:

Unquestioned integrity;

The courage to render decisions in accordance with the Constitution and the will of the people as expressed in the laws of Congress;

A keen knowledge and understanding of the law; in other words, professional competency;

Compassion, which recognizes both the rights of the individual and the rights of society in the quest for equal justice under law;

Proper judicial temperament—the ability to prevent the pressures of the moment from overpowering the composure and self-discipline of a well-ordered mind;

An understanding of, and appreciation for, the majesty of our system of government—in its separation of powers between the branches of our Federal government; its division of powers between the Federal and State governments; and the reservation to the States and to the people of all powers not delegated to the Federal Government.

There is no doubt that the nominee before us today meets these qualifications. His intellectual credentials are impeccable: Phi Beta Kappa, distinguished professor of law at Yale Law School, and respected author. His experience is extraordinary: in academia, as a general practitioner, as Solicitor General, and as a Judge for the United States Court of Appeals for the D.C. Circuit (felt by many to be the second most important court in this country). Judge Bork has a longstanding reputation for integrity and judicial temperament. On two occasions, Judge Bork has had his professional qualifications and personal character specifically examined and carefully scrutinized by the American Bar Association. On both occasions, the ABA has given Judge Bork the highest possible rating for his professional competence, integrity, and temperament.

Judge Bork is not a new or unknown quantity. He has been before this Committee twice previously, and both times the Committee and the Full Senate have deemed him worthy of confirmation: to be Solicitor General and to be a Judge of the U.S. Court of Appeals for the D.C. Circuit. It is also worthy of note that both times Judge Bork was confirmed by the Full Senate—once when Democrats controlled the Senate, and once when Republicans did—there was not a single dissenting vote.

In fact, if we were to put aside questions of philosophy and ideology, Judge Bork would in all likelihood already be sitting on the Court. However, it is apparent that some would have the issue of philosophy become the standard for whether or not we confirm this nominee for the Supreme

Court. This nomination has been delayed longer—by any standard—than any other Supreme Court nomination in the last 25 years, while opponents mount an ideological campaign against him. Because so much has been said about the question of philosophy and ideology, I believe we should examine that issue within the context of the nominating process.

Some have said that philosophy should not be considered at all in the confirmation process (In Fact, I have been incorrectly aligned with that position), and others say that philosophy should be the sole criteria. I reject both of these positions. I believe that a candidate's philosophy may properly be considered, but philosophy should not be the sole criteria for rejecting a nominee, with one notable exception. The one exception is when the nominee clearly does not support the basic, longstanding, consensus principles of our Nation.

I want to be very clear about this point: I do not believe that philosophy alone should bar a nominee from the Court unless that nominee holds a belief that is so contrary to the fundamental, longstanding principles of this country that the nominee's service would be inconsistent with the very essence of this country's shared values.

Such a nominee's position should be unequivocal and in violation of a basic belief. For example, freedom of speech is a fundamental, accepted principle in this Country—but exactly what constitutes "speech" and whether or not there are limitations on any particular activity, are issues on which reasonable people can disagree. Freedom of religion is an accepted tenet of this Country—but whether freedom of religion means that a person in the military can wear religious garb rather than his uniform is a matter that can be, and is, openly debated. That there should be no government-established religion in America is a fundamental principle—but whether that prescribes prayer in our schools is a matter of accepted public debate and commentary. That discrimination based on race or national origin is unacceptable is a basic tenet of this Nation—but there certainly is no such agreement on the use of preferential quotas. I raise these examples not to launch into a substantive debate on any of these issues, but merely to point out that we should not confuse core, fundamental principles with evolving and debatable applications of those principles.

In applying this standard, which could lead to automatic rejection of a nominee, we must be reasonable. We must apply it in a manner which also protects the basic American interest of free and open debate on important issues. As the courts, and all Americans, grapple with new applications of our principles and new doctrines are created and offered, these evolving decisions are not sacrosanct and above criticism. In fact, debate and discussion of these new ideas is not only welcomed, it is essential. This is a stringent standard, but in my tenure in the Senate, this test has never been used to disqualify a nominee because no President has ever sent such a nominee to the Senate. To apply a broader philosophical litmus test would put a nominee in jeopardy of being labeled "unamerican" or "unfit" if he has ever been in a minority position on any issue.

It has been said that since the President uses philosophy to pick a nominee, the Senate can use philosophy in evaluating a nominee. A corollary statement should be just as true: when the President does not solely use philosophy to choose his nominee, the Senate should not solely use philosophy to reject that nominee. Historically, Presidents do consider philosophy when appointing nominees to the Supreme Court. That is part of our system of government; it is the manner in which the American people have an opportunity to influence the Court which so greatly affects them. Not only is that generally accepted, but this President was re-elected overwhelmingly when the issue of such appointments was a major, well-discussed campaign issue.

Because this process is well understood by the American people, any nominee selected by a President comes to the Senate with a presumption in his favor. Accordingly, opponents of the nominee must make the case against him. That is why opponents of Judge Bork are trying to fit him into some accepted basis for disqualification or create a new one to defeat him.

First, Judge Bork's opponents will try to raise questions about his character and integrity. Falling this, they will assert that he is disqualified by virtue of his philosophy, by labeling him as an extremist or "outside the mainstream." This, in essence, refers to the purely philosophical test which I have discussed. A review of Judge Bork's record indicates that he indeed is well within the mainstream of legal debate and discussion in this Country. His record on appeals is perhaps the best in the Country.

However, even if a nominee occasionally dissents from a majority view, that should not disqualify him. Although Judge Bork has been in the accepted majority position almost without fail, there is a grand tradition of legal dissent in this country. As Justice Felix Frankfurter said, "In this Court, dissents have gradually become majority opinions." There certainly is nothing wrong with writing a dissent at any judicial level if it is called for; in fact, integrity demands it.

Opponents of this nominee have also surfaced a new theory of "balance" on the Court; that somehow there is a mandated, immutable balance on the Court. This theory has an inherent problem: when did the Court reach the perfect balance—was it the Warren Court, or the Courts which preceded the Warren Court and which were so greatly overturned by the Warren Court? Further, does anyone really believe that these proponents of a "balance theory" would oppose a liberal nominee solely because he had been named to replace a conservative Justice? Of course not. More fundamentally, such a theory presupposes that the Supreme Court is infallible, when clearly it is not. Do we really want to enshrine, for all time, every decision the Court makes? History gives us many examples of the Supreme Court overruling itself and correcting its own errors. Usually, those who argue "balance" have certain decisions that do not want reconsidered under any circumstances. On the other hand, I believe the Court should be allowed to correct errors it has made.

Finally, there is one other issue that should be addressed. I believe, as I have stated before, that the Full Senate should make the final determination on all nominations. The confirmation process should not stop at the Committee level. The Constitution requires the advice and consent of the Senate, not simply the opinion of any one Committee. I am pleased that both Chairman Biden and the Distinguished Majority Leader, among others, have indicated that they agree that this nomination should be dealt with by the Full Senate.

Judge Bork, welcome again to the Committee, and we look forward to your testimony.

## POLAND

Mr. KASTEN. Mr. President, I rise today to draw attention to the voice of liberty being heard from within Communist Poland.

Last weekend, 40,000 Polish young people gathered in Warsaw to enjoy one of the world's most democratic art forms: Rock music. Just as rock 'n roll has become one of the most potent expressions of America's spirit of individual freedom, the Polish version has given an outlet to the suppressed energies of Poland's youth.

The Polish regime, like all repressive totalitarian governments, seeks to deny the personal creativity at the heart of all human endeavor and achievement. The ideology of the few supplants the spirit of the many; bureaucratic uniformity threatens to deaden the genius of the people.

Zbigniew Holdys, leader of the rock band "Perfekt," made clear how Poland's youth feels about the inhumanity of the Polish regime, and he did so in words that compare favorably with the defiant-youth lyrics of our own Chuck Berry, and with the protest songs of Bob Dylan.

He sang:

A lot of us—few of them. They are afraid of us, they are afraid to sleep at night * * * they are afraid of themselves.

Mr. President, when Holdys sang these words, he was wearing a cape with a letter "S" emblazoned on it, to show his support for the outlawed Solidarity trade union.

Mr. President, I ask unanimous consent that the front-page article in the Washington Post of September 14, the article in which this extraordinary peaceful protest is described, be entered in the RECORD.

The youth of Poland give us hope, and deserve our respect.

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

[From the Washington Post, Sept. 14, 1987]

ROCK AROUND THE REGIME—40,000 CHEER AS LYRICS TWIT POLISH RULE

(By Jackson Diehl)

WARSAW, Sept. 13—It was billed as the biggest, freest, most daring rock concert ever staged in Poland. And sure enough, when the home-grown group Perfekt hit the stage of a huge outdoor stadium here last night, 40,000 waiting young people jumped up to dance, shout, and sing out their frustration with communist rule.

"I'm not dead yet," shouted Perfekt leader Zbigniew Holdys, to the opening bars of a three-hour hard-rock show driven by the twin themes of alienation and defiance. At its end, his band was nearly drowned out by the crowd as thousands held up flames and sang out the words of the group's anthem, "We want to be ourselves."

What happened in between was a distinctively Polish show, where a base of blasting guitars was topped by gestures of protest ranging from the ironic to the explicit. At one point, thousands in the crowd added a word to a Perfekt chorus and repeatedly

Mankiewicz moved to MGM in 1934 where, after being refused permission by Louis B. Mayer to direct what he wrote, he functioned as writer/producer on numerous films including "Manhattan Melodrama", "Fury", "Three Comrades", "Philadelphia Story", and "Woman of the Year".

By 1943 he was under contract to Twentieth Century Fox—now as writer/director/producer—with his talents approaching their most fruitful period. Among his Fox films were "The Ghost and Mrs. Muir", "A Letter to Three Wives", "No Way Out", "People Will Talk", "Five Fingers" and the unparalleled "All About Eve". This masterpiece was nominated for 14 Academy Awards with 5 in the "best acting" category alone. This was a record number of nominations which has yet to be equalled by any single film.

Leaving Fox to freelance, he continued his career with "Julius Caesar", "The Barefoot Contessa", "Guys and Dolls" and "Suddenly Last Summer". In 1952, having returned to New York City, he changed pace somewhat by directing a production of "La Boheme" at the Metropolitan Opera.

Mankiewicz is the only filmmaker to have won four Academy Awards in consecutive years for Best Screenplay and Best Director. These were for the films "A Letter to Three Wives" in 1949 and the triumphant "All About Eve" the following year. His most recent nomination was for directing the fine thriller "Sleuth" in which both members of the cast were nominated for acting awards.

Numerous international honors have been bestowed upon Mankiewicz from around the world, including awards from the British Film Academy for "All About Eve" and "Julius Caesar"; the "Edgar" (Allen Poe) from the Mystery Writers of America; the Writers Guild of America's Laurel Award; the D.W. Griffith Award for Outstanding Lifetime Achievement in Film Directing. President Saragat of Italy awarded him "Commander in the Order of Merit" and important retrospectives have been tendered him by British and French film institutes. Finally, Columbia College honored him with the Alexander Hamilton Medal in 1986 "for distinguished service and accomplishment in any field of human endeavor * * *"

Joseph Mankiewicz is a brilliant master of the very special craft of motion picture-making. Generations of film-goers will delight in the work he has created throughout his long and distinguished career. He has done so much to raise this unique art form to be one of mankind's great arts.

I take this opportunity to personally salute Frank L. Mankiewicz for all he has done to enrich our lives and wish him well for the years ahead.

## THE CONFIRMATION OF JUDGE BORK: QUALIFICATIONS OR POLITICS?

Mr. PRESSLER. Mr. President, I shall vote for Judge Robert Bork to be a Justice of the U.S. Supreme Court. I have been closely following the hearings for the last few days and feel he is doing an excellent job. He is one of the most qualified individuals ever nominated. Barring some unforeseen and unanticipated ethical problem, Judge Bork should be confirmed by the U.S. Senate. I recently met with him to discuss his current views on the judicial system. When I attended Harvard Law School and Oxford University, I had the opportunity to hear his lectures and read some of his articles.

Politics should not dictate judicial nominations. In the past, I have supported the qualified judicial nominees of Democratic and Republican Presidents alike. For example, I supported President Carter's qualified and competent nominees even when I disagreed with some of their views.

It is the role of the President to nominate Supreme Court Justices. The Senate has the power to "advise and consent" on these nominations. The confirmation process is designed to ensure that nominees are highly qualified and have neither ethical nor character problems. It was not intended to be a battleground for partisan politics. Senators should be evaluating Judge Bork's qualifications and his extensive judicial record. Unfortunately, some individuals are making Judge Bork out to be an extremist. After reading many of his opinions and articles, I find this view to be unfounded. Not one of Judge Bork's majority opinions has been overturned by the Supreme Court. His is not the record of a radical.

Judge Bork believes in judicial restraint—the idea that the Court's role is to ensure that the laws are consistent with the Constitution rather than a judge's personal beliefs. He believes that it is the role of judges to interpret the Constitution, not to make laws.

The Supreme Court reconvenes on the first Monday in October, but Judge Bork's confirmation hearings were not scheduled to start until September 15—2½ months after the nomination was submitted! Why the delay? Some individuals seem to be using this time to make a partisan issue of an important matter where politics has no place. It may even be that some would oppose any Reagan nominee in the hope that Court appointments could be made by the next President. This is inexcusable. Because of this delay, it is possible that there will be only eight Justices when the Supreme Court reconvenes this fall. The American people need and deserve the Supreme Court working at full strength. When Justice Powell retired from the Court, he noted that vacancies "created problems for the Court and for litigants." Such problems could be prevented if we rise above politics and focus on the issues.

Recently, the American Bar Association endorsed Judge Robert Bork's Supreme Court nomination by giving him its highest rating. In 1982, Judge Bork also received the American Bar Association's highest rating when he was nominated to serve on the U.S. Court of Appeals for the District of Columbia Circuit. Judge Bork was confirmed unanimously by the Senate. He has served in that position for the last 5 years. Judge Bork has served as a professor at Yale Law School, as Solicitor General of the U.S. Department of Justice, and in the U.S. Marine Corps. As a practitioner, he has argued and won numerous cases before the Supreme Court. Justice John Paul Stevens, who is considered to be a moderate-liberal Justice, publicly stated "I personally regard him as a very well-qualified candidate and one who will be a very welcome addition to the Court."

In addition to being highly qualified on the basis of experience, Robert Bork believes that excessively liberal interpretations of procedural rights do not serve the goal of protecting justice for all. Many of Judge Bork's opinions illustrate his strong belief that we must protect constitutional rights, but the guilty should not go free. There has been much debate regarding the exclusionary rule. To what extent do we disallow evidence, knowing that a guilty party will go free. Yes, criminals should have constitutional rights. But as Judge Bork has asked, "at what cost?" Many law enforcement agencies have announced their support for Judge Robert Bork, including: The Fraternal Order of Police, International Association of Chiefs of Police, National District Attorneys Association, and the National Sheriff's Association, just to name a few. Stronger law enforcement procedures are needed and supported by the American people.

Some have clearly distorted Judge Bork's role in the Watergate Saturday night massacre in an attempt to make an issue where none exists. Former President Nixon ordered then-Attorney General Elliot Richardson to fire Special Prosecutor Archibald Cox. Richardson refused to carry out the President's order and resigned. Solicitor General Bork carried out Nixon's order. A point often overlooked by Bork's detractors is that Elliot Richardson urged Mr. Bork to stay at the Justice Department to maintain order in the wake of his own resignation. Soon after Cox was dismissed, Bork sought another special prosecutor and pressed former President Nixon into agreeing not to interfere with the investigation. Because of his actions, the

Watergate investigation continued free from Presidential control.

It is time for everyone to focus on Judge Bork's qualifications and dispense with the politics. There is one goal—filling the vacancy on the Supreme Court with a worthy candidate. It is my hope that Senators will not vote for or against Judge Bork based solely on political philosophy or partisanship. The vacancy should be filled before the Supreme Court reconvenes in October. Further delays surely will make the American people wonder if Judge Bork is receiving a fair hearing.

## MESSAGES FROM THE HOUSE

At 10:05 a.m., a message from the House of Representatives, delivered by Mr. Berry, one of its reading clerks, announced that on August 7, 1987, the Speaker appointed conferees to the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3) entitled "An Act to enhance the competitiveness of American industry, and for other purposes," and pursuant to the order of the House of that day, the Speaker now supplements that initial appointment.

Accordingly, the Speaker appoints the following Members from the committees designated, including both the Members initially appointed and Members newly appointed, as conferees:

From the Committee on Ways and Means, for consideration of titles I, II, VIII, and XV, and sections 704 and 906 of the House bill, and titles I, II, III (except sections 308 and 310), IV (except sections 412 through 415), V through VIII, IX (except sections 963, 967 through 972, 974, 975, and 977) of the Senate amendment, and modifications committed to conference: Mr. Rostenkowski, Mr. Gibbons, Mr. Jenkins, Mr. Downey of New York, Mr. Pease, Mr. Russo, Mr. Gephardt, Mr. Guarini, Mr. Matsui, Mr. Duncan, Mr. Archer, Mr. Vander Jagt, Mr. Crane, and Mr. Frenzel.

From the Committee on Ways and Means, for consideration of sections 321, 323, 363, 907 through 909 of the House bill, and title XXXVII and sections 308, 310, 412, 977, 2002, and 3871 of the Senate amendment, and modifications committed to conference: Mr. Rostenkowski, Mr. Gibbons, Mr. Jenkins, Mr. Downey of New York, Mr. Pease, Mr. Russo, Mr. Crane, Mr. Frenzel, and Mr. Schulze.

From the Committee on Ways and Means, for consideration of sections 613, 626, 627, 671 through 675, 681, 682, 691, and 692 of the House bill, and sections 974, 975, 2112, 2128, 2171, 2173 through 2175, 2191, 2193, and 2194 of the Senate amendment, and modifications committed to conference: Mr. Rostenkowski, Mr. Gibbons, Mr. Jenkins, Mr. Pease, Mr. Russo, Mr. Matsui, Mr. Archer, Mr. Thomas of California, and Mr. Daub.

From the Committee on Ways and Means, for consideration of sections 605 through 607, 611, and 663 of the House bill, and sections 2113, 2114, and 2136 of the Senate amendment, and modifications committed to conference: Mr. Rostenkowski, Mr. Gibbons, Mr. Jenkins, Mr. Matsui, Mr. Thomas of California, and Mr. Daub.

From the Committee on Ways and Means, for consideration of title X of the House bill, and section 3911 of the Senate amendment, and modifications committed to conference: Mr. Rostenkowski, Mr. Gibbons, Mr. Gephardt, Mr. Guarini, Mr. Crane, and Mr. Frenzel.

From the Committee on Ways and Means, for consideration of sections 351, 901, and 902 of the House bill, and sections 968 through 972, 1030 through 1033, and 3811 through 3824 of the Senate amendment, and modifications committed to conference: Mr. Rostenkowski, Mr. Gibbons, Mr. Downey of New York, Mr. Archer, and Mr. Schulze.

From the Committee on Agriculture, for consideration of title VI and sections 318 through 321 of the House bill, and title XXI (except sections 2178 through 2180A and 2185 through 2187) and sections 601, 602, 604, 605, 974, 975, and 4706 of the Senate amendment, and modifications committed to conference: Mr. de la Garza, Mr. Brown of California, Mr. Panetta, Mr. Glickman, Mr. Stenholm, Mr. Volkmer, Mr. Roberts, Mr. Morrison of Washington, Mr. Gunderson, and Mr. Grandy.

From the Committee on Agriculture, for consideration of section 308 of the Senate amendment and modifications committed to conference: Mr. de la Garza, Mr. Brown of California, Mr. Glickman, Mr. Roberts, and Mr. Morrison of Washington.

From the Committee on Banking, Finance and Urban Affairs, for consideration of section 126 (insofar as it would add new sections 311(g) (1) and (2) to the Trade Act of 1974), sections 401 through 427, and 431 through 452 of the House bill, and titles XIII and XVII and sections 108, 2008, 2012, and 2178 through 2180A of the Senate amendment, and modifications committed to conference: Mr. St Germain, Mr. Fauntroy, Mr. Garcia, Mr. LaFalce, Mr. Schumer, Mr. Morrison of Connecticut, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of section 322 of the House bill, and section 1106 of the Senate amendment, and modifications committed to conference: Mr. St Germain, Ms. Oakar, Mr. Garcia, Mr. Vento, Mr. Schumer, Mr. Morrison of Connecticut, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of sections 341 and 344 of the House bill, and modifications committed to conference: Mr. Fauntroy, Ms. Oakar, Mr. Garcia, Mr. LaFalce, Mr. Schumer, Mr. Morrison of Connecticut, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of section 428 of the House bill, and section 1506 of the Senate amendment, and modifications committed to conference: Mr. St Germain, Mrs. Oakar, Mr. Vento, Mr. Barnard, Mr. Schumer, Mr. Morrison of Connecticut, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of sections 461 through 471 of the House bill, and sections 3801 through 3809 of the Senate amendment, and modifications committed to conference: Mr. St Germain, Mr. Fauntroy, Mr. Garcia, Ms. Oakar, Mr. LaFalce, Mr. Vento, Mr. Wylie, Mr. Leach of Iowa, Mr. McMillan of North Carolina, and Mr. Roth.

From the Committee on Banking, Finance and Urban Affairs, for consideration of sections 476 and 477 of the House bill, and sections 1101 through 1103 of the Senate amendment, and modifications committed to conference: Mr. St Germain, Mr. Fauntroy, Ms. Oakar, Mr. Garcia, Mr. LaFalce, Mr. Vento, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. Roth.

From the Committee on Banking, Finance and Urban Affairs, for consideration of section 907 of the House bill, and modifications committed to conference: Mr. St Germain, Mr. Fauntroy, Ms. Oakar, Mr. Garcia, Mr. Vento, Mr. Schumer, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of section 911 of the House bill, and modifications committed to conference: Mr. St Germain, Ms. Oakar, Mr. LaFalce, Mr. Vento, Mr. Schumer, Mr. Morrison of Connecticut, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of section 959 of the Senate amendment, and modifications committed to conference: Mr. St Germain, Mr. Fauntroy, Ms. Oakar, Mr. Garcia, Mr. LaFalce, Mr. Schumer, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of sections 1026 and 1027 of the Senate amendment, and modifications committed to conference: Mr. St Germain, Ms. Oakar, Mr. LaFalce, Mr. Vento, Mr. Schumer, Mr. Morrison of Connecticut, Mr. Wylie, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of sections 1501 through 1504 of the Senate amendment, and modifications committed to conference: Mr. St Germain, Ms. Oakar, Mr. Vento, Mr. Barnard, Mr. Schumer, Mr. Morrison of Connecticut, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of section 1805 of the Senate amendment, and modifications committed to conference: Mr. St Germain, Mr. Fauntroy, Mr. Garcia, Mr. Vento, Mr. Schumer, Mr. Morrison of Connecticut, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of title XIX and section 2001 of the Senate amendment, and modifications committed to conference: Mr. St Germain, Mr. Fauntroy, Mr. Garcia, Mr. LaFalce, Mr. Vento, Mr. Schumer, Mr. Wylie, Mr. Leach of Iowa, Mr. Bereuter, and Mr. McMillan of North Carolina.

From the Committee on Banking, Finance and Urban Affairs, for consideration of section 313 of the House bill, and sections 1201 and 1203 of the Senate amendment, and modifications committed to conference: Mr. Fauntroy, Mr. Garcia, Mr. Morrison of Connecticut, Mr. Leach of Iowa, and Mr. Bereuter.

From the Committee on Banking, Finance and Urban Affairs, for consideration of section 326 of the House bill, and modifications committed to conference: Mr. St Germain, Ms. Oakar, Mr. Garcia, Mr. Wylie, and Mr. Leach of Iowa.

From the Committee on Banking, Finance and Urban Affairs, for consideration of sec-

UNITED STATES OF AMERICA

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# SENATE—*Tuesday, September 22, 1987*

The Senate met at 8 a.m. and was called to order by the Honorable PATRICK J. LEAHY, a Senator from the State of Vermont.

## PRAYER

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

Let us pray:

*Hear ye now what the Lord saith; * * * He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?*—Micah 6: 1 and 8.

Holy God, Your words are plain and simple and basic. Where would we be without justice, kindness, and humility before You? Forgive us for the arrogance which elevates ourselves as though we are gods and have all the answers. Help us to see ourselves—to evaluate ourselves in the light of truth. Remind us of the terrible and tragic consequences in history when a society and its leadership abandon justice. Give to the leadership of our Nation a passion for righteousness and integrity. Deliver us from the destructive force of relative values and ethical anarchy. Make this a place dominated by unequivocal moral and ethical values. In the name of Jesus Christ—for the glory of God and the welfare of the people. Amen.

## APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. STENNIS].

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
*Washington, DC, September 22, 1987.*

*To the Senate:*

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable PATRICK J. LEAHY, a Senator from the State of Vermont, to perform the duties of the Chair.

JOHN C. STENNIS,
*President pro tempore.*

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

## RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. Under the standing order, the distinguished Senator from West Virginia, the majority leader, is recognized.

## THE JOURNAL

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

Mr. President, I ask unanimous consent that the Journal of proceedings be approved to date.

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

## THE CHAPLAIN'S PRAYER

Mr. BYRD. Mr. President, I thank our Chaplain for reading from the Book of Micah this morning and for his strengthening prayer: For "what doth the Lord require of Thee, but to do justly, and to love mercy, and to walk humbly with Thy God?"

## BORK HEARINGS GOING WELL

Mr. BYRD. Mr. President, last week we celebrated the 200th anniversary of our Constitution, one of the greatest documents of its kind ever written by the hands of man.

Celebrations were held throughout the country, including an impressive ceremony on the steps of the Capitol.

But no celebration, however fervent or elaborate, could have been a more fitting tribute to the work of the framers than the discussions on the history and purpose of the Constitution that took place in the hearings on the nomination of Judge Robert Bork to be a Supreme Court Justice.

I commend our colleague from Delaware, Senator BIDEN, for the exemplary way in which he has been chairing these historic hearings. When Judge Bork was testifying, Senator BIDEN made sure that every member of the committee was given the opportunity to question the nominee at length, and he allowed Judge Bork to respond fully and to offer his own comments. The committee members kept their questions on a high plane, so that the issues discussed were those of principle, not personality.

For his part, Judge Bork handled himself with a combination of stamina, wit, and intelligence. He expressed his views with eloquence and considerable clarity, and he offered opinions on a broad spectrum of issues.

The result was not only what Judge Bork might term "an intellectual feast," but also an explanation to the American people of the fundamental principles behind our system of law. Part history lesson, part legalist seminar, and part debate, the hearings provided our citizens a rare opportunity to learn about the Constitution and the beauty of its application.

Reasonable men and women can and do differ about the merits of Judge Bork's nomination, and like many others in this body, I have not yet made up my mind. The hearings so far have been exemplary in their depth and breadth. They have been extremely helpful, I think, to all of us, and I am eager to follow them to their completion.

## RESERVATION OF TIME

Mr. BYRD. Mr. President, I reserve the remainder of my time. I ask unanimous consent that the time of the Republican leader may be reserved.

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

## BICENTENNIAL MINUTE

### SEPTEMBER 21, 1814: THE SENATE MEETS AFTER CAPITOL IS BURNED

Mr. DOLE. Mr. President, 173 years ago this week, September 21, 1814, marked the 3d day, of the 3d session, of the 14th Congress. An examination of the "Annals of Congress" reveals that something unusual was afoot. On the 21st, for example, a resolution passed without opposition authorizing Senate Sergeant-at-Arms Mount Joy Bayly "to employ one assistant and two horses." Why, in the fall of 1814, did the Senate suddenly find itself in need of assistants and horses? The answer lies in the fact that the Senators were not meeting in the Capitol Building, but in Blodgett's Hotel downtown.

The War of 1812 was still raging on American soil. Scarcely a month before, on August 24, the British had marched into Washington virtually unopposed, and had set fire to the Capitol. Only a torrential rainstorm prevented them from burning it to the ground. As it was, the dome and the roofs of both wings lay in ashes. Smoke-stained walls pierced by gaping holes where windows once had been, memorialized the Nation's humiliation. The new assistants and horses, along with other special provisions passed in the early days of this 1814 "special session," represent the Senate's efforts to try to get its affairs back in order.

For more than a year, the Senate met at "Blodgett's," with assistants and horses making frequent trips between the blackened Capitol and the old hotel. Then, in December 1815, the Congress moved to new quarters on Capitol Hill. Washington businessmen, eager to keep the Government in their

more students are actually considering pursuing a college education. A highly educated population, as we all know, is the key to a strong economy. I congratulate Oregon educators for their role in strengthening the State's educational system and for fostering in the schools and throughout the communities a higher regard for learning.●

## THE BORK NOMINATION

● Mr. DANFORTH. Mr. President, I have followed the hearings on the Bork nomination with great interest. I believe there is a strong chance that Judge Bork will not be confirmed. This would be an outrage. The hearings by the Judiciary Committee have established that Judge Bork is a person of great intellect and that his views are in the mainstream of thinking about the proper role of the Court.

I was deeply impressed by his intelligence and the precision of his answers. He spent 5 days in the witness chair—a marathon. He handled line drives, fast grounders, slow rollers, bunts, pop flies, and foul balls with the skill of Ozzie Smith. If the Bork nomination is rejected, it will not be the result of the hearings.

Judge Bork's problem is that he is the target of an amazing lobbying campaign by liberal interest groups. I have never seen such intensity and total commitment. Intensity and commitment are what win close fights in the Senate. The stop-Bork drive is a Who's Who of liberal activism: the National Abortion Rights Action League, People for the American Way, the American Civil Liberties Union, the Alliance for Justice, the Leadership Conference on Civil Rights, the national AFL-CIO leadership, Common Cause, Public Citizens Litigation Group, and others. On this nomination, these groups have intensity and commitment to burn.

In this context, I take note of an article in the September 21 edition of Legal Times entitled "Working the Bork Hearings—In Fund Raising and Spin Control, Liberals Outflank Their Foes." I ask that the article in Legal Times be inserted in the RECORD, at the end of my remarks. Judge Bork's opponents have a clear view of what they are fighting for. They are fighting for power, in the form of control over appointments to the Supreme Court. They are intense and committed. In order to confirm Robert Bork, the Senate will have to walk across hot coals.

The stop-Bork groups want an activist Court that takes power away from Congress and State legislatures and places it in the hands of judges. Stop-Bork groups favor most of the judge-made law of recent years. They favor powerful judges and weak legislatures. Robert Bork is an advocate of judicial restraint, not judicial activism. He is a champion of democratic values, as against judicial elitism. Therefore, he must be stopped.

The question isn't Robert Bork's intellect or his credentials or his character or his judicial philosophy. Robert Bork is brilliant. His integrity is beyond question. His philosophy of judicial restraint is in the mainstream of American jurisprudence.

I support Judge Bork because he believes in judicial restraint, as do I. He believes the duty of judges is to interpret the law, not to make the law.

He would be a superb Justice. We may get him, but we may not. If we do not, it will be because political activists in Washington approached the nomination as a raw struggle for power, pulled out every stop, and lobbied a brilliant jurist and a wonderful human being into rejection by the Senate.

The material follows:

[From the Legal Times, Sept. 21, 1987]

### WORKING THE BORK HEARINGS—IN FUND RAISING AND SPIN CONTROL, LIBERALS OUTFLANK THEIR FOES

(By Anne Kornhauser)

When Sens. Edward Kennedy (D-Mass.) and Patrick Leahy (D-Vt.) needed some information about a free-speech case on the second day of Judge Robert Bork's confirmation hearings last week, they got the word out to the American Civil Liberties Union. The next day, hundreds of copies of a memorandum explaining the case and Bork's position on it appeared in the hearing room.

And when it seemed as though Bork was contradicting himself on such issues as free speech and sex discrimination, three different position papers comparing "the new Bork" and "the old Bork" were quickly prepared and distributed at the hearings. They had been compiled overnight by the ACLU, the National Abortion Rights Action League (NARAL), and the Leadership Conference on Civil Rights.

The anti-Bork activists were clearly out in force, with lobbyists for the various anti-Bork coalitions making up the plurality of the often surprisingly sparse audience in the historic Russell Senate Office Building Caucus Room. They appeared en masse during the breaks to caucus with senators, their staffers, and each other, and to answer the ceaseless flow of questions from the more than 150 journalists covering the most contentious judicial nomination in 18 years. With ample financial resources, some of it the result of a highly successful direct-mail effort, the anti-Bork forces have also been conducting an intense media campaign.

Almost invisible, however, were the pro-Bork lobbying groups.

Smaller in number and with fewer resources because of a far-less successful fund-raising effort—and with some proponents feeling confident enough to stay away—the leaders of the various pro-Bork groups opted for the most part to watch the hearings on television and to field press inquiries from their offices.

"We have limited resources," explains Patrick McGuigan, legal affairs analyst for the conservative Coalitions for America, "so there's not a lot of interaction with people on the Hill." Adds McGuigan: "I trust them [the White House] to do their job."

In the hearing room to grant interviews were such representatives from the White House as counsel A.B. Culvahouse, lobbyist Thomas Korologos, and former Bork clerk Peter Keisler, who now works for Culvahouse.

But there was far less interplay among the senators on the committee, their staffs, and the conservatives at the hearings. By contrast, the squads of anti-Bork activists were constantly feeding the panel and the press with proposed questions and fresh materials relating to Bork's most recent statements at the hearings.

Some pro-Bork lobbyists just did not think to show up. "I guess I probably should be there," acknowledges Daniel Casey, executive director of the American Conservative Union.

Among the legions of anti-Bork lobbyists attending the hearings, many of whom are members of a large anti-Bork coalition, were longtime civil-rights advocate and attorney Joseph Rauh; Democratic Party consultant Ann Lewis; Morton Halperin, Leslie Harris, and Jerry Berman of the Washington ACLU office; Nan Aron, executive director of the Alliance for Justice; Ralph Neas, executive director of the Leadership Conference on Civil Rights: Kate Michelman, executive director of NARAL; and representatives from the AFL-CIO, Planned Parenthood, the National Association for the Advancement of Colored People, Common Cause, People for the American Way, the Federation of Women Lawyers, the Urban League, and Public Citizen Litigation Group.

#### ANTI-BORK WING'S IMPACT STRONG

The impact of both sets of ideological pressure groups on the questions and debate was immediately apparent, although far more striking in the case of the anti-Bork wing.

In his opening remarks on Tuesday, for example, Sen. Robert Byrd (D-W. Va.) paraphrased the Public Citizen Litigation Group report on Bork when he cited an apparent pattern in Bork's opinions that gave victories to business and the executive branch.

On the other side, remarks by Sen. Orrin Hatch (R-Utah) about how Bork's opponents were emphasizing only selected parts of his record echoed McGuigan's press releases. McGuigan acknowledges that he communicated with Hatch the week before the hearings to underscore the selectivity issue.

Anti-Bork lobbyists seemed particularly adept at picking up concerns voiced by the undecided senators. When Sen. Arlen Specter (R-Pa.) first expressed confusion over Bork's conflicting statements and changed positions, the liberals jumped in with yet more position papers highlighting the differences in past and present statements by Bork and heaped them on Specter and the other senators.

By last Friday, after carefully observing the questioning by the swing senators and after talking privately with Senate staffers, Bork's opponents were feeling quite optimistic about getting the votes of both DeConcini and Specter. They remained unsure about Heflin.

The anti-Bork lobbying campaign included: regular 8 a.m. meetings of leaders of the various anti-Bork groups at the ACLU office across the street from the hearing room; daily satellite-made transcripts of the proceedings; and access to "legal experts" who

were produced within hours to answer reporters' questions.

Some lobbyists fed questions for Bork to friendly senators during the breaks. Rauh, for example, was seen conferring with Sen. Howard Metzenbaum (D-Ohio). Rauh refused to divulge the content of their conversation but did acknowledge that "Howard and I are old friends."

LOOKING BEYOND JUDICIARY

The anti-Bork lobbyists are already looking beyond the Judiciary Committee hearings. At the beginning of last week, the ACLU twice held briefings for about 40 Hill staffers of non-judiciary committee senators in preparation for the impending floor fight. It is expected that even if Bork is denied committee approval, his nomination will still go to the floor. According to the ACLU's Harris, the purpose of the briefings was "to give context so they understand, for example, the arcane debates on the 14th Amendment."

The pro-Bork activists spent much of last week struggling to release material defending the consistency of Bork's testimony and praising his candor. This material did not arrive at the hearings until last Friday, the fourth day of the hearings. McGuigan lamented that he only had access by last Thursday to a partial transcript of the first day of the hearings.

The biggest indication that the conservatives were short on resources was the absence of a pro-Bork media campaign. Bork's opponents have hit the airwaves and newspapers with a flurry of paid ads.

Last week, People for the American Way ran full-page ads in dozens of papers across the country. On radio and in television, the group aired sports prepared by Washington consultant Joseph Rothstein. The group's director, Arthur Kropp, had said at the outset of the Bork battle in June that his organization would not air television ads, but Kropp told reporters last week that "an outpouring of support" received from a direct-mail campaign had made it possible to do a $2 million media buy.

By contrast, the conservatives have done smaller mailings that have generated little income. Although recent media reports have maintained that millions of dollars are pouring in from both sides of the Bork fight, top direct-mail consultants and conservative activists paint a different picture.

Republican direct-mail consultant Bruce Eberle says he has mailed out about one million letters for pro-Bork groups, which have netted about $300,000 for the cause.

MONEY-RAISING NOT EASY

Some conservative consultants say Bork's confirmation is a hard issue on which to raise money, because their regular donors are optimistic about his confirmation. Sandra McPherson of the National Conservative Political Action Committee says her group has only done one mailing to 450,000 people.

"We're not doing any further mailings on it," she says, "primarily because the signs are showing up that Bork will be successful. We feel pretty confident."

Eberle agrees. "Bork has become a better issue for the left than for the right," Eberle says, because conservatives have minimized the Bork opposition.

Conservative activist Casey adds that his organization's fund-raising results have been "about average" on Bork. "In a sense, it's not one of our issues," Casey says. He contends that the most successful fund-raising issues for conservatives are in the areas of foreign policy and economics. "On civil-rights issues, we can't compare," he observes.

But Richard Viguerie, the right's pre-eminent direct-mail fund-raiser, says his Bork mailings "are doing 50 percent better than average" and that conservatives are simply not doing enough of it. "The conservatives really didn't get their act together on lobbying on Bork as the liberals did," Viguerie says.

"The battle is not being fought properly," Viguerie complains. "Most people feel it's not going well for Bork because he's followed liberal advice. He's tried to position himself as more moderate and I think that's hurt him," says Viguerie.

But if the conservative direct mail is not generating vast amounts of money, it is generating a lot of mail on the Hill. Undecided senators have been the biggest recipients. Heflin reports his above-normal volume of mail is about fifty-fifty on Bork; DeConcini's is about three-to-two in Bork's favor.

In an effort to capitalize on their momentum, the anti-Bork activists will spend much of this week preparing for testimony and developing questions for friendly witnesses, according to the ACLU's Berman.

Witness lists were still not released by Biden's office by the end of last week, leaving both camps unsettled. About 200 groups thus far have filed requests with Biden to have their representatives testify. And with Bork on the defensive much of the first week of the hearings, conservative activists who did bother to request to testify may soon have regrets.

One is McGuigan, who says he did not ask to be included on the witness list because he feared "the attention might get drawn to things other than substance—like partisanship."●

## CENTENNIAL OF THE MICHELSON-MORLEY EXPERIMENT

● Mr. GLENN. Mr. President, although most people probably wouldn't recognize his name, Albert Abraham Michelson was one of this country's most formidable scientists. His work in optical physics has profoundly affected our understanding of the world. This year, Ohioans take special pride in celebrating the one hundredth anniversary of what is arguably Michelson's greatest experiment, a critical examination of the so-called luminiferous ether, performed in collaboration with chemist Edward Morley at the Case School of Applied Science (now Case Western Reserve University) in Cleveland, OH. Their conclusion, that the ether does not exist (and therefore does not serve as the medium through which light is conducted), forced a rethinking of the composition of space—a rethinking that may have produced the space-time notions of the physical universe embodied in Einstein's theory of special relativity.

Before the Michelson-Morley experiment, the entirety of space was believed to be filled by the ether, an indescribable medium through which the earth, planets, and even light were supposed to move. For centuries, the world's brightest scientific minds had wrestled with the ether's exact composition and the precise method by which it conducted the energy and objects it surrounded. The idea of such a substance gained increasing prominence in the 19th century as scientists began searching for ways to detect and thereby prove its existence. One possibility followed from the basic assumption that the ether was stationary and that earth moved through it at a calculable rate. In pursuit of this figure, scientists devised instruments designed to measure the speed of light through other media, hoping to demonstrate the probability of a similar effect as light traveled through the stationary ether of outer space. None of these "ether draft" experiments of the mid-1800's succeeded conclusively in providing the existence of a stationary ether.

Intrigued by these failures, a young Albert Michelson began seriously contemplating the ether problem in the fall of 1880. Born in Prussian Poland of Jewish parents, Michelson was brought to this country in 1855. A short year later, the family resettled to San Francisco. Albert spent his youth in California and there developed an abiding interest in the sciences. In 1869, Michelson traveled alone cross country to personally request an over-quota appointment to the U.S. Naval Academy at Annapolis. After initially rejecting the request, President Grant acceded and Michelson began at the Academy that year. Upon graduation 3 years later, Ensign Michelson was assigned as a lecturer in physics. It was during this time that Michelson, fully immersed in the day's leading theories of light, electricity, and the ether, began to focus on the need to challenge the conventional wisdom.

In 1880, on a year's leave of absence from the Navy, Michelson traveled to Germany to study and work at the University of Berlin. Naturally inquisitive and particularly interested in optics, Michelson devoted most of his time to the development of a method to observe the conduct of light through the ether. It was while in Berlin that Michelson constructed an instrument he called an interferential refractometer (later renamed the interferometer) which was to be the key to the Michelson-Morley success. The idea of the experiment Michelson pondered was simple. He would project a beam of light in the direction in which the Earth is traveling in its orbit and simultaneously project a beam at right angles to the first; if the stationary ether existed, it would retard the first beam. The second beam, at exact right angles to the first, would arrive ahead of the first (even though the distances were the same) by a length of time determined by the velocity of the Earth. The difference would be directly observable through the interference pat-

of good offices, mediation and reconciliation.

"Why are we so persistent in raising the question of a comprehensive system of international peace and security?

"Simply because it is impossible to put up with the situation in which the world has found itself on the threshold of the third millenium—facing the threat of annihilation, in a state of constant tension, in an atmosphere of suspicion and strife, expending huge funds and quantities of the labor and talent of millions of people only to increase mutual mistrust and fears.

"One can speak as much as he pleases about the need for terminating the arms race, uprooting militarism, or about cooperation. Nothing will change unless we start acting.

"The political and moral core of the problem is the trust of the states and peoples in one another, and respect for international agreements and institutions. And we are prepared to switch from confidence measures in individual spheres to a large-scale policy of trust which would gradually shape a system of comprehensive security. But such a policy should be based on the community of political statements and real positions.

"The idea of a comprehensive system of security is the first plan for a possible new organization of life on our common planetary home. In other words, it is a pass into the future where security of all is a token of the security for everyone. We hope that the current session of the United Nations General Assembly will jointly develop and concretize this idea."●

## CITIZENS FOR DECENCY THROUGH LAW ON JUDGE ROBERT H. BORK

● Mr. ARMSTRONG. Mr. President, in a few weeks the full Senate will debate the nomination of Judge Robert Bork to the Supreme Court of the United States. In preparing for that debate, my colleagues will no doubt review many articles, studies, and statements on Judge Bork, both pro and con. In the spirit of helping Senators have access to all sides of the question, I am inserting into the RECORD a brief analysis of Judge Bork's judicial philosophy prepared by the Citizens for Decency Through Law of Scottsdale, AZ. I hope my colleagues find this statement of use as they reflect on this important matter.

I ask that the statement be printed in the RECORD.

The statement follows:

ANALYSIS OF ROBERT H. BORK'S JUDICIAL PHILOSOPHY, CITIZENS FOR DECENCY THROUGH LAW, INC., SCOTTSDALE, AZ

SUMMARY

Citizens for Decency through Law, Inc. strongly urges the United States Senate to confirm Judge Robert Bork as an Associate Justice of the United States Supreme Court. Judge Bork's lengthy and distinguished legal career provides him with superb qualifications to serve on the Court. His understanding of the role of the judiciary, and his approach to constitutional interpretation are consistent with the separation of powers provided for by the authors of the Constitution. Specifically Judge Bork understands, as does the Supreme Court, that obscene and pornographic material is outside the protection of the first amendment, and can constitutionally be proscribed by communities and states.

INTRODUCTION

Judge Robert Bork has been described by opponents as a "rigid, ideological conservative." He also has been derogatorily characterized as "against abortion," "against pornography" and "against homosexual rights." In fact, he is none of these things. Those who accuse him reveal only their own ignorance of the intricacies of constitutional law and judicial philosophy, or worse, their talent for character assassination and outright dishonesty.

Even Judge Bork's enemies acknowledge his brilliant scholastic and jurisprudential record. Justice Stevens, considered a moderate-to-liberal member of the high Court, has taken the rare step of publicly defending Judge Bork. Justice Stevens has praised Bork's qualifications and called him a "welcome addition to the Court." Federal judges surveyed by the L.A. Times would vote to confirm Bork by a better than 2-to-1 margin. Leading law professors—liberal and conservative—have publicly vouched for Bork's academic credentials and urged his confirmation.

But credentials are no longer the issue. His "ideology"—as his critics so crudely refer to a judicial philosophy developed over four decades of learning—has been made the central issue of the upcoming confirmation hearings. These attacks must be answered by a defense of Judge Bork's principled and reasoned approach to jurisprudence. This memorandum shall do three things:

(1) Explain the judicial philosophy of Judge Bork with regard to the constitutional role of the judiciary, and the judge's obligation to interpret the Constitution by discerning the intent of the Framers;

(2) Show that Judge Bork's judicial philosophy does not favor the political goals of conservatives or liberals;

(3) Show that Judge Bork's judicial philosophy is not only correct, but required by the Constitution.

SEPARATION OF POWERS

Judge Bork's views on the role of the judiciary can be summed up quite easily: "A judge is not a legislator." It seems a simple and obviously true proposition, yet most attacks on Judge Bork focus on his refusal to act like a legislator. But the President cannot make rulings on guilt or innocence—that is for the judiciary. The Congress cannot negotiate treaties—that is for the President. And the judiciary cannot make laws—that is for the Congress. Obviously Judge Bork understands the constitutionally required separation of power better than his critics. Invariably, their concern is not the Constitution, but the bottom line on particular issues. That is why they rail against Judge Bork for being "against abortion," even though he has never publicly expressed any view on the wisdom or morality of the practice.

Judge Bork is not, in a legal sense, "against' abortion. In fact, given his self-avowed libertarian leanings, he quite possibly might oppose any restrictions by the state on the practice of abortion, if he were a voting member of Congress. But as a judge, his personal views about abortion are completely irrelevant. When asked to decide whether a state law outlawing abortion violates the Constitution, the question for a judge is not: "Should abortion be illegal?" but "Does the Constitution prevent states from outlawing abortion?" The Judge may believe strongly that women should be free to obtain abortions, but unless he finds something in the Constitution that says otherwise, he must let the law stand as constitutional. But the approach taken by a divided Supreme Court, in Bork's words, "confuses the constitutionality of laws with their wisdom." [1] Believing that abortion should be legal, the Court has ruled that the Constitution requires it to be legal.

In his 1971 law review article "Neutral Principles and Some First Amendment Problems," Bork describes the proper role of the judiciary:

"Nothing in my argument goes to the question of what laws should be enacted. I like the freedoms of the individual as well as most, and I would be appalled by many statutes that I am compelled to think would be constitutional if enacted. But I am also persuaded that my generally libertarian commitments have nothing to do with the behavior proper to the Supreme Court." [2]

SUBSTANTIVE DUE PROCESS

The theory of substantive due process, culminating in the "right to privacy" line of abortion cases, is a prime example of what ails present methods of constitutional interpretation. At the same time, substantive due process provides us with historical evidence that judicial activism can be used to either "conservative" or "liberal' political ends.

Substantive due process is the judicially created notion that there inhere within the 14th Amendment due process clause some substantive rights retained by individuals; that tbe words ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ." not only guarantee procedural rights, as the language clearly indicates, but also give rise to separate substantive rights. These substantive rights, which cannot be deprived even if due process is given, supposedly arise from an individual's "liberty" interest. But what are these rights? There is no way of telling—until the Supreme Court tells us.

Essentially, substantive due process is a fiction created by the judiciary to strike down legislation with which the judiciary disagrees. Although now used nearly exclusively to "liberal" political ends, the doctrine was originally created in the 1930's by conservative Supreme Court justices who sought to stop President Roosevelt's New Deal legislation. These justices disagreed with Roosevelt's progressive legislation, and created substantive due process as a means to protect free market capitalism.

Faced with President Roosevelt's court-packing scheme, the Supreme Court eventually changed its view of the New Deal legislation. The doctrine of substantive due process fell out of favor, until it was revived in the 1960's in the case of *Griswold v. Connecticut.* [3] But this time liberal judges were the activists, using the theory of substantive due process to protect non-economic "privacy" interests discovered floating in the "penumbras" of the Bill of Rights. But all that talk about "penumbras" and "privacy" means only that the Supreme Court didn't like the fact that Connecticut prevented the use of contraceptives, even by married couples. But the Court needed some justification to strike down the law.

Eight years later the Supreme Court informed us that this "zone of privacy" also protected a women seeking to abort her child. [4] But in 1986 we found out that it doesn't protect homosexual sodomy. [5] As

Judge Bork points out in his criticism of *Griswold*, this kind of judicial creation does not provide any "neutral principles" upon which to base a decision. That leaves only the subjective value preferences of whoever happens to be on the Court. Judge Bork prophetically saw that the lack of guiding principles in *Griswold* would lead to the confusion of extending the right to one group (women seeking abortions) and not another (homosexuals):

"*Griswold*, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defies that right, or rather fails to define it. We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future. 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 the power to regulate involves a choice betwen the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than it s own value preferences, upon which to weigh the respective claims to pleasure." [4]

If Judge Bork truly were a "rigid, conservative ideologue," he certainly would have supported the use of substantive due process to strike down liberal legislation in the 1930's. But Judge Bork has made clear his view that substantive due process is wrong when used to conservative ends, wrong when used to liberal ends. He has been just as critical of the use of substantive due process to protect the free market as to create a "right to privacy." He would not be a "conservative activist" on the Supreme Court.

When the Court acts to strike down majority legislation without explicit authority from the Constitution, all that has happened is that the power to make law has been shifted from elected representatives to five unelected lawyers. Right now liberals are happy with substantive due process, because it has served their political ends. But once upon a time it served the interests of conservatives, and it may do so again. That is why it is in the interest of all to support the confirmation of Judge Bork, who would apply "neutral principals" in a manner that would serve the political interests of neither the left or the right, and return the "imperial judiciary" to its proper role under the Constitution.

INTENT OF THE FRAMERS

Judge Bork's intellectual pursuit of a theory of constitutional interpretation that is "neutrally derived, defined and applied," [7] led him to what is now called an "original intent" methodology. Essentially, proponents of this methodology assert the seemingly non-controversial view that the Constitution means what its authors intended it to mean.

An example of Judge Bork's method of constitutional interpretation is given in the 1971 "Neutral Principles" article. Specifically, Judge Bork takes the correct view that pornography was never intended to be protected by the first amendment guarantee of free speech. This is the same view taken by the United States Supreme Court in every decision on the subject—that category of material that is legally "obscene" is outside the protection of the first amendment. And this is why Citizens for Decency through Law, Inc. supports the confirmation of Judge Bork. His correct view of the Constitution leads him to the correct legal view on particular issues, including the issue with which CDL is concerned. Again, Judge Bork recognizes that the question for a judge is not: "Should obscene material be banned?" but "Does the Constitution forbid the banning of obscene material?"

To answer that question, Judge Bork examines the free speech clause of the first amendment in an attempt to discern what the Framers intended it to protect. At the time he wrote the 1971 article, Judge Bork believed the Framers intended the first amendment to protect only explicitly political speech:

"I am led by the logic of the requirement that judges be principled to the following suggestions. 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." [9]

In contrast to critics' portrayal of Judge Bork as a rigid, inflexible conservative, he has since amended his view, stating that the Framers intended more than explicitly political speech to be protected by the first amendment. Nevertheless, his inquiry remains the correct one: "What did the Framers of the first amendment intend that provision to protect?" rather than "What limitations do we think should be placed on speech?" The latter is a question to be debated by the legislative branch of government. But when judges start talking about the "broad principles" contained in the first amendment, this invariably means they are departing from the intent of its authors, and substituting their ideas of what should be constitutionally protected for what actually is protected. Judge Bork, on the other hand, is committed to the principle that a written Constitution is meaningless if we pay no attention to the intent of the men who wrote it. Without the anchor of "original intent," judges would be free to make their own value preference a part of constitutional law, thus essentially usurping the law-making function from the legislative branch. Judge Bork would resist the temptation to impose this will on the country, and would return the judicial branch to its proper role of interpreting, not making law.

FOOTNOTES

[1] R. Bork, "Neutral Principles and Some First Amendment Problems," 47 INDIANA L.J. 1, at 28.
[2] Id., at 21.
[3] 381 U.S. 479 (1965).
[4] *Roe* v. *Wade*, 410 U.S. 113 (1973).
[5] *Bowers* v. *Hardwick*, 106 S.Ct. 2841 (1986).
[6] Bork, 47 INDIANA L.J. at 9.
[7] Id., at 23.
[8] Id.
[9] Id., at 20.●

## INFORMED CONSENT: MISSOURI

● Mr. HUMPHREY. Mr. President, there is no person in any State that is immune to the complications that can follow medical procedures. For the patient's own protection, medical personnel must inform them about the possibilities of complications before a procedure is initiated.

In the case of abortion, however, such informed consent is neither required nor often provided. My office has received hundreds of letters from women in every State that indicate many people are being denied appropriate information about the abortion procedure and its effects.

To rectify this situation, I ask my colleagues to support my informed consent bill, S. 272. It would allow those considering abortion to be told the pertinent facts so they can make an informed decision. Anything less is an abridgement of a woman's rights.

Mr. President, I also ask that a letter be inserted into the RECORD.

The letter follows:

FEBRUARY 14, 1987.

HON. GORDON J. HUMPHREY: My abortion took place in 1975 in southern California. I went into a Planned Parenthood hoping to have an IUD implanted after being on the pill. Since my period had not started, a pregnancy test was given resulting in a positive test. I was married at the time but I was so unsure about our marriage. The news so shocked me. I know that even though we took some time to "think" about it, I was not stable enough emotionally, physically and mentally to make the decision.

After a week or so my husband and I went back to the Planned Parenthood center to schedule an abortion. We sat down with a "counselor" who only asked us basically the questions "why have you decided on an abortion?" and "Are you sure?" The only information she provided was the standard medical procedure that we needed to know, i.e., what was expected of us in preparation, the procedure and anesthesia to be used and proper care, etc. There were no pictures of fetal development, no mention of possible consequences or complications. I know that if I was shown a picture of the fetus at that stage, I would have used some common sense. The counselor fed me just the information needed to satisfy my emotional state of being!! I strongly urge for adequate logical, realistic, complete counseling to be done. I support you in your work!

May God Bless You!

REBECCA FALKNER,
*Missouri.*●

## GRAMM-RUDMAN-HOLLINGS

● Mr. PELL. Mr. President, since the Gramm-Rudman-Hollings proposal for automatic Federal Government spending cuts was first presented to the Senate I have consistently opposed and voted against it.

Yesterday, for the first time, I voted in support of legislation that included a new version of the Gramm-Rudman-Hollings deficit reduction provisions. I did so with great reluctance. I remain opposed to the basic concept of automatic mindless budget cuts that take effect without the considered judgment and by the specific vote and approval of the people's elected representatives in Congress. As I have said repeatedly, running our government and determining its budget by complex, incomprehensible formulas seems to me to be an abdication of the responsibility of the Congress to determine the policies of the nation using its own best judgments.

tients per capita of any U.S. city. It has responded compassionately and effectively to the epidemic through the development of an extensive network of home and community-based care as well as by providing first-rate hospital care. Consequently, people with AIDS and ARC migrate to San Francisco from throughout the country.

San Francisco has borne more than its share of the burden. The city has allocated $18 million in its 1987-88 budget for AIDS—5 percent of the city's entire health fund. It has spent more than $50 million on AIDS since 1982—more than any other municipality—and needs Federal assistance to continue to provide vital health services.

A subacute-care facility would be a resource not just for the residents of San Francisco and those AIDS and ARC patients who have moved to that city, but, indeed, individuals in the entire region.

This amendment would be an important step in the Federal Government's acknowledging that this extraordinary epidemic requires that extraordinary steps be taken to combat it and to ensure that people with the disease receive compassionate and effective care.

Mr. President, I urge all my colleagues to support this amendment.

The PRESIDING OFFICER. The time of the Senator has expired.

Under the previous order, the hour of 12:45 p.m. having arrived, the Senator from New Jersey is recognized to speak not beyond the hour of 1:15 p.m. today.

Mr. DIXON. Mr. President, if I may impose on the Senator from New Jersey, I will say I will make the motion to table this evening.

The PRESIDING OFFICER. The Senator from California.

Mr. WILSON. Mr. President, I do not object to my friend sharing that intelligence with me. I think that as a matter of procedure it is not yet in order. Is that correct?

The PRESIDING OFFICER. The Senator has not yet made the motion?

Mr. WILSON. How much time remains?

The PRESIDING OFFICER. The Senator from California has 1 minute remaining.

The Senator from New Jersey.

## JUDGE ROBERT BORK

Mr. BRADLEY. Mr. President, the verdict on the appointment of Robert Bork to the Supreme Court will be one of the most important decisions this body will ever make. It will have a decisive effect not only on the Nation's highest court but also on all the courts throughout the land. The next appointee will be the pivotal vote on issues that are crucial to the kind of society we will become and the way we relate to each other as human beings. I believe paramount among his qualifications must be an unquestioned commitment to civil rights and individual liberties.

Many Senators have concerns about Judge Bork's position on the right to privacy, equality for women, or the legitimacy of "original intent." I share these concerns, but for me Judge Bork's record on civil rights is the determining factor. Why do I put so much weight on civil rights? Because an essential part of what is best about America has been shaped by racial minorities struggling to realize the promise of the Declaration of Independence "that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed."

America's effort to put out most noble ideals into practice distinguishes our democracy. That progress is not ancient history. Some of it happened just yesterday. Certainly much of it happened within our lifetime. And without vigilance it could be lost, as it was in previous eras.

We forget that 50 years after Emancipation, during the Presidency of William Howard Taft, the Post Office, the Census Bureau, the Federal Treasury, and the Bureau of Printing and Engraving all practiced segregation.

We forget that by the end of the Wilson administration, over 50 years after the ratification of the 14th and 15th amendments, segregation had been extended to the galleries of the U.S. Senate and the lunchroom of the Library of Congress. Toilets in Federal buildings were marked "whites only" and "colored."

We forget that the U.S. Armed Forces was segregated until President Harry Truman issued his Executive order in 1948.

We forget that as recently as the 1960's, blacks were still risking their necks for the right to share lunch counters, parks, hotels, and public transportation with their white compatriots.

We forget that until 1964, the right to vote was routinely denied by the imposition of poll taxes.

We forget the footdragging that persisted throughout the 1970's in implementing the school desegregation which was ordered 20 years before.

We forget that during the 1980's in New Jersey, in Louisiana, and in Texas, there have been attempts to intimidate black voters from exercising their franchise.

We forget that only 4 years ago, the Reagan Justice Department declared that private schools which practiced racial discrimination would have their bigotry subsidized by the American taxpayers through retention of the schools' tax-exempt status. The result, had the Supreme Court not rejected it, would have been segregation, condoned and supported by the Federal Government, much as it was 100 years earlier.

And if we forget the history that happened in our own lifetime, how likely are we to remember the 350-year odyssey of black Americans' struggle for equality? Yet that history frames today's debate.

We must remember that all Americans are better off because of the progress we make.

We must remember that the change begun by Brown versus Board of Education brought black Americans greater freedom and opportunity, but it also gave white Americans self-respect.

We must remember that the civil rights movement transformed the South from a place of national sorrow and misunderstanding to a center of hope and pride; from a community divided to a community emulated; from a contradiction of the Founding Fathers' ideals to the realization of their fulfillment. As it challenged all Americans, both North and South, it revealed what we should have known all along—that racial discrimination has no geographical boundaries and that redemption from our original sin was a national yearning.

Throughout the Judiciary Committee hearings, Judge Bork has attempted to put himself on the right side of this history. He has repudiated views he once held that denied minorities full equality with whites, and he has affirmed that the Constitution outlaws all racial discrimination. I am pleased to hear that. But, even if Judge Bork does accept the principle of unabridged quality for racial minorities, there is little, if anything, in his record, that persuades me he can be counted on to enforce this principle vigorously.

He has opposed decisions that upheld the constitutionality of the Federal Voting Rights Act which enabled minorities in America to participate in the electoral process. Without the Voting Rights Act, States would again be free to require literacy tests as a condition for voting. This would disenfranchise millions of voters.

He has opposed a decision prohibiting State courts from enforcing racially restrictive covenants requiring homeowners not to sell their property to nonwhites. Had Judge Bork's view prevailed on the Supreme Court, we might still be waiting to breakdown legal racial barriers in neighborhoods.

He has opposed a decision declaring the poll tax unconstitutional. Had this view prevailed on the Supreme Court, the spectre of Jim Crow would still hover over the voting booths of America.

Judge Bork also has disagreed with a number of cases implementing the equal protection clause of the 14th amendment. His opposition to providing remedies for discrimination is highly significant. It prevents him from upholding laws that actually give minorities full equality. He apparently opposes remedying the effects of past discrimination except where an individual proves that he or she has been the direct victim of racial discrimination.

If this view were to prevail, institutions that have implemented smoothly functioning affirmative action programs would be plunged into chaos. Should they abandon them, regardless of how well they are working, or how good they are for profits and morale? And to what purpose? To support some narrow reading of the 14th amendment remarkable only for its insensitivity to American's history?

Mr. President, in the years ahead, a deeper trust among the races will require great candor. It will require more action and less rhetoric; more mutual understanding, less finger-pointing; more willingness to confront fears of violence, less acceptance of token solutions to deteriorating economic conditions. Above all, white America must assure black America that the legal basis for black advancement remains unchallengeable and the determination to enforce the law remains unquestioned. The Supreme Court is the ultimate guarantor of that assurance. We must have a Supreme Court that understands the need to make opportunity a reality for minorities who historically have been excluded from jobs, from schools, from full participation in society. Anything less is a sham.

Judge Bork is erudite. He has a quick mind and a ready wit. He possesses the attractive qualities of a great college professor—the ability to provoke, to challenge assumptions, to argue fiercely, to reach a conclusion, and then move on to the next class. His iconoclasm, while stimulating in a professor, can be disastrous in a judge. What is important in our deliberations is not how nimble his argument will be but how his decisions will affect millions of Americans who will have to live by them.

So ultimately what we are asking is not only what's in Judge Bork's mind but also what is in his heart. Or as former Attorney General Nicholas Katzenbach asked for me: "Is Robert Bork a man of judgment?" Is he sensitive to human and racial problems? Is he fair, impartial, and open-minded?

I can hear his supporters saying here comes the irrational argument. But it is prudence, not irrationality, to give as much emphasis to citizen Bork's past views as to nominee Bork's new views. His supporters say, "Can't one change his views." Yes, certainly. Otherwise, how could we, in the last 32 years, have moved from a time when the air was heavy with racism to one in which the union of religious faith and civic action has begun to create a new American reality. So, yes, people can change.

The question here though is not whether people can change in a generic sense but whether Judge Bork has changed since he expressed his hostile attitudes toward civil rights laws and court decisions. On the one hand, we have the started conversion of a man who in his life time has had several different viewpoints. On the other side, we have the lengthy list of current and past positions hostile to civil rights from the nominee of an administration which supports subsidizing segregated schools. So what does one do?

During the confirmation hearings, several members of the Judiciary Committee tried to pin Judge Bork down on how he regarded the importance of precedent. Would he, they asked, seek to overturn decisions with which he disagreed? His answer: No with respect to some areas; unclear as to others. He chose ambiguity on the central question.

A law school professor dissects precedents. A circuit court judge applies precedents. A Supreme Court Justice sets precedents. If a professor slips back temporarily into the blank spot of racial insensitivity, it hurts only his immediate friends who believed him to be a different person. If a Justice of the Supreme Court slips back, it could hurt generations of Americans; it could affect our place in the world; it could destroy our self-respect; it could reopen wounds long healed; it could paralyze the forward movement of society toward a reconciliation with our past.

Ask yourself how you will feel 5, 7, or 10 years from now if the Supreme Court, with Judge Bork as the decisive vote, issues a series of decisions that effectively ends 32 years of progress in civil rights. Ask yourself how you will face your neighbors, and supporters, who believed in you. Most Senators would say it could never happen. I hope it will not, but I am not prepared to take the chance that Justice Bork would never slip back to the views of Professor Bork.

So, Mr. President, I will vote against the confirmation of Robert Bork, not because I question his integrity, competence, or qualifications, but because I doubt that he has the commitment to civil rights and individual liberties on which the decency and well-being of our American community depends.

Mr. CRANSTON addressed the Chair.

The PRESIDING OFFICER. The Senator from California is recognized.

Mr. CRANSTON. Mr. President, I would like to compliment the Senator from New Jersey on a very, very thoughtful address on a vitally important matter to our country, civil rights and the nomination of Judge Bork to be on the Supreme Court. It is the sort of thoughtful analysis that we have come to expect from the distinguished Senator from New Jersey.

## RECESS UNTIL 2 P.M.

Mr. CRANSTON. Mr. President, I now move in accordance with the previous order that the Senate stand in recess until the hour of 2 p.m.

The motion was agreed to; and, at 1 p.m., the Senate recessed until 2 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. DODD).

## NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEARS 1988 AND 1989

The Senate continued with the consideration of S. 1174.

VOTE ON AMENDMENT NO. 783

The PRESIDING OFFICER. Under the previous order a vote will now occur in relation to amendment No. 783 offered by the Senator from Kansas, the Republican leader.

The yeas and nays have been ordered, and the clerk will call the roll.

Mr. CRANSTON. I announce that the Senator from Tennessee [Mr. GORE] and the Senator from Illinois [Mr. SIMON] are necessarily absent.

I further announce that, if present and voting, the Senator from Tennessee [Mr. GORE] would vote "yea."

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 98, nays 0, as follows:

[Rollcall Vote No. 283 Leg.]

YEAS—98

| | | |
|---|---|---|
| Adams | Garn | Moynihan |
| Armstrong | Glenn | Murkowski |
| Baucus | Graham | Nickles |
| Bentsen | Gramm | Nunn |
| Biden | Grassley | Packwood |
| Bingaman | Harkin | Pell |
| Bond | Hatch | Pressler |
| Boren | Hatfield | Proxmire |
| Boschwitz | Hecht | Pryor |
| Bradley | Heflin | Quayle |
| Breaux | Heinz | Reid |
| Bumpers | Helms | Riegle |
| Burdick | Hollings | Rockefeller |
| Byrd | Humphrey | Roth |
| Chafee | Inouye | Rudman |
| Chiles | Johnston | Sanford |
| Cochran | Karnes | Sarbanes |
| Cohen | Kassebaum | Sasser |
| Conrad | Kasten | Shelby |
| Cranston | Kennedy | Simpson |
| D'Amato | Kerry | Specter |
| Danforth | Lautenberg | Stafford |
| Daschle | Leahy | Stennis |
| DeConcini | Levin | Stevens |
| Dixon | Lugar | Symms |
| Dodd | Matsunaga | Thurmond |
| Dole | McCain | Trible |
| Domenici | McClure | Wallop |
| Durenberger | McConnell | Warner |
| Evans | Melcher | Weicker |
| Exon | Metzenbaum | Wilson |
| Ford | Mikulski | Wirth |
| Fowler | Mitchell | |

his true calling. His constituents clearly agreed, returning him to the House of Representatives on 16 consecutive occasions.

Ray Madden's legacy persists today, 10 years after he left Congress, and is not diminished by his death. He will long be remembered for his extraordinary contributions to the people he served and his unparalleled role in Indiana's rich political history.

## THE CONFIRMATION OF JUDGE BORK: QUALIFICATIONS OR POLITICS?

Mr. PRESSLER. Mr. President, I shall vote for Judge Robert Bork to be a Justice of the U.S. Supreme Court. I have followed the hearings closely and feel he did an excellent job. Robert Bork is one of the most qualified individuals ever nominated. Barring some unforeseen and unanticipated ethical problem, he should be confirmed by the U.S. Senate. I recently met with Judge Bork to discuss his current views on the judicial system. When I attended Harvard Law School and Oxford University, I had the opportunity to hear his lectures and read some of his articles.

Politics should not dictate judicial nominations. In the past, I have supported the qualified judicial nominees of Democratic and Republican Presidents alike. For example, I supported President Carter's qualified and competent nominees even when I disagreed with some of their views.

It is the role of the President to nominate Supreme Court Justices. The Senate has the power to advise and consent on these nominations. The confirmation process is designed to ensure that nominees are highly qualified and have neither ethical nor character problems. It was not intended to be a battleground for partisan politics. Senators should be evaluating Judge Bork's qualifications and his extensive judicial record. Unfortunately, some individuals are making Judge Bork out to be an extremist. After reading many of his opinions and articles, I find this view to be unfounded. Not one of Judge Bork's majority opinions has been overturned by the Supreme Court. His is not the record of a radical.

Judge Bork believes in judicial restrain—the idea that the courts' role is to ensure that the laws are consistent with the Constitution rather than a judge's personal beliefs. He believes that it is the role of judges to interpret the Constitution, not to make laws.

The Supreme Court reconvenes on the first Monday in October, but Judge Bork's confirmation hearings were not scheduled to start until September 15—2½ months after the nomination was submitted. Why the delay? Some individuals seem to be using this time to make partisan issue of an important matter where politics has no place. It may even be that some would oppose any Reagan nominee in the hope that Court appointments could be made by the next President. This is inexcusable. Because of this delay, it is possible that there will be only eight Justices when the Supreme Court reconvenes this fall. The American people need and deserve the Supreme Court working at full strength. When Justice Powell retired from the Court, he noted that vacancies "created problems for the court and for litigants." Such problems could be prevented if we rise above politics and focus on the issues.

Recently, the American Bar Association endorsed Judge Robert Bork's Supreme Court nomination by giving him its highest rating. In 1982, Bork also received the American Bar Association's highest rating when he was nominated to serve on the U.S. Court of Appeals for the District of Columbia Circuit. Judge Bork was confirmed unanimously by the Senate. He has served in that position for the last 5 years. Judge Bork has served as a professor at Yale Law School, as Solicitor General of the U.S. Department of Justice, and in the U.S. Marine Corps. As a practitioner, he has argued and won numerous cases before the Supreme Court. Justice John Paul Stevens, who is considered to be a moderate liberal Justice, publicly stated:

> I personally regard him as a very well-qualified candidate and one who will be a very welcome addition to the court.

In addition to being highly qualified on the basis of experience, Robert Bork believes that excessively liberal interpretations of procedural rights do not serve the goal of protecting justice for all. Many of Judge Bork's opinions illustrate his strong belief that we must protect constitutional rights, but the guilty should not go free. There has been much debate regarding the exclusionary rule. To what extent do we disallow evidence, knowing that guilty person will go free. Yes, criminals have constitutional rights. But as Judge Bork has asked, "at what cost?" Many law enforcement agencies have announced their support for Judge Robert Bork, including: the Fraternal Order of Police, International Association of Chiefs of Police, National District Attorneys Association, and the National Sheriffs' Association, just to name a few. Stronger law enforcement procedures are needed and supported by the American people.

Some have clearly distorted Judge Bork's role in the Watergate Saturday Night Massacre in an attempt to make an issue where none exists. Former President Nixon ordered then-Attorney General Elliot Richardson to fire Special Prosecutor Archibald Cox. Richardson refused to carry out the President's order and resigned. Solicitor General Bork carried out Nixon's order. A point often overlooked by Bork's detractors is that Elliot Richardson urged Mr. Bork to stay at the Justice Department to maintain order in the wake of his own resignation. Soon after Cox was dismissed, Bork sought another Special Prosecutor and pressed former President Nixon into agreeing not to interfere with the investigation. Because of his actions, the Watergate investigation continued free from Presidential control.

It is time for everyone to focus on Judge Bork's qualifications and dispense with the politics. There is one goal—filling the vacancy on the Supreme Court with a worthy candidate. It is my hope that Senators will not vote for or against Judge Bork based solely on political philosophy or partisanship. The vacancy should be filled before the Supreme Court reconvenes in October. Further delays surely will make the American people wonder if Judge Bork is receiving a fair hearing.

## SECOND ANNUAL ETHNIC AMERICAN DAY

Mr. PRESSLER. Mr. President, on September 20, 1987, the Mayflower Hotel here in Washington, DC, was the site of a program honoring 19 distinguished ethnic Americans and celebrating the Second Annual Ethnic American Day. As the chairman of the Honorary Committee for Ethnic American Day these past 2 years, I am proud to report that this year's program was just as successful as the one held last year in D.A.R. Constitution Hall.

During my tenure as chairman of the Honorary Committee, I have learned much about the enormous contributions to our society by Americans who are either first generation immigrants to America or whose ancestors chose to become Americans. All Americans should become more aware of their efforts to realize the promise of American democracy and their contributions to the richness of American life and culture.

Dr. Selven Feinschreiber, the founder of Americans By Choice and the father of Ethnic American Day, deserves special recognition for his unflagging efforts to make the event possible. Ethnic Americans and all who live in our great Nation owe him a deep debt of gratitude. Mr. Chuck Tower also deserves praise for his able assistance to Dr. Feinschreiber in planning this year's event. I wish to thank Americans By Choice for giving me the opportunity to serve and especially appreciate the thoughtful recognition awards presented by that organization to our distinguished House colleague, Congressman DANTE B. FASCELL, and myself.

likely to make the deterrent of both sides credible and to prevent nuclear war.

Mr. President, I thank my good friend, the majority leader, once again, and I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Wisconsin yields the floor.

## RECOGNITION OF SENATOR CRANSTON

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from California, Senator CRANSTON, will be recognized for not to exceed 15 minutes.

## THE NOMINATION OF ROBERT H. BORK TO THE SUPREME COURT

Mr. CRANSTON. Mr. President, I rise to speak in opposition to Senate confirmation of the nomination of Robert H. Bork to be an Associate Justice of the U.S. Supreme Court.

Before I discuss the basis for my decision, I want to comment on the singular importance of the vote on this nomination and on Senate responsibility in the confirmation of a Supreme Court Justice.

Mr. President, the vote on the Bork nomination is undoubtedly one of the most important votes that any Member of this body will make. Senators, Members of the House of Representatives, and the President serve for fixed terms and are directly accountable to the electorate at regular intervals. That is not true of members of the Federal judiciary. A seat on the Supreme Court is a lifetime position. A Justice can be removed from office only upon impeachment and conviction of the severest of high crimes. It is not uncommon for a Supreme Court Justice to serve for two and sometimes three decades. A Supreme Court Justice has an unparalleled opportunity to influence the most pressing issues facing this and future generations of Americans.

The framers of the Constitution recognized the great importance of the selection of individuals to serve on our highest court. They deliberately refused to entrust the selection to any one individual or any one branch of Government. Instead, they decided that this should be a matter of shared power and shared responsibility.

### SENATE'S ROLE

Mr. President, almost 2 years ago—long before the current vacancy arose on the Supreme Court and before the current controversy over the Bork nomination—our esteemed former colleague and friend, Senator Mathias, and I undertook extensive research into the role and responsibility of the Senate in the judicial confirmation process. Both of us consulted widely with a broad range of scholars representing the full spectrum of legal philosophy.

We summarized our results in separate speeches on the Senate floor on July 21 and 22, 1986.

Senator Mathias, a Republican, and I, a Democrat, reached remarkably similar conclusions about the role the Constitution bestows upon the Senate in the judicial confirmation process.

Senator Mathias said, and I concurred, that:

> Among all the responsibilities of a U.S. Senator, none is more important than the duty to participate in the process of appointing judges and justices to serve on the U.S. Courts, from the trial bench to the Supreme Court of the United States. * * * [A] Senate that automatically consents to a President's nominations abdicates its constitutional responsibility. Its members fail to measure up to the demands embodied in their oath of office.

Those words ring even more true today.

Some people argue that a Senator need not exercise independent judgment in deciding the Bork nomination; they suggest that we should defer to the President and review the nomination on the very narrow basis of whether the nominee is legally competent and of good moral character.

I disagree.

### COEQUAL ROLE IN THE CONFIRMATION PROCESS

Mr. President, the Constitution gives the President the power to nominate an individual to serve on the Supreme Court. It also gives the Senate the responsibility to review and evaluate that nomination independently.

Alexander Hamilton in the Federalist Papers confirmed that the decision by the Founding Fathers to divide the appointment responsibility between the President and the Senate was a deliberate one and that it was intended to have a salutary effect on the quality of appointments.

Granting the President the entire power of appointment, Hamilton argued, would, "enable him much more effectually to establish a dangerous empire over that body—the Senate—than a mere power of nomination subject to their control."

Hamilton feared that a President with exclusive appointment power might select judges to please particular Senators whose votes the President wanted to influence on other issues.

He also believed that a President would choose his nominees with greater care if he is faced with the possibility of a Senate rejection. But that is an effective check on Presidential power only if the President has reason to believe that the Senate is prepared to exercise its power of rejection.

The framers gave the Senate the obligation and the power to make its own independent judgment of whether confirmation of a judicial nomination would be in the best interest of the Nation.

Senator Le Baron Bradford Colt, Republican, Rhode Island, himself a former Federal trial and appellate judge, said on the Senate floor in 1916:

> By these provisions the framers of the Constitution believed they would secure judges of high character, free from partisanship and from every form of corrupting influence, and who would devote their lives to an impartial administration of law.

As Walter Dellinger, professor of law at Duke University, recounts:

> The original Virginia plan, introduced at the convention on May 29, 1787 provided that all judges would be appointed by the national legislature. By June 19, the convention had decided that the whole legislature was too numerous for the appointment of judges, and lodged that power in the Senate acting alone. *Attempts to confer the power on the President to the exclusion of the Senate were solidly defeated.* George Mason stated that he "considered the appointment by the executive as a dangerous prerogative. It might even give him an influence over the judiciary department itself." *Only near the end of the convention was it agreed to give the President any role in the selection of judges;* even then the President's power to nominate was carefully balanced by requiring the concurrence of the Senate. That final language was not seen to dislodge the Senate from a critical role in the process. Gouverneur Morris paraphrased the final provision as one leaving to the Senate the power "to appoint judges nominated to them by the President." (Emphasis added.)

The Senate's "advice and consent" function in confirming judges is different from its function in confirming administration nominees who serve at the President's pleasure and who can be removed by the next administration. Most scholars and most Senators agree that the Senate should apply far stricter standards to lifetime judicial appointments.

Then-Republican Senate Whip Robert Griffin, Republican, Michigan, made the distinction well during debate on the Haynsworth nomination in 1969:

> Traditionally, the Senate has applied a different test with respect to nominees to the Supreme Court than * * * to those nominated by Presidents to serve in the Cabinet or in the Executive Branch * * * particularly with respect to nominations for the Supreme Court, however, I do not believe * * * that the Senate is limited to accepting every nomination merely because it can't be proved that the nominee has beaten his wife, or has done this or that. I think the responsibility of the Senate is much higher than that. Under the Constitution, the President is vested with only half of the appointing power. He nominates and the Senate confirms. Accordingly, the Senate's advise and consent responsibility is at least equal to the President's responsibility in nominating. If the judiciary is to be an independent branch * * *, it is essential that its members owe no greater indebtedness for an appointment to one particular branch of our government.

Throughout our history, the Senate has blocked judicial nominees who were deemed qualified in the narrow sense, but whose confirmation would

have been unwise in the broader context. Indeed, the Senate has refused to confirm nearly 20 percent of Presidential Supreme Court nominations.

Senators have given a variety of reasons for refusing to confirm. These include negative judgments on the nominee's ability, temperament, political record, or philosophy.

President Theodore Roosevelt, who consistently sought highly qualified nominees, recognized the wide latitude of judgment the Constitution gives the Senate. In a letter to one Senator whose recommendation for appointment to a lower Federal court Roosevelt was rejecting, Theodore Roosevelt said:

> It is, I trust, needless to say that I fully appreciate the right and duty of the Senate to reject or to confirm any appointment according to what its members conscientiously deem their duty to be; just as it is my business to make an appointment which I conscientiously think is a good one.

Roosevelt made three nominations to the High Court. All were confirmed.

President Richard Nixon stands in contrast. In a letter to a Senator during consideration of the Carswell nomination, Nixon wrote:

> What is centrally at issue * * * is the constitutional responsibility of the President to appoint members of the court—and whether this responsibility can be frustrated by those who wish to substitute their own philosophy or their own subjective judgment for that of the one person entrusted by the Constitution with power of appointment.

The Senate demonstrated its own view of its responsibility by rejecting the Carswell nomination, 45 to 51, with 13 Republican Senators joining 38 Democrats. It was the second of Nixon's high court nominations to be defeated.

Theodore Roosevelt's view—not Nixon's—is consistent with the intent of the framers and with the language of the Constitution. It is also consistent with historical precedents.

As early in our Nation's history as George Washington's second term, a Supreme Court nomination, Associate Justice John Rutledge to be Chief Justice, was rejected by the Senate.

The Senate rejected President James Madison's nomination of Alexander Wolcott to be Associate Justice, when a majority of Senators decided he lacked the requisite legal qualifications for service on the High Court.

For a variety of reasons, five of President Tyler's High Court nominees were not confirmed. And President Fillmore and Grant lost three nominations each.

In 1930, a Republican Senate rejected President Hoover's nomination of Judge John Parker to the Supreme Court because his discredited racial and economic views were not sufficiently sensitive to the temper of the times.

For nearly 40 years, from 1931–69, all the Supreme Court nominations of four consecutive Presidents were confirmed. But the Senate's responsibility had not changed during that time. A review of the list of nominees during this period indicates each of the Presidents had submitted nominees who were both well-qualified and not likely to create a one-sided Supreme Court. This period of Senate-Presidential agreement ended with the forced withdrawal of President Lyndon Johnson's nomination of Abe Fortas to be Chief Justice.*

CRITERIA FOR SUPREME COURT NOMINATIONS

Although the Constitution gives the Senate an important role in Supreme Court appointments, it spells out no standards for weighing the qualifications of a potential Justice. For example, unlike the constitutionally prescribed standards for service in the House, the Senate, or the Presidency, no minimum age is specified. And, though no President has ever nominated a nonlawyer, a judicial nominee does not even need to be a lawyer.

The Constitution leaves each Senator free to develop his or her own criteria. Historically, however, several tests have evolved. At a bare minimum, the nominee should possess at least these qualifications: intellectual excellence, superior legal ability, and personal integrity. No nominee who does not possess at least these qualifications should even be submitted for the Senate's consideration. To be confirmed, however, a nominee should possess more.

Judicial temperament has been deemed to be a key requirement. By that, I mean not simply the personal demeanor which the dignity of the courtroom requires. Rather, judicial temperament, in the broad sense, means the capacity to perform the essential functions of a judge: to be fair, impartial, and balanced in approaching judicial questions.

Finally, the overwhelming weight of reasoned opinion through the years has been that a nominee's judicial philosophy or ideology is an appropriate criterion for Senate approval or disapproval. Felix Frankfurter, while still a Harvard law professor, thought it odd that any nominee would expect or even desire immunity from public inspection of his views. He said:

> Surely the men who wield the power of life and death over political decisions of legislatures should be subjected to the most vigorous scrutiny before being given that power.

However, excessive ideological zeal or biased prejudgment of issues should disqualify a nominee. The agenda of an ideological extremist—whether of the extreme right or of the extreme left—creates a doctrinal conflict of interest fully as inappropriate as a financial conflict of interest. To be locked into an extreme and inflexible ideology fundamentally conflicts with the judicial responsibility to be fair and just, to be open-minded and free of prejudice, and to be able to decide cases solely on the evidence and arguments before the court and on applicable law. A nominee committed to a rigid ideology lacks the impartiality that is the essence of judicial temperament.

A nominee's philosophy or ideology becomes even more relevant to confirmation when an administration uses its appointive power for ideological purposes. By all accounts, Judge Bork was selected by this administration on the basis of his commitment to a certain judicial ideology. It is naive to think otherwise and deceptive to pretend otherwise.

This President, like Presidents before him, obviously took his nominee's judicial ideology into account before deciding to name him. This Senate, like Senates before us, has an obligation to examine that judicial philosophy in deciding whether to confirm the President's nominee.

There is little doubt that the Bork nomination is part of a determined effort by this administration to achieve by a court appointment an extremist social, political, and economic agenda it has failed to advance through the legislative process. The administration thus seeks to end run the legislative process and then cries "politics" when we seek to stop it.

Finally, Mr. President, some people argue that the Senate should defer to the President's choice because he was given a mandate in 1984. Whether that was a mandate to remake the Supreme Court is highly questionable. Moreover, to the extent that election returns deliver any mandates, the 1986 election, which restored control of the Senate to a Democratic majority, is arguably a mandate to check the Reagan administration in this as well as other areas. In the final analysis, however, no election can relieve Members of the Senate of our constitutional responsibility to exercise our independent and prudent judgments.

Mr. President, as I have said, each Senator must determine for himself or herself the acceptable criterion in judging a Supreme Court nominee. I for one believe that a Supreme Court Justice must be open-minded and impartial; have an ability to look beyond his or her own political predilections; and be able to comprehend a wide range of legitimate interests.

Sixteen years ago when Justice Powell's nomination was before the Senate, I said that in my opinion a Supreme Court Justice must also demonstrate a basic commitment to and respect for individual rights and liberties inherent in the fabric of the Bill of

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Footnotes at end of article.

Rights, for it is these rights that stand as the last bulwark between the force of government and individual freedom.

I find evidence of these essential qualifications lacking in Judge Bork's record.

JUDGE BORK DOES NOT MEET THE BASIC QUALIFICATIONS TO SERVE ON THE SUPREME COURT

Mr. President, after an exhaustive review of Judge Bork's extensive publications and speeches, decisions as a member of the Court of Appeals for the District of Columbia Circuit, and his testimony before the Senate Judiciary Committee, I have concluded that he does not meet the fundamental and indispensable standards for a Supreme Court Justice.

For more than a quarter of a century—as a professor, a legal scholar, a writer, and, most recently, as a Federal judge—Robert Bork has used his considerable intellect and skills to disparage, deride, and repudiate a body of law and principles which the majority of Americans support.

In matters of racial equality, religious freedom, women's rights, free speech, personal privacy, family rights, and the fundamental right of individuals to live their lives free from undue government interference and control, Judge Bork has advocated extreme, radical, and reactionary positions.

In the sixties, when our Nation was struggling, slowly and painfully, to overcome racial discrimination, Judge Bork was denouncing civil rights leaders as part of a mob attempting to force its moral views on others. In carefully crafted, erudite language, he opposed enactment of the historic 1964 Civil Rights Act and put the alleged moral right of bigots to discriminate ahead of the moral and constitutional right of black Americans to be free from racial discrimination. Since that time, he has reportedly attacked court decisions protecting rights of minorities.

Judge Bork has also repudiated equal rights for women. He would throw out Supreme Court decisions which forbid discrimination on the basis of gender. He has attacked cases holding that government cannot interfere with an individual's right to use birth control, to make a personal and private decision about abortion at certain stages of a pregnancy, and to decide how to raise and educate one's children. If Judge Bork's positions prevailed, women truly would be relegated to second-class citizenship.

Religious freedom has also been one of Bork's targets. He has assaulted Supreme Court decisions maintaining the wall of separation between church and state. He has advocated putting religion back into the public sector—something the first amendment was aimed at preventing.

On the issue of freedom of expression, Judge Bork has tried to rewrite the first amendment to allow Government censorship of a wide array of artistic and literary works. He has argued against a long line of Supreme Court decisions which protect the rights of Americans to speak out without fear of punishment.

Bork's view of individual liberty is embodied in his contention that the Bill of Rights, the essence and symbol of our unique freedom, was "a hastily drafted document upon which little thought was expended".[1]

Throughout his philosophy runs the radical notion that the framers of the Constitution had no overriding intention to limit the power of government over individual lives. Bork has argued that a long list of Supreme Court decisions upholding the rights of individuals against government interference are flatly wrong and without constitutional foundation. His reading of the history of our country runs directly contrary to that of Justice Brandeis who wrote in the early part of this century that the framers of our Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[2] In Bork's view, government can do almost anything to an individual that it wishes to do. Indeed, he has even taken the position that there is no constitutional barrier or fundamental interest at stake to stop a State from enacting compulsory sterilization laws if it chooses. As Prof. Lawrence Tribe testified before the Judiciary Committee, Bork finds no "constitutional obstacle" to such government action in the absence of racial bias.

Mr. President, the dangers of placing on the Supreme Court an individual who repudiates so many of the settled principles of constitutional law established during the past two centuries cannot be overstated. Although he suggested a different position in his confirmation hearings, Judge Bork has made it patently clear in his voluminous speeches, publications, and prior congressional testimony that he does not believe that a Supreme Court Justice is bound by the rule of precedent to adhere to prior decisions of the Court if he personally deems them constitutionally wrong. He has given us repeated warnings that he is ready to rewrite settled principles of constitutional law, particularly in the area of individual rights. That is what his right-wing supporters expect him to do and that is what his opponents expect he will do.

In practical terms, this could mean reopening civil rights issues settled long ago and reversing the Supreme Court's decision on abortion, thereby making it possible for a State to declare abortion illegal. The State's power to enact legislation which discriminates against women could be reinstated. A State could enact legislation—like that which died in the Senate a few short years ago—to prohibit the use of certain contraceptives, including birth control pills. It means that religious freedoms could be curtailed and the wall between church and state eroded.

Mr. President, abandonment of precedents established by earlier High Court decisions could lead to utter chaos. No one would know with any degree of certainty what the law is, which laws might be reopened, and what fundamental right withdrawn.

Justice Powell takes a different view from Judge Bork on the issue of precedents. Speaking specifically of a Justice's obligation to adhere to earlier Court decisions, Justice Powell said that respect for this doctrine was essential in "a society governed by the rule of law."[3] Only the most compelling circumstances, in Justice Powell's view, would justify deviation from that doctrine.

Our Nation does not need a Supreme Court Justice who wants to rewrite case law and constitutional principles that have evolved slowly and carefully over decades of jurisprudence. And we especially do not need to have them rewritten by an individual who holds such extreme and radical notions about the fundamental constitutional principles of individual rights and liberties.

Moreover, Mr. President, we do not need a Supreme Court Justice who is so tied to his own ideology that he is unable to fulfill the single most important requirement of a judge: impartiality.

Judge Bork's remarkable record in the brief period he has served on the court of appeals amply demonstrates that he often decides controversial cases according to his own peculiar prejudices. Judge Bork seems to be locked into an ideological doctrine which almost invariably predetermines his decisions when certain issues are raised or when certain classes of people enter his courtroom. It is possible to predict how Judge Bork will rule in almost any given closely contested case simply by identifying the parties involved.

Workers, minorities, women, consumers, environmentalists, and individuals asserting their rights against a Government agency will almost certainly leave the Bork courtroom empty-handed. Big business and big government, on the other hand, find in Bork a ready, willing, and ingenious activist on behalf of their interests.

There is often no consistency in Judge Bork's application of the law. His legal principles are revised and applied to achieve preordained results—results which reflect the social, eco-

nomic, and political priorities of the far right. The most striking example of Bork's ability to revise his arguments to justify reaching a particular result is the contrast between his rationale for opposing civil rights legislation in the sixties and his contemporary support for legislation imposing the morality of the far right. When the subject was racial discrimination, he argued against imposing moral values through legislation. When the subject was sexual morality, however, he argued on behalf of the right of the majority to impose its moral values on individuals.

Mr. President, to confirm Judge Bork to sit on the Supreme Court would be to ratify a narrowminded, prejudicial doctrine of law that he has espoused throughout a lifetime of public discourse. It would stand as an invitation to the radical right to try to overturn decades of constitutional law. It would reopen heated debates over civil rights, abortion, and a host of other issues that could tear our Nation apart.

A recent poll shows that the more information people are given about what Judge Bork has said and done during this career, the more they oppose him. I believe the same is holding true for Members of the Senate.

Judge Bork's record speaks for itself. The White House would have us dismiss much of what Bork has said as simply the musings of an academician. They would have us believe that Bork really would not seek to achieve on the Supreme Court the radical changes he has spent the previous 25 years advocating.

In his testimony before the Senate Judiciary Committee, Judge Bork attempted to separate himself from the statements and judicial philosophy which made him the darling of the radical right and won him the nomination in the first place. Has he truly undergone a transformation? Or is this a cynical move to try to persuade us what we see before us now is a new Bork—that he is a different man and a moderate jurist? No amount of rationalization or recanting can convince me that Judge Bork is any different from what he has been: An extremist prepared to rewrite the Constitution to reflect his peculiar legal philosophy.

Mr. President, let me now turn in more detail to Judge Bork's record and to the philosophy to which he has ascribed throughout his career as a professor, a scholar, and a judge.

IDEOLOGY BASED UPON REPUDIATION OF INDIVIDUAL LIBERTIES

Mr. President, Judge Bork believes in the doctrine of original intent. Original intent—or as it sometimes called, the interpretationist school of judicial philosophy—maintains that judges should restrict their deliberations only to the presumed intent of the framers of the Constitution or the authors of the legislation in contention. Interpretationists then claim to know, and so are able to "interpret," that intent.

The original intent philosophy has been characterized as little more than a slogan which its adherents use to justify repudiation of court decisions with which they disagree. An article written by Leo Rennert cogently points up the fallacies of this doctrine. Rennert wrote that original intent "is a fiction that won't stand up to either judicial or historical analysis." [4]

Prof. Philip Kurland of the University of Chicago Law School notes that the Bill of Rights is frequently the main target of original intent advocates. Judge Bork's version of the "original intent" doctrine assumes that the principle intent of the framers of the Constitution was simply to establish mechanisms for majoritarian rule or, as he calls it, a Madisonian rule of law. Although he pays lipservice to the notion that the framers intended to protect some areas of individual rights against the tyranny of the majority, there are very few and very limited areas where he is willing to acknowledge that such rights exist.

One legal scholar has characterized Judge Bork's philosophy as providing that, "the majority is free to impose contested moral views on individuals and minorities in all but nearly universally acknowledged cases of constitutional violation." Another has observed that, "Bork's entire current constitutional jurisprudential theory is essentially directed to a diminution of minority and individual rights." [5] With few exceptions, Judge Bork's view of the Constitution promotes "the majority will at the expense of individual rights." [6]

Judge Bork's constricted interpretation of the intent of the framers of the Constitution is without historic foundation. As Professor Kurland observed:

> The watchword of the people and the constitutional and ratifying conventions was "liberty." They were intent on framing a government to guarantee liberty to 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. * * * 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 the individual expression of life on the terms of him who has to live it."

Judge Bork characterizes his philosophy as the application of "neutral principles." But what Judge Bork and his allies call "neutral principles" translates in actual practice into an attack on the American heritage of protecting individual liberty against government tyranny.

Judge Bork's contention that the right of the majority to impose its will is the only general principle the framers intended to establish would overturn a long line of court decisions of the past 200 years that were based on the assumption that the Constitution limits the power of the majority over individuals. Indeed, Judge Bork himself reaches that conclusion in discussing a broad range of Supreme Court decisions.

Mr. President, let me try to highlight some of the Supreme Court decisions which Judge Bork has attacked.

RIGHT TO PRIVACY

Much attention has been focused on the impact Judge Bork's appointment would have upon the Roe versus Wade decision. That decision recognized the right of a woman to have an abortion without government intrusion at certain stages of a pregnancy. People concerned about preserving the rights recognized in Roe versus Wade have ample justification for fearing the confirmation of Judge Bork.

Judge Bork has called Roe versus Wade an "unconstitutional decision." In the part, he has repeatedly made it clear that he would feel no obligation to follow its precedent if he were a member of the Supreme Court. In his testimony at his confirmation hearings, he suggested a somewhat different position, but one which is not any more reassuring regarding the future of that case. He indicated he would consider three factors in deciding whether to overturn Roe versus Wade. First, he would invite the attorneys to present arguments as to whether there is a right to privacy which can be derived from a specific provision in the Constitution—an argument he has repeatedly and vehemently rejected since the Roe case was decided. Then he would allow them to try to argue that a right to an abortion can be found elsewhere in the Constitution. Finally, he would allow the attorneys to argue that Roe versus Wade is the kind of case that should not be overturned, even if it was wrong. Although he tried to suggest he was thus not totally committed to reversing Roe versus Wade and the decisions on which it was based, given his prior views, it is difficult to imagine how the proponents of the case could satisfy his criterion.

Judge Bork's attack on the Roe versus Wade decision reflects his general legal philosophy. He believes that the Constitution provides no basis for protecting individual choices against the will of a majority, even in the most personal, private, and intimate areas of family life. In his view, government has unfettered power to impose moral choices when those in office feel they speak for majority values. In his testimony before the Judiciary Committee, he reiterated his position that he could find no general right to privacy in the Constitution.

His opposition to the Roe case is simply one manifestation of that view.

Judge Bork sets forth the most detailed explanation of this view in an article he wrote for the Indiana Law Journal in 1971. He repeated those views in a 1984 speech to the American Enterprise Institute,[7] and again in a 1985 speech at the University of San Diego Law School.[8] In an interview in 1985, Judge Bork affirmed that the 1971 article continues to represent his basic judicial philosophy.[9] In his testimony before the Judiciary Committee, he indicated it still reflected his views, except in the area of freedom of speech and to some extent the application of the equal protection clause of the 14th amendment.

In the Indiana Law Journal article, Judge Bork used the Supreme Court's decision in Griswold versus Connecticut[10] as a case study to lay out his basic thesis. In the Griswold case, the Supreme Court invalidated a State law that made it a crime for a married couple to use contraceptives. Bork described the case as "unprincipled" and contended that the right of "a husband and a wife * * * to have sexual relations without fear of unwanted children" is no more entitled to constitutional protection than a business entity's desire not to be subjected to economic regulation.

Bork claimed that Griswold's antecedent cases also were wrongly decided. He challenged a Supreme Court decision which found that the right to "marry, establish a home and bring up children" was entitled to protection under the Constitution,[11] and he objected to a decision which upheld the right of parents "to direct the upbringing and education" of their children.[12]

If there is any doubt as to whether Judge Bork would carry to the Supreme Court his limited view of the constitutional rights of families and parents, one need only read his opinion in the court of appeals decision in Franz versus U.S.[13] This case involved alleged constitutional violations of a divorced father's right to communicate with his children who had been relocated with their mother under the Federal witness protection program. The majority held that severance of the relationship between parent and child will survive constitutional scrutiny only if it can be shown that a compelling State interest exists which cannot be achieved through any means less restrictive of the rights of parent and child. The case was remanded for further proceedings.

A month later, Judge Bork filed a lengthy statement concurring in part and dissenting in part. The thrust of his statement was an assault upon the majority for recognizing any constitutional rights on the part of the noncustodial parent.

He thus questioned the notion that the Constitution affords any basic protections for family relationships and reiterated his long-standing disapproval of the line of Supreme Court decisions including Griswold and Roe versus Wade which recognized a constitutional right of privacy in family-related areas. Similarly, he criticized this line of decisions in his majority opinion in a case involving the discharge of a serviceman because of homosexuality.[14]

Bork further asserted that the equal protection clause of the 14th amendment should be limited strictly to requiring that the Government not discriminate along racial lines. He contended that courts have no "principled" way of saying which nonracial inequalities are impermissible. Under Bork's equal protection formulation, there are no "fundamental interests" courts are required to recognize. He has said that specific decisions like Skinner versus Oklahoma, which held that a State could not require the compulsory sterilization of all persons who had been convicted twice of certain theft offenses, are "as improper and intellectually empty as Griswold versus Connecticut."[15] Judge Bork would thus have upheld the Oklahoma Compulsory Sterilization Act—an act which every member of the 1942 Supreme Court found abhorrent and unconstitutional.

During his testimony at his confirmation hearing, Judge Bork suggested that the Oklahoma statute could have been struck down on the grounds it had an adverse racial impact—that minorities fell more frequently into the categories of criminal offenses for which sterilization was mandated. That suggestion—consistent with his view that the 14th amendment should be limited to Government acts based upon racial factors—would allow the compulsory sterilization law to stand if the burden of proof demonstrating racial animus could not be satisfied. Judge Bork does not appear to have changed his underlying view that there is no fundamental constitutional interest which would itself protect any individual—regardless of race—from being subjected to involuntary sterilization.

Bork's repudiation of the right of privacy embodied in the Roe versus Wade decision and its antecedents, including Skinner versus Oklahoma, is representative of his general constitutional philosophy. He does not believe that the framers of the Constitution intended to establish any general principles or concepts of fundamental freedom from Government interference.

Moreover, even where individual rights are specifically cited in the Bill of Rights, as in the first amendment, Judge Bork would subordinate them to the dictates of the State.

CONSTRICTED VIEW OF THE FIRST AMENDMENT

Mr. President, the framers of the Constitution unequivocally sought in the first amendment to protect certain fundamental rights from governmental intrusion. Yet, Judge Bork has argued that even these fundamental liberties can be subjected to the domination of the will of the majority.

In the area of religious liberty, for example, Judge Bork set forth his constricted view of the first amendment's protection in a series of speeches.[16] The religious freedom provisions of the first amendment prohibit the Government from either "establishing" religion or interfering with an individual's "free exercise" of religion. Judge Bork has attacked the Supreme Court for holding that subsidization of religious schools with Federal educational funds violates the establishment clause of the first amendment,[17] as well as criticized the Court's application of the free exercise clause.[18]

Despite the specific protection the first amendment gives to religious freedom and the indisputable intent of the framers to guarantee individuals special protections against governmental interference, Judge Bork argued that these cases reflected an objectionable, "unprincipled" trend in constitutional law.

"All of these trends, from interpretations of the religious clauses, to readings of the speech clause, to the privacy cases share the common theme that morality is not usually the business of Government but is instead primarily the concern of the individual. Whether or not so intended, these cases may be seen as representing the privatization of morality," he said.

Bork went on to argue for "a relaxation of current rigidly secularist doctrine" which would allow for "the reintroduction of some religion into public schools and some greater regigious symbolism in our public life"—a development he characterized as "sensible."

Mr. President, Judge Bork attacks court decisions enforcing the separation of church and state on the same basis upon which he attacks other decisions upholding individual liberties: Judge Bork believes that individual liberties are not entitled to protection against the moral choices of a majority. And the majority view, he contends, is whatever the Government of the moment desires.

This approach is also reflected in Judge Bork's treatment of that other great freedom guaranteed by the first amendment—the freedom of expression.

The commitment of the framers of the Constitution to the principle of free expression also is indisputable. Yet, Judge Bork has argued that that freedom too can be curtailed by the will of the majority.

"Constitutional protection should be accorded only to speech that is explicitly political," he wrote in 1971. "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. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the Government or the violation of any law."[19] Although Judge Bork now states he was wrong in attempting to limit the first amendment protections to political speech and has abandoned that position, the core of his limited view of the free speech clause remains intact. As recently as his 1984 American Enterprise speech he specifically linked his first amendment principles to his notion that the highest constitutional principle is the right of the majority to impose its will. In that speech, he attacked current first amendment law for denying the community the right to "express [its] moral beliefs in law."

Moreover, in his testimony before the committee he continued to take the view that speech calling for the violation of law could be punished. When specifically asked how this approach would have affected Martin Luther King's speech calling for civil disobedience as part of the civil rights movement, Bork offered his theory that since Dr. King was challenging the constitutionality of those laws, his speech would be protected if those laws were subsequently found to be unconstitutional. Judge Bork was uncertain whether the same rule would apply if the laws being protected withstood the constitutional challenge. He clearly allows for the possibility that one's right to advocate peaceful disobedience to a particular law depends on whether one is ultimately correct in predicting how the Supreme Court will rule on the constitutionality of that law.

Let me illustrate the problems Judge Bork's new rule would create. It is unlawful to demonstrate within a specific distance from the South African Embassy. That law, on its face, has been held to be valid. Many individuals have intentionally violated it and gone to jail as a result. Bork's theory of restricting speech calling for violation of a valid law would allow a speaker who said or wrote, "Let's demonstrate in front of the embassy" to be punished, even imprisoned, for such a statement. That is a preposterous result in a society like ours where dissent and free expression of that dissent is highly valued.

Such an interpretation of the first amendment would have allowed Connecticut to make it a crime for anyone to urge violation of the State law forbidding married couples from using birth control. If Bork's view of the Connecticut law had been one which the Griswold court had adopted, those who had advocated its violation could have been imprisoned for that speech. No serious constitutional scholar would support such a proposition.

Mr. President, Judge Bork's Judiciary Committee testimony illustrated a remarkable abandonment of a view he had previously announced was a necessary result of an original intent interpretation of the Constitution and the tentative creation of a novel theory of when speech advocating civil disobedience is or is not protected by the first amendment. Clearly Judge Bork's new-found principle—if indeed he has found it—would have a chilling effect on freedom of speech since no one would know in advance what speech was protected. Moreover, one might well ask where in the Constitution this "original intent" jurist found this new first amendment standard.

As recently as a May 28, 1987, interview with Bill Moyers, Bork indicated that art fell at the outer edges of the first amendment and might not be protected unless it was "political." The bottom line is that although it is difficult to determine with any certainty precisely where Judge Bork stands today with regard to free speech issues, it is clear he continues to limit the protections of that amendment.

OTHER INDIVIDUAL RIGHTS BORK HAS REJECTED

Mr. President, as I said earlier, Judge Bork's guiding philosophy has been that the Government that happens to be in power at any given time has the right to infringe on individual freedoms because that Government presumably represents the will of the majority. As a result of this strange philosophy, he would overturn a long list of cases upholding individual rights rendered by the Supreme Court over the past 200 years. Some of the decisions Judge Bork has criticized as wrongly decided include Shelly versus Kraemer,[20] forbidding courts from enforcing racial restrictions in deeds; Baker versus Carr,[21] and Reynolds versus Sims,[22] requiring that legislative districts be based on one man, one vote: Katzenbach versus Morgan,[23] and Oregon versus Mitchell,[24] upholding civil rights laws barring literacy tests for voting; Harpe versus Virginia State Board of Elections,[25] striking down poll taxes; and the entire line of modern first amendment cases from Dennis versus U.S. to Brandenberg versus Ohio[26] holding speech can be forbidden only if "clear and present danger" or "imminent and likely harm" is established.

Mr. President, special attention should be paid to Judge Bork's narrow construction of the 14th amendment whose equal protection clause he has said was aptly described as the "equal gratification" clause. Judge Bork has stated that he does not believe the 14th amendment applies to areas other than racial discrimination—and even there he has argued for very limited protections—and, perhaps, procedural due process. The equal protection clause, he has contended, because of its "historical origins," should be restricted to a very narrow and limited range of cases involving government discrimination along racial lines.[27]

The fact is the 14th amendment makes no mention of "race." And historically the courts properly have applied the amendment's prohibitions to a whole range of discriminatory practices.

RIGHTS OF WOMEN

Application of Bork's theory of the 14th amendment would reverse a line of cases over the past two decades which have held that arbitrary discrimination on the basis of gender is constitutionally suspect.

Under Bork's approach, the meaning of the Constitution is frozen in time to reflect only the presumed intent of the men "who drafted, proposed, and ratified its provisions and its various amendments." Although he would allow modern courts to accommodate certain technological advances such as applying the fourth amendment's protections against unreasonable searches and seizures to electronic surveillance, he sees no need to make any adjustments for social changes in our society. He thus rejects a long line of Justices beginning with Chief Justice Marshall who recognized that a Constitution is "intended to endure for ages to come, and consequently, [must be] adapted to the various crises of human affairs"[28] to Chief Justice Hughes who also rejected the argument that "the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them."[29]

Because the legal rights and interests of women were not specifically addressed at the time the Constitution and the 14th amendment were drafted, Bork finds no special constitutional prohibition against sex discrimination. The only constitutional protection Bork would extend specifically to women is the right to vote because of the 19th amendment.

Not surprisingly, Judge Bork has in the past expressed opposition to the equal rights amendment to the Constitution which would afford explicit protection to women. He contended it would give judges the power to decide "enormously sensitive, highly political, highly cultural issues."[30]

Mr. President, in a long line of cases since 1971 the Supreme Court has held that, under the equal protection clause of the 14th amendment, the Government may treat men and

women differently only when the differential treatment is substantially related to the achievement of an important governmental interest. Many laws discriminating against women have been struck down under the standard established in 1971—a standard Bork rejects.

In his testimony before the Judiciary Committee, Judge Bork suggested that the 14th amendment could be read to protect women against "unreasonable" discrimination. Adoption of this standard would return sex discrimination cases to the status they held prior to 1971 when virtually any basis offered by a State was sufficient to justify differential treatment. He contended that application of his standard would reach the same result as the standard currently used by the Supreme Court. Yet when discussing a recent decision of the Court striking down differential drinking ages for males and females, he indicated that the State might have been able to produce evidence showing that its distinction was "reasonable." In light of his philosophy of generally giving deference to the judgments of Government entities, it is not unrealistic to assume that a legislative determination of reasonableness would frequently prevail under his application of this standard.

As recently as June 10, 1987, Judge Bork reiterated his view that the "Equal protection clause probably should have been kept to things like race and ethnicity," implicitly acknowledging that the use of his "reasonable basis" standard for reviewing sex-discrimination would effectively remove the 14th amendment's protections from women.[31]

Judge Bork's hostility to legal equality for women also emerges in his decisions on the court of appeals interpreting statutory provisions. Most striking is his dissenting opinion in Vinson versus Taylor.[32] In this case, a unanimous Supreme Court, in an opinion written by Chief Justice Rehnquist, held that job-related sexual harassment is prohibited by title VII of the Civil Rights Act. Judge Bork, however, questioned whether sexual harassment should be considered discrimination at all. "[S]ome of the doctrinal difficulty in this area," he said, "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."[33] In a statement reflecting the view that sexual harassment was less offensive than racial harassment, Judge Bork argued that a more stringent standard of proof and rule of vicarious liability for supervisors should apply in cases involving sexual harassment than apply in cases involving racial harassment.

Judge Bork's attempt in this case to narrow the statutory protections against sexual discrimination has absolutely no legislative basis, and his position was sharply rejected by a unanimous Supreme Court. It endorsed the view that, "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."[34]

A singular consistency emerges from both Judge Bork's restricted interpretation of the 14th amendment and his efforts to constrict the scope of title VII when applied to sex discrimination: hostility to equal rights for women.

RACIAL EQUALITY

An examination of Judge Bork's views on racial justice must begin with his 1963 New Republic article, "Civil Rights—A Challenge." In that article, Judge Bork strongly opposed enactment of civil rights legislation, the Public Accommodations Act, to outlaw racial discrimination in businesses serving the public.

Although Judge Bork would later argue in favor of the Government's authority to impose moral values supposedly supported by a majority of the people, Bork in this instance challenged "the morality of enforcing morals though law" when the moral principle the majority sought to impose was racial nondiscrimination. The danger, in Judge Bork's words, was that "justifiable abhorrence of racial discrimination will result in legislation by which the morals of the majority are self-righteously imposed upon a minority."

Judge Bork characterized the Public Accommodations Act as the Federal legislature "inform[ing] 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 [black customers] with whom they do not wish to associate." He described proponents of the Public Accommodations Act as "part of a mob coercing and distributing [sic] other private individuals in the exercise of their freedom. Their moral position is about the same as Carrie Nation's when she and her followers invaded saloons." He stated the issue "is not whether racial prejudice or preference is a good thing but whether individual men ought to be free to deal and associate with whom they please for whatever reasons appeal to them * * *. One may agree that it is immoral to treat a man according to his race or religion and yet question whether that moral preference deserves elevation to the level of the principle of individual freedom and self-determination."[35] No amount of clever verbiage can disguise the sentiment underlying the article: tolerance for racial discrimination

During his 1973 confirmation hearing to be Solicitor General,[36] Judge Bork backed away from the views he expressed in that article. In response to questions from Senator Tunney as to enforcement of the Civil Rights Act in light of his article, Judge Bork replied that "I no longer agree with that article * * *. The reason I do not agree with that article, it seems to me I was on the wrong track altogether * * *. It seems to me that the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today I would support it."

As to whether he would vigorously enforce the Interstate Public Accommodations Act, he responded simply that he would "take the Government's position." There is no indication whether his change of position was based upon a repudiation of his notion that it was inappropriate to impose moral principles against racial prejudice through legislation, or the practical assessment that contrary to his dire prediction the public accommodations law had worked and that by 1973 only an avowed racist would publicly continue to oppose that law. Proponents of Judge Bork argue that his recanting of his offensive 1963 article in 1973 should nullify any criticism of him on civil rights grounds. Unfortunately, that article was not an isolated instance of his misguided judgment. It reflected a deep and enduring lack of understanding of the necessity of ridding this country of racial prejudice and discrimination.

Although Bork concedes that the 14th amendment forbids racial discrimination, he nevertheless has attacked Supreme Court decisions enforcing those protections. For example, he has challenged the decision in Shelly versus Kraemer,[37] which forbids courts from enforcing racially restrictive covenants in deeds. He claimed in 1971, as he did in 1963, that only government discrimination—not private discrimination—should be declared unlawful. "[The] text and history [of the 14th amendment] clearly show it to be aimed only at governmental discrimination," Bork wrote in his 1971 Indiana Law Journal article.[38]

Challenging the power of Congress to ban literacy tests, Judge Bork has described two major decisions upholding key provisions of the 1965 Voting Rights Act, Katzenbach versus Morgan,[39] and Oregon versus Mitchell,[40] as "very bad, indeed pernicious, constitutional law."[41] Ironically, Bork usually argues in favor of deferring to legislative authority.

Judge Bork has also asserted that Harper versus Virginia Board of Elections,[42] which held that poll taxes are unconstitutional, was wrongly decided.

During his 1973 confirmation hearing, he defended his position, contending that the poll tax involved in Harper 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."[43] As the NAACP Legal Defense and Education Fund noted in a recently issued report, "Judge Bork's benign characterization of the poll tax is difficult to reconcile with the facts that were common knowledge long before 1973." The Supreme Court in the Harper case expressly noted that the Virginia poll tax at issue "was born of a desire to disenfranchise" black voters.[44]

The NAACP Legal Defense and Education Fund also pointed out the Supreme Court was not alone in recognizing that poll taxes had been adopted for the purpose of disenfranchising black voters. The Senate Judiciary Committee, the U.S. Commission on Civil Rights, and several lower Federal courts had reached the same conclusion.[45] Indeed, Congress in 1962 proposed a constitutional amendment to prohibit the use of a poll tax for Federal elections, an amendment which was promptly ratified by the States to become the 24th amendment to the Constitution.

Judge Bork's bald assertion that the poll tax was "not discriminatory" flies in the face of reality. And his statement before the Judiciary Committee that he personally opposes poll taxes is both irrelevant and inconsistent with his 1973 testimony that the Virginia tax in question didn't have much impact one way or the other. Moreover, Judge Bork's statement that he might have found the poll tax unconstitutional if the complaint had been brought on other grounds—a defense which Judge Bork also used to explain his position regarding the Skinner sterilization case—is pure speculation.

Judge Bork's approach would put the burden on those individuals subjected to these unjust laws to devise a new and different legal basis for protecting interests which the Supreme Court correctly held to be guaranteed as fundamental constitutional rights.

Mr. President, in addition to opposing title II of the 1964 Civil Rights Act banning racial discrimination in public accommodations, Judge Bork in a 1964 article appearing in the Chicago Tribune urged rejection of title VII of the act governing employment. He argued that both provisions presented "serious and substantial difficulties" because they would "adopt a principle of enforcing associations between private individuals which would, if uniformly applied, destroy personal freedom over broad areas of life." Striking at the very heart of civil rights legislation, Bork contended that "[t]he accommodations and employment provisions of the civil rights bill cannot be viewed in isolation but must be assessed as only a modest first step in a broad program of coerced social change."[46]

On school desegregation, Judge Bork was one of only two law professors to testify in 1972 in support of the constitutionality of legislation that would have drastically curtailed remedies which the Supreme Court had held constitutionally necessary to cure violations of the 14th amendment.[47] In 1978 he attacked the Supreme Court's decision in University of California Regents versus Bakke, upholding the constitutionality of affirmative action programs. He described that decision as "resting upon no constitutional footing."[48]

For more than 25 years Judge Bork has appeared unable to recognize the magnitude of the problem of racial discrimination. He seems to have neither the insight nor the compassion to view discrimination from the perspective of its victims.

OTHER VULNERABLE GROUPS

Mr. President, Judge Bork's views on racial issues, the rights of women, separation of church and State, and freedom of speech are inimical to basic principles of equality and justice. His constricted view of the equal protection clause of the 14th amendment would render many other groups in our society vulnerable.

Because he does not believe that the 14th amendment provides any special restriction against the Government engaging in arbitrary and invidious discrimination except in a very narrow area involving race, he would effectively withdraw 14th amendment protections not only from women, but also from disabled individuals, aliens, illegitimate children, and any other class of vulnerable people upon whom the State chooses to impose its will. Since he finds no barrier in the 14th amendment to compulsory sterilization of thieves, Skinner versus Oklahoma, it is difficult to postulate where he would draw the line limiting the power of the State to affect the lives of individuals. Ironically, under Bork's warped line of judicial reasoning, a State law making abortion compulsory would not be unconstitutional—an outlandish result.

Bork's assault upon many of the Supreme Court precedents protecting individual rights is also based on his view that Congress lacks the power to enact laws protecting those rights in many of these areas. For example, in his criticisms of the Supreme Court's decisions in Katzenbach versus Morgan, and Oregon versus Mitchell, he expressed the view that Congress lacks the power under the 14th amendment to enact laws establishing what he called "substantive" constitutional law.

Similarly, he has challenged the constitutional authority of Congress to adopt the Public Accommodations Act under the commerce clause, contending such power over the States should be "beyond the reach of the National Government."[49] "If Congress can dictate the selection of customers in a remote Georgia diner," Bork wrote, "because the canned soup once crossed a State line, federalism—so far as it limits national power to control behavior through purported economic regulation—is dead." I might point out that the importance of the commerce clause to congressional authority is evidenced by the legislation we recently enacted prohibiting discrimination against disabled citizens in air travel.[50] Although Judge Bork has said he would not overturn existing commerce clause case law, it is unclear how he would handle future cases relating to this provision.

Mr. President, it is not possible to provide a definitive list of the rights established by Congress or recognized under the Constitution by Supreme Court decisions that Judge Bork would invalidate nor would it be appropriate during his confirmation process to propound questions as to how he might rule in prospective cases. A review of his prior statements and philosophy regarding fundamental rights and the authority of Congress to protect those rights suggests, however, that many of the rights and protections Americans routinely assume are secure would become vulnerable under Judge Bork's philosophy and approach to constitutional and statutory interpretation.

DIFFERENT PHILOSOPHY IN THE AREA OF BUSINESS INTERESTS

Mr. President, Judge Bork's philosophy on general principles of law dramatically changes in the area of law affecting business—big business primarily.

As I will discuss in a few moments, a review by the Public Citizens Litigation Group of Judge Bork's decisions reveals a consistent pattern of his siding with the Government against the interests of individuals, consumers, environmentalists, and workers. But a different picture emerges when business interests are at stake.

This different standard for business appears repeatedly throughout his writings and speeches, as well as his opinions on the bench.

It is particularly apparent in Judge Bork's field of expertise: antitrust law. Numerous articles and papers criticize Judge Bork's approach to antitrust law as "virtually eliminat[ing] enforcement of the antitrust laws,"[51] constituting a "sustained attack on modern Federal antitrust legislation," and evincing "rigid ideological identification with corporate interests."[52] What is remarkable about Judge Bork's views in this area, however, is the manner in which he disregards virtually every principle of judicial restraint that he demands in the area of individual rights.

For example, despite repeated declarations that judges should defer to the specific intent of legislative bodies since legislatures represent the "will of the majority," Bork's deference fades when the legislative body does not share his views. Disagreeing with virtually all antitrust legislation enacted in this century, Bork complains that "Congress as a whole is institutionally incapable of the sustained rigorous and consistent thought that the fashioning of a rational antitrust policy requires." [53] Beyond his rhetorical assaults upon the competency of elected officials to develop coherent policy in this area, Judge Bork has argued that courts should not enforce antitrust provisions "unrelated to reality and which, therefore, [the court] knows to be utterly arbitrary." He has written:

Even in statutory fields of law, courts have obligations other than the mechanical translation of legislative will, and these obligations are particularly important with statutes as open-textured as the antitrust laws.

This is a rather astonishing position in light of Judge Bork's insistence on judicial restraint and deference to legislative authority in the area of individual rights.

The AFL-CIO Executive Council in its August 17, 1987, statement on Bork's nomination, noted that:

Bork's writings in anti-trust law thus present the irony of a man who purports to abhor a judge's reliance on his own values arguing that judges should refuse to enforce statutes that Congress has passed, because Congress did not—and still does not—sufficiently understand economic truth.

John Donohue of Northwestern University School of Law made another important point about Judge Bork's antitrust philosophy: [54]

Bork has argued that the anti-trust laws should be used to further economic efficiency, not social or political goals [i.e. protecting small businesses].

Donohue wrote:

Bork . . . makes the further claim [that his view] expresses the "true" legislative intent of Congress in passing the Sherman Anti-trust Act in 1890. . . . [However,] anyone who has read the entire legislative debate over the Sherman Act will see immediately that its congressional supporters spoke with many, and at times contradictory, voices about this legislation. . . . For Bork to "find" the unequivocal, "unmistakable" original intent amidst this cacophony suggests a remarkable ability to ignore the overwhelming inconvenience of contradictory facts. . . . It does show . . . that when Bork wants to reach an outcome, he is quite facile in dressing his own subjective preferences in the garb of "original intent."

SWEEPING EXECUTIVE BRANCH PRIVILEGES

Another theme dominates both Bork's writings and actions: support for sweeping executive authority. Except where the executive branch has interfered with some business interest, Judge Bork has consistently advocated judicial and legislative subordination to executive branch authority.

This philosophy is demonstrated not only in his rigid application of the policy of deference to agency rulemaking decisions, but in his substantive policy statements in numerous areas.

One of the most striking examples of this extreme bias in favor of the executive branch is set forth in his dissenting opinion in Bartlett versus Bowen.[55] The Bartlett case involved a challenge to the constitutionality of provisions of the Social Security Act which limited payment of Medicare benefits for beneficiaries utilizing both skilled nursing facilities affiliated with the Christian Science Church and secular facilities for the same illness. The case was brought on the grounds that the statute penalized the beneficiary on the basis of her religion.

Generally, the Medicare Act precludes judicial review of claims below $1,000—an amount in excess of the claim made in the Bartlett case. The majority of the court of appeals panel held, however, that Congress in enacting the $1,000 threshold for claims had not intended to preclude judicial review of constitutional challenges to the law itself. The majority noted that the Supreme Court had previously held that a challenge to the constitutionality of the GI bill legislation was reviewable despite statutory language barring judicial review of benefit decisions of the head of the Veterans' Administration.[56] Any other conclusion, the Supreme Court ruled, would "raise serious constitutional questions."

Judge Bork would have denied judicial review to the claimant. He based his position on what the majority in Bartlett described as "an extraordinary and wholly unprecedented application of the notion of sovereign immunity." [57]

In another case, Wolfe versus U.S. Department of Health and Human Services,[58] Bork proposed another novel way to insulate the executive branch from scrutiny. The Wolfe case involved a Freedom of Information Act [FOIA] request for records disclosing when proposed and final regulations were transmitted between the Food and Drug Administration, the Department of Health and Human Services, and the Office of Budget and Management. The district court had rejected the Government's efforts to withhold these documents, and the court of appeals affirmed with Bork dissenting. Although his dissent was based upon his construction of the statute in favor of the Government's position, he offered his support for the Government's claim, made for the first time on appeal, that a constitutional executive privilege justified withholding all communications to or from OMB. The majority protested that this would create "an unnecessary sequestrating of massive quantities of information from the public eye," a result totally contrary to the purposes of the FOIA.[59] In both the Bartlett and Wolfe cases Judge Bork engaged in judicial activism by dredging up theories to insulate the executive branch from outside review.

Judge Bork also adheres to the supremacy of the executive branch in matters of foreign policy. In Abourezk versus Reagan.[60] for example, he favored essentially nullifying the McGovern amendment to the Immigration and Nationality Act which requires the Secretary of State to follow specified procedures in denying admission to certain aliens because of their political affiliations. The appeals court reversed a summary judgment entered for the Government by the district court and ordered the case remanded for a full trial of the issues. The court observed that though the executive branch had broad discretion over the admission and exclusion of aliens, that discretion was not boundless and the State Department was obligated to respect restraints imposed by Congress. Judge Bork dissented, arguing that the "principle of deference applies with special force where the subject of that analysis is a delegation to the executive of authority to make and implement decisions relating to the conduct of foreign affairs."[61] He asserted that "such authority is fundamentally executive in nature" and argued that it does not require as a basis for its exercise an act of Congress.

In another case with foreign policy implications, Barnes versus Kline,[62] Judge Bork sought to deny judicial review of executive branch action. Barnes involved President Reagan's attempted pocket veto of legislation requiring human rights certification as a condition of continued military assistance to the Government of El Salvador. The majority held that the pocket veto had been improperly exercised and ordered the case remanded for a summary judgment in favor of the congressional plaintiffs. Judge Bork dissented, claiming that neither Congress nor individual members could litigate the validity of the purported veto notwithstanding the fact the executive branch had conceded that the Senate did have standing to sue. Judge Bork charged that the majority decision expanded the power of the judicial branch. The fact is that his dissent, had it prevailed, would have expanded the power of the executive.

Judge Bork's opinions on the court of appeals regarding the power of the executive branch are consistent with views he expressed as a private citizen. In various articles and statements he has challenged the war powers resolution as an infringement upon the executive branch's inherent authority, and he has argued that Congress lacked

authority to limit President Nixon's conduct of the Vietnam war.[63] He also has argued that requiring the executive branch to obtain a warrant before conducting espionage-related surveillance of persons within the United States was an unconstitutional interference with the President's powers as commander in chief.[64]

Finally, Judge Bork's excessive view of the powers of the executive branch was reflected in his role in President Nixon's infamous "Saturday Night Massacre." A Federal district court subsequently determined that Bork had acted illegally in firing Special Prosecutor Archibald Cox.[65]

LACK OF IMPARTIALITY

Mr. President, as I said earlier, most fundamental to judicial temperament is the ability to be fair and open-minded. Judge Learned Hand put it well:

> . . . [a judge] must approach his problems with as little preconception of what should be the outcome as it is given to men to have; in short, the prime condition of his success will be his capacity for detachment.

Judge Bork's record over the past 5 years illustrates his lack of impartiality.

Evidence of Bork's "result-oriented" brand of judicial philosophy is set forth in the exhaustive analysis of Judge Bork's record as a member of the U.S. Court of Appeals for the District of Columbia Circuit conducted by the Public Citizen Litigation Group, a nonprofit public interest group which has never before taken a position on a judicial nomination.[66]

Mr. President, as a member of the court of appeals, Judge Bork participated in approximately 400 cases in which opinions were published. Judge Bork wrote 144 majority, concurring, and dissenting opinions. Fifty-six of the four hundred cases involved "split decisions." The Public Citizen analysis focused extensively on the split decisions. The split decisions involve those cases in which one or more of the judges on the panel disagreed with the majority on how the case should be resolved and filed a dissent. Most of the cases decided by the court of appeals are decided by unanimous three-judge panels. Many of these cases involved relatively simple or noncontroversial issues, and the court is simply affirming the decision of an administrative agency or a district court.

The split decision cases tend to be the more controversial, "tough" cases where the position of each of the judges can determine the outcome.

The results of this analysis are startling. Judge Bork's record shows no consistent application of judicial restraint, or any judicial philosophy for that matter. One can predict with almost complete accuracy how Judge Bork would rule simply by identifying the parties in the case. His concept of judicial restraint varied according to who appeared at the courthouse door. When individuals such as consumers, workers, or environmentalists brought suit against a government agency, Judge Bork almost invariably supported the agency. Not so, however, when the litigant was a business. Then his doctrine of judicial restraint changed radically.

Judge Bork voted in favor of the Government in all seven split decisions in which public interest organizations had challenged Federal regulations. He voted for the Government in all seven split decision freedom of information cases. And he voted for the Government in four of the five split cases involving workers' rights. By contrast, there were eight split decisions involving business challenges of the Government; Judge Bork voted against the Government and for business every time.

Perhaps the most dramatic illustration of this inconsistency is found in Judge Bork's separate opinion, concurring in part and dissenting in part, in the case of Planned Parenthood Federation of America versus Heckler.[67]

The case involved a challenge to regulations promulagted by the Department of Health and Human Services requiring family planning programs funded under title X of the Public Health Service Act to notify a parent or guardian when prescription contraceptives are provided to a minor.

A majority on the court found that it was clear from the legislative history that the regulations were inconsistent with the 1981 amendments to the act and the intent of Congress in passing them. The court held that the regulations violated both the express terms of the 1981 statute and "the crystal clear and unequivocal expression of congressional intent" in the 1981 conference report.

Judge Bork did not disagree. In a separate opinion concurring in part and dissenting in part, he acknowledged that the 1981 amendments did not provide authority for the contested regulations and he conceded that the "evidence cited by majority amply demonstrates the error in HHS' position." But he aruged that the amendments did not expressly forbid the promulgation of such regulations and urged that because we "are dealing in a vexed and hotly controverted area of morality" the case should be remanded so that HHS might have an opportunity to reissue the regulations under some other authority.

In essence, Judge Bork encouraged HHS to devise a new strategy to evade what he himself conceded to be the intent of Congress. In pursuit of ends sought by the right wing, Judge Bork did not hesitate to encourage the circumvention of congressional intent. In other cases, however, Judge Bork has rigidly applied his concept of congressional intent.

Oil, Chemical and Atomic Workers versus American Cyanamid Co.,[68] dramatically illustrates Judge Bork's inconsistent approach.

This case involved a chemical company's policy of discharing female employees of childbearing years unless they agreed to be sterilized. The Federal Occupational Safety and Health Act [OSHA] requires employers to provide safe and healthful working conditions. The lead level in certain departments of the plant in question registered at a level too high for the safety of an unborn fetus. The employer contended that it was economically infeasible to reduce the level of lead and instead adopted the policy that women of childbearing age working in that department would be fired unless they were sterilized. A company doctor and nurse gave the female employees a briefing on the surgery that was involved, and they were informed that the company health plan would cover the expenses. They were also informed that there would be only seven jobs for fertile women in the entire plant after the new policy was implemented.

The Secretary of Labor determined that this policy was improper and issued a citation to the employer for violation of OSHA. Following an administrative hearing, the OSHA Commission rule against the Secretary of Labor on the grounds that the sterilization policy was not a workplace hazard of the nature Congress intended to cover in OSHA.

Judge Bork's opinion in this case affirmed the Commission's decision, noting that—

> There is no doubt that the words of the general duty clause [in OSHA] can be read, albeit with some sematic distortion, to cover [the sterilization] policy.

He then went on, however, to decline to apply the OSHA statute to this policy since he found no discussion of such a hazard in the legislative history of the act and concluded that to extend the scope of the act to this type of policy would establish a broad principle of unforeseen scope.

It is interesting to note that an amicus brief was filed in this case on the side of the employer by the Washington Legal Foundation, a conservative legal advocacy group.

Judge Bork's handling of the American Cyanamid case might not be remarkable if he consistently deferred to administrative agencies or congressional intent. Yet, as I indicated, the Planned Parenthood case demonstrates he does not consistently defer to congressional intent.

In numerous other instances, Judge Bork's deference to an administrative agency was inconsistent, depending on whether a business entity, an individual, a worker, or a consumer was involved. For example, in Vinson versus

Taylor,[69] he refused to give any deference to the "Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex" in a case where those guidelines were favorable to a claim that sexual harassment constituted illegal sex discrimination—a claim Judge Bork strongly opposed.

In a series of utility ratesetting cases, Bork refused to uphold an agency decision favoring consumers. In one case, Judge Mikva described Bork's opinion as a "blatant interference with the ratemaking procedures adopted by the [agency]."[70] Similarly, in Middie South Energy, Inc. versus Federal Energy Regulatory Commission, Judge Bork sided against consumers and substituted his personal interpretation of the statute for that of the regulatory agency. His position prompted a dissent from Judge Ginsberg who observed that, absent clear evidence that an agency's construction of its statute is incorrect, the agency's interpretation merits considerable deference.[71]

The pattern that emerges is that of a jurist who is fully prepared to modify his judicial principles to achieve a predetermined result.

Mr. President, a final striking example of Judge Bork's willingness to tailor his judicial philosophy to justify support of a right-wing agenda is displayed in his writings about the right of the majority of a community to curtail the liberties of individuals. His views on this subject have varied sharply, depending upon whether the majority is expressing a liberal or a conservative value.

In his 1963 article opposing civil rights legislation, Judge Bork argued in favor of an individual's right to engage in racially discriminatory acts because, he said, the majority was attempting to impose a moral judgment by enacting civil rights legislation. Then he argued against "the morality of enforcing morals through law."

In language diametrically opposite this rationale, however, Judge Bork has since repeatedly claimed that the majority does have the right to legislate its moral beliefs and to forbid behavior which it regards as morally wrong despite the impact on others civil liberties. In his 1984 American enterprise speech he argued that the majority should have the right "to express [its] moral beliefs in law."

Thus, in the sixties, Judge Bork argued against civil rights legislation on the grounds that it represented an unjustifiable effort to impose moral values by law, but subsequently he has used precisely the opposite argument to advocate enactment of laws that would impose moral values of a different kind. Specifically, he has argued that if a majority believes the use of contraceptives is morally abhorrent, a court should not override that decision.[72]

As Ronald Dworkin, professor of law at New York University wrote in the New York Review of Books, Judge Bork's "principles adjust themselves to the prejudices of the right however inconsistent these might be."[73]

IMPACT OF JUDGE BORK ON THE SUPREME COURT

Mr. President, when President Reagan first nominated Judge Bork to the Supreme Court, his supporters hailed the nomination as a great victory for advancing the agenda of the far right well beyond the Reagan Presidency. Of late, however, the administration has launched a disinformation campaign seeking to characterize Bork as a moderate mainstream jurist, akin to Justice Powell, who would obey the rule of law and not upset the existing balance of the Court.

Responding to this campaign, Owen Fiss, a professor of law at Judge Bork's former institution, Yale Law School, wrote recently in the New York Times:

> [Judge Bork] owes his pre-eminence as a conservative spokesman—and perhaps his nomination—in no small measure to his rejection of the constitutional doctrine associated with [cases Justice Powell supported]. . . . [W]hat Judge Bork's writings—spanning almost 20 years as a professor—reflect is not a concern for precedent but a dogmatic commitment to a comprehensive or general theory and a willingness to denounce, repudiate, even deride decisions that do not agree with his theory. Judge Bork's performance on the Court of Appeals has not revealed a change of outlook.[74]

Prof. Philip Kurland of the University of Chicago put it even more forcefully:

> The concerted efforts in the press to repaint Robert Bork as a closet liberal in order to make him acceptable to centrists in the Senate has all the cogency of Admiral Poindexter's testimony before the House and Senate Select Committees. To make Bork over in the image of a Lewis Powell, a Robert Jackson, or a Felix Frankfurter, as they would seek to do, rather than seeing him as in the tradition of a Sutherland, McReynolds, or Rehnquist, is to give the lie to Bork's public extra-judicial professions of his beliefs . . . The Department of Justice and the White House Staff . . . are not entitled to tell contradictory tales to different Senators to entice their votes for inconsistent reasons. Bork is either the moderate, restrained New Deal-type jurist that he is depicted to be by some of his recent advocates in the press. Or he is the Meeseian, "original intent", constitutional revisionist, as he has depicted himself to be in his talks to the "Federalist Society" and in other forums throughout the country.[75]

A recent study by the Columbia Law Review confirms that Judge Bork is decidedly more conservative in his judicial opinions than other Reagan appointees to the Federal bench.

This study covering 1,200 nonunanimous decisions of all of the U.S. courts of appeal during 1985 and 1986 found Bork voted on the "conservative" side 90 percent of the time compared to 69 percent for other Reagan appointed judges. Like the Public Citizen Group, the Columbia Law Review study found that Bork voted consistently in favor of business groups against Federal agencies while opposing the claims of individuals and public interest groups.[76]

Mr. President, Judge Bork's proponents have also argued that the fact that he has never been reversed by the Supreme Court demonstrates that he is not a judicial radical, but a moderate.

It should be pointed out, however, that the Supreme Court has never even reviewed a case in which Judge Bork wrote the majority opinion. In 1986-87, it granted review in only five cases from the District of Columbia circuit. Moreover, the argument also conveniently ignores the fact that in at least one case, Vinson versus Taylor, supra, the Supreme Court unanimously rejected twisted positions Judge Bork had asserted in his dissenting opinion.

Finally, Judge Bork's supporters point to a handful of cases in which he did not take a "radical-right" position. Most often, his opinion in Ollman versus Evans[77] is cited as evidence of his support for freedom of expression under the first amendment. It should not be overlooked that the parties in this case were two conservative journalists and an alleged Marxist professor. Judge Bork sided with the conservative journalists and noted that the case fell within the scope of speech—political speech—which he has consistently recognized, sometimes exclusively, as protected by the first amendment. He reached a similar conclusion—that political speech was at issue—in Lebron versus Washington Metropolitan Area Transit Authority.[78] On the other hand, he has been on the other side of the first amendment in a number of cases, for example, Finzer versus Barry,[79] upholding a statute forbidding the display of signs opposing the policies of a foreign government within 500 feet of its embassy, but permitting the display of signs supporting that government's policy, and Abourezk versus Reagan,[80] relating to policies excluding certain aliens invited to speak in the United States. Similarly, as to women's rights, Judge Bork joined the majority in three cases decided favorably to women asserting rights against employment discrimination under title VII of the Civil Rights Act.[81] As the National Women's Law Center noted, each of these cases involved settled principles of law in which the court of appeals reached unanimous decision.[82]

Finally, Mr. President, some commentators have suggested Judge Bork's elevation to the Supreme Court would not threaten individual freedoms since few legislatures today

would seriously consider the laws struck down in cases Judge Bork has attacked; that is, a ban on contraceptives in Griswold or involuntary sterilization in Skinner. The short answer to that assertion is that only a few years ago, legislation, S. 158, the proposed human life statute, was considered in the Senate. That legislation would have prohibited the use of some commonly accepted forms of contraception, such as the IUD and certain types of birth control pills. When S. 158 was offered as a floor amendment in 1982 to a debt ceiling bill, it was tabled by a 1-vote margin of 47 to 46. Similarly, the recent school textbook censorship cases and legislation mandating instruction in the theory of creationism show that erosion of the wall between church and state, particularly in the classroom, is an ever present danger.

Individual rights cannot rest upon the mere hope or speculation that legislatures will not propose measures that trample freedom.

OVERTURNING PRECEDENTS

Of perhaps most critical importance in trying to assess the impact of elevating Judge Bork to the Supreme Court is his view of precedents.

At his confirmation hearing, he expressed a very different view about the obligation of a Supreme Court Justice to adhere to prior constitutional decisions from the view he had frequently stated before. In his testimony, he emphasized that he believed that certain decisions, although wrong, were so firmly established that they should not be reversed.

In the past, however, Judge Bork has not hesitated to express his view that a Supreme Court Justice is free to seek to reopen settled issues of law, particularly constitutional law, which he believes were wrongly decided. In a 1985 interview he said:

A Supreme Court Justice always can say, and many times the Supreme Court has said, that their first obligation is to the Constitution, not to what their colleagues said 10 years before.[83]

More recently, in a 1987 speech before the Federalist Society, Judge Bork expanded on that view:

Most constitutional doctrine is merely the judge-made superstructure that implements the framers' basic values.

This means, I think, that the role of precedent in constitutional law is less important than it is in a proper common law or statutory model. . . . So 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 statute to overturn precedent.[84]

In this speech, Judge Bork also reiterated his longstanding opposition to decisions that do not comport with his "originalist" theory of constitutional requirements and declared that—

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.

Any lingering doubts regarding Bork's respect for precedents with which he disagrees should be resolved by a look at his record on the intermediate court of appeals. It belies the lip-service he pays now to honoring Supreme Court precedents. For example, in his 1985 dissenting opinion in Barnes versus Kline, Judge Bork wrote:

Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions of those who framed and ratified our constitution.

He further observed that—

Constitutional doctrine should continually be checked not just against words in prior opinions but against basic constitutional philosophy.[85]

The majority in the Barnes case attacked Judge Bork's refusal to adhere to the established precedents: "The dissent contends that previous decisions of this court permitting congressional standing do not bind this panel because they are the result of the court's failure to give proper regard to the underpinnings of article III's standing requirement, namely, the separation of powers," and observed that "Supreme Court precedent contradicts the dissent's sweeping views" on the issue of congressional litigation.

Similarly, in Dronenburg versus Zech, Judge Bork wrote a blistering attack upon Supreme Court precedents establishing a right of privacy. This prompted other members of the Court to criticize Judge Bork for trying to use "the panel's decision to air a revisionist view of constitutional jurisprudence" and for attempting "to wipe away selected Supreme Court decisions." [86]

Professor Dworkin of the New York University Law School aptly describes Bork as a "constitutional radical" who rejects the view that the Supreme Court must test its interpretations of the Constitution against the principles inherent in its past decisions, as well as other aspects of constitutional theory. As Dworkin notes, Judge Bork repeatedly has made clear his belief that "central parts of settled constitutional doctrine [are] mistakes now open to repeal by a right-wing court." [87]

Mr. President, nothing he said in his testimony before the Senate Judiciary Committee convinces me he has abandoned these views.

Once on the Supreme Court, Judge Bork is unlikely to be deterred by the legitimacy of precedents or the doctrine of stare decisis from reopening settled issues of constitutional law. He has made it clear that he regards a long line of decisions of the Supreme Court, stretching back to the 1920's, recognizing constitutionally protected freedoms to be without legitimacy. He pointedly refused to include these cases among those he considered to be settled questions of law. He has repeatedly made clear that he would, as a member of the Supreme Court, be an activist judge in seeking to overturn and reverse longstanding decisions which he regards as incorrect. I believe the Reagan administration fully understands Judge Bork's mind and intentions in this regard. It is surely a key reason for his nomination.

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE

Mr. President, I withheld making a final decision on the Bork nomination until Judge Bork had an opportunity to testify before the Senate Judiciary Committee and respond to the many concerns which have been raised regarding his record and fitness to serve on the Supreme Court.

He has now had that opportunity.

I found his testimony, taken as a whole, to be both disingenuous and unpersuasive.

I have commented earlier on several aspects of his testimony including his new positions on the first amendment, on sex discrimination under the equal protection clause of the 14th amendment, and on reversing Roe versus Wade, and his explanation of his position with regard to Skinner versus Oklahoma dealing with involuntary sterilization.

In numerous other instances he stated positions starkly different from those he has taken in the past.

For example, in discussing the issue of a Supreme Court Justice adhering to the doctrine of stare decisis and precedents established by earlier Courts, he several times suggested that the law should not be seen as changing each time the personnel on the Court changed. Yet, he has in the past specifically pointed to the change in the personnel of the Court as the means for reversing decisions with which he disagrees. In 1982, he stated:

The only cure for a Court which oversteps its bounds that I know of is the appointment power. * * * [88]

In 1986 he wrote:

Democratic responses to judicial excesses probably must come through the replacement of judges who die or retire with new judges of different views.[89]

When pressed to explain his extraordinary prior positions that the 14th amendment should not apply to women and that the 1st amendment's protection of free speech should be restricted to political expression, he presented the committee with new positions I described earlier which were inconsistent with his prior public statements. As a result, it is almost impossible to state accurately what Judge

Bork's current legal position is with respect to sex discrimination or freedom of speech or how he might apply these new policies in the future. It is also virtually impossible to understand how the doctrine of "original intent"—to which he still pledges allegiance—has led him to his new positions on these matters.

Judge Bork repeatedly characterized his opposition to specific, pivotal Supreme Court decisions upholding individual liberties as mere criticisms of the Court's reasoning, not necessarily the result. What he refers to as "reasoning" is recognizing and protecting fundamental constitutional rights. Because Judge Bork does not find these fundamental rights explicitly mentioned in the Constitution, he disagrees with the "reasoning" of the cases.

He frequently stated that he did not personally support the statutes which the Court had struck down, but, as a legal matter, did not believe that the Court had the authority to overturn the law. Judge Bork's personal view, for example, that the Connecticut law making it a crime for a married couple to use contraceptives was "nutty," is totally irrelevant. The fact remains that, as a judge, he would have allowed the law to stand. When pressed in questioning about that unacceptable result, he could only respond that the law had not been enforced and would be impossible, as a practical matter, to enforce.

Finally, he defended some of his most outrageous statements on the grounds that his job, as a professor, was to be provocative. It should be stressed that the record which gives rise to so much concern about the prospect of Judge Bork being placed on the Supreme Court does not involve statements as a professor alone. It also involves articles in publications such as the Chicago Tribune, the Wall Street Journal, Fortune, New Republic, and National Review as well as numerous speeches delivered while on the Federal bench. These were clearly efforts to engage in and influence public debate and legal philosophy regarding controversial issues. And the criticism of Judge Bork's record rests upon his record as a judge, not merely his years as a professor.

In short, his characterization of his positions during his testimony before the Judiciary Committee did little to resolve my deep concerns arising from his record and statements for the past 25 years.

CONCLUSION

Mr. President, I urge that the nomination of Judge Bork be rejected.

The struggle over this nomination is as much about the future and where this Nation is going in the next century as it is about what Judge Bork has said and done over the past 25 years.

Judge Bork looks into the Constitution and finds it an empty vessel, a mere instrument for government to impose its will on individuals. I look at the same document and see a charter for restraining the power of government from interfering with individual freedom. Judge Bork looks at the intent of the framers and sees a narrow vision of democracy. I see in the words and struggles of our Founding Fathers a deep and abiding desire to establish a rule of law which protects individuals from the tyranny of the majority.

Judge Bork is committed to a judicial philosophy that rejects the principles of individual freedom which lie at the very heart of our Constitution and our national heritage. That philosophy threatens the principles of law, liberty, and privacy which Americans deeply cherish. On the Supreme Court, he could undermine the stability of precedents and jeopardize the hard-fought gains of women and minorities. This is a time when we should be moving forward in protecting individual rights. His confirmation would move the Nation backward. The nomination should be rejected.

FOOTNOTES

*For a discussion of the role of the Senate in the confirmation of Supreme Court Justices and citations to the historical record, see generally Tribe, "God Save This Honorable Court" (1985).

[1] Bork, "Neutral Principles and Some First Amendment Problems," Indian Law Journal, fall 1971, 1, 22 (hereinafter cited as "Neutral Principles").

[2] *Olmstead* v. *U.S.*, 277 U.S. 438, 478 (1928).

[3] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 419-420 (1983).

[4] Congressional Record, July 22, 1987, S10516.

[5] Barber, "The New Right Assault on Moral Inquiry in Constitutional Law," the George Washington Law Review, 253, 259 (1986); Kurland, "Bork: The Transformation of a Conservative Constitutionalist," Chicago Tribune, Aug. 18, 1987.

[6] American Civil Liberties Union, "Report on the Civil Liberties Record of Judge Robert H. Bork."

[7] Bork, "Traditional and Morality in Constitutional Law," American Enterprise Institute, Dec. 6, 1985.

[8] Bork, "The Constitution, Original Intent, and Economic Rights," San Diego Law Review, July/August, 1986.

[9] McGuigan, "An Interview with Judge Bork," Conservative Digest, October 1985.

[10] 381 U.S. 479 (1965).

[11] *Meyer* v. *Nebraska*, 262 U.S. 390 (1922).

[12] *Pierce* v. *Society of Sisters*, 286 U.S. 510 (1925).

[13] 712 F.2d 1428 (1983), majority opinion reported at 707 F.2d 582 (1983).

[14] *Dronenburg* v. *Zech*, 741 F.2d 1388 (1984).

[15] 316 U.S. 535 (1942); "Neutral Principles", supra at 12.

[16] These views were fully developed in a speech, "Religion and the Law," presented at the University of Chicago on Nov. 13, 1984, and reiterated in a speech given at the Brookings Institute on Sept. 12, 1985.

[17] *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

[18] Although he clearly criticized the Court's application of the free exercise clause, the record is in dispute as to whether this attack specifically included criticism of the pivotal school prayer decision, *Engel* v. *Vitale*, 370 U.S. 421 (1962). In his Judiciary Committee testimony, Judge Bork stated he had not taken a position on the school prayer issue. However, the Dean of the N.Y. University Law School has written that Judge Bork attacked the Engel decision in a speech delivered at the New York University Law Review Dinner in May of 1982.

[19] "Neutral Principles", supra at 20.

[20] 334 U.S. 1 (1948).

[21] 369 U.S. 186 (1962).

[22] 377 U.S. 533 (1964).

[23] 348 U.S. 641 (1966).

[24] 400 U.S. 112 (1970).

[25] 383 U.S. 663 (1966).

[26] 341 U.S. 494 (1951) and 395 U.S. 444 (1969). During his testimony before the Senate Judiciary Committee, Judge Bork indicated he would accept *Brandenberg* although he still regards it as wrong. What that actually means in terms of future first amendment cases is totally unclear.

[27] "Neutral Principles", supra at 11.

[28] *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

[29] *Home Bldg & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934).

[30] McGuigan, 1985 interview, supra at 8.

[31] *Reed* v. *Reed*, 404 U.S. 71 (1971); *Kirchber* v. *Pienstra*, 450 U.S. 455 (1981); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); Worldnet Interview, June 10, (1987), p. 12.

[32] 753 F.2d 141, rehearing denied, 760 F.2d 1330 (1985), aff'd sub nom., *Meritor Saving Bank* v. *Vinson*, 106 S. Ct. 2399 (1986).

[33] 760 F.2d at 1333 n. 7.

[34] *Meritor Savings Bank*, supra at 2406, citing *Henson* v. *Dundee*, 682 F.2d 897, 902 (1982).

[35] New Republic, Aug. 13, 1963, 21-24.

[36] Hearing before the Committee on the Judiciary, U.S. Senate, 93rd Cong., 1st Sess., Jan. 17, 1973.

[37] 334 U.S. 1 (1948).

[38] "Neutral Principles", supra at 16.

[39] 348 U.S. 641 (1966).

[40] 400 U.S. 112 (1970).

[41] Hearings on the Human Life Bill before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., June 1, 1981 at 314.

[42] 383 U.S. 663 (1966).

[43] Hearings before the Senate Judiciary Committee, 93rd Cong., 1st Sess., Jan. 17, 1973 at 17.

[44] "Judge Bork's Views Regarding Racial Discrimination," a Report of the NAACP Legal Defense and Education Fund, Inc., August 1987.

[45] S. Rep. No. 162, 89th Cong., 1st Sess., (1965); U.S. Commission on Civil Rights, "With Liberty and Justice for All" (1959); *U.S.* v. *Texas*, 252 F. Supp. (W.D. Tex 1966); and *U.S.* v. *Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966).

[46] Bork, "Two Professors Tell Civil Rights Bill Merits, Faults," Chicago Daily Tribune, Mar. 1, 1964.

[47] Hearings of the Subcommittee on Education of the Senate Committee on Labor and Public Welfare on the Equal Educational Opportunity Act of 1972, 92d Cong., 2d Sess. (1972).

[48] Bork, "The Unpersuasive Bakke Decision," Wall Street Journal, July 21, 1978.

[49] Chicago Daily Tribune, March 1, 1964, supra.

[50] Air Carrier Access Act of 1986, Public Law 99-435.

[51] Robert Pitofsky; Georgetown Law School, memorandum to Senate Judiciary Committee, August 1987.

[52] Leonard Grland, University of Connecticut, memordandum to Senate Judiciary Committee, August 1987.

[53] Bork, "The Anti-Trust Parodox: A Policy at War With Itself," 412 (1978).

[54] Donohue, "Judge Bork, Anti-Trust Law, and the Bending of Original Intent", Chicago Tribune, July 22, 1987.

[55] 816 F.2d 695 (1987).

[56] Id., citing *Johnson* v. *Robison*, 415 U.S. 361 (1974).

[57] 816 F.2d at 703.

[58] 815 F.2d 1527 (1987).

[59] 815 F.2d at 1533.

[60] 785 F.2d 1043 (1986).

[61] 785 F.2d at 1063.

[62] 759 F.2d 21 (1985).

[63] Confirmation Hearing, 1973; Wall Street Journal, Mar. 9, 1978.

[64] Wall Street Journal, Mar. 9, 1978.

[65] *Nader* v. *Bork*, 366 F. Supp. 104 (1973), subsequently vacated as moot.

[66] "The Judicial Record of Judge Robert H. Bork", August 1987. See Congressional Record, Aug. 7, 1987 at S11788.

[67] 712 F.2d 850 (1983).

[68] 741 F.2d 444 (1984).

[69] 760 F.2d 1330 (1985).

[70] *Jersey Central Power and Light* v. *Federal Energy Regulatory Commission*, 810 F.2d 1168 (1987).

[71] 747 F.2d 763, 744 (1984).

[72] American Enterprise Speech, 1984; San Diego Law Review, July/August (1986) at 830-31.
[73] "The Bork Nomination", Aug. 13, 1983.
[74] New York Times, July 31, 1987.
[75] Kurland, letter to L.A. Journal, July 1987.
[76] Columbia Law Review Release, July 27, 1987.
[77] 750 F.2d 970 (1984).
[78] 749 F.2d 893 (1984).
[79] 798 F.2d 1450 (1986).
[80] 785 F.2d 1043 (1986).
[81] *Palmer v. Schultz*, 815 F.2d 84 (1987); *Laffey v. Northwest Airlines*, 740 F.2d 1071 (1984); and *Ososky v. Wick*, 704 F.2d 1264 (1983).
[82] "Setting the Record Straight: Judge Bork and the Future of Women's Rights," August 1987.
[83] "Justice Robert H. Bork: Judicial Restraint Personified," California Law Journal, May 1985, at 25.
[84] "Changing the Law: The Role of Lawyers, Judges, and Legislators," Jan. 31, 1987.
[85] 759 F.2d at 56, 67.
[86] 746 F.2d at 1580.
[87] "The Bork Nomination," New York Review of Books, Aug. 13, 1987.
[88] 1982 confirmation hearing, p. 7.
[89] "Judicial Review and Democracy," Encyclopedia of the American Constitution, v. 3, p. 1062 (1986).

## RECOGNITION OF SENATOR LEAHY

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Vermont, Senator LEAHY, is recognized for not to exceed 30 minutes.

Mr. LEAHY. I thank the distinguished Presiding Officer and the distinguished deputy majority leader, both of whom were here at about a quarter of 11 when we left last night and were back here again at a quarter to 7 this morning. I applaud you for that. I thank the distinguished majority leader for arranging for us to come in early enough so that we could do this.

## THE CONFIRMATION OF JUDGE ROBERT BORK

Mr. LEAHY. Mr. President, the Judiciary Committee is drawing toward the conclusion of an extraordinary series of hearings on the nomination of Robert Bork to be Associate Justice of the Supreme Court. Never before in our history have the qualifications and judicial philosophy of a Supreme Court nominee been publicly examined with such thoroughness, fairness, and seriousness.

As a member of the Judiciary Committee, I prepared intensively for these hearings by reading as much as I could of Judge Bork's voluminous articles, speeches, and judicial decisions. I have participated actively in the hearings. I have studied Judge Bork's testimony, his responses to the questions posed by all 14 members of the committee, and the testimony and questioning of the other witnesses.

Based on this extensive record, I have arrived at a difficult decision. I will vote against the confirmation of Judge Bork to the Supreme Court.

I am not opposed to Robert Bork, the person. I have great admiration for his intellect, scholarship, and skill in crafting judicial opinions. Nor do I question his personal decency and integrity. His forthrightness in responding to the most probing and far-ranging questioning by committee members is unparalleled, and sets a high standard that future nominees will have to work hard to match. In the hearings, Judge Bork handled himself in a way that commands not only our respect, but also our admiration for the support shown by his impressive family.

Robert Bork the person, has my praise and respect. Robert Bork, the nominee to the Supreme Court, does not have my vote, and the President does not have my consent to this nomination.

Confirming this nominee could alter the direction the Supreme Court takes into the next century. My children will live most of their lives in that century, and my vote speaks to the legacy I would leave them—and all other Americans.

The central issue in this nomination is not Robert Bork, the person, but Robert Bork's approach to the Constitution and to the role of the Supreme Court in discerning and enforcing its commands. The central issue is his judicial philosophy. When the hearings began, I said that Judge Bork's judicial philosophy is comprehensive and clearly stated. It is also a record of consistent and forceful opposition to the main currents the Supreme Court has taken on a wide range of issues that touch on the basic freedoms of the American people. While in some areas Judge Bork departed from this long-standing record in his testimony before the Judiciary Committee, I am not convinced that his fundamental approach to constitutional principles has changed. This is a key factor in my vote on this nomination. Let me explain why.

With Judge Bork, as with any Supreme Court nominee, the record before the Senate is a record of the past: what the nominee has said and done up to the moment the Senate makes its decision. But that decision is a referendum on the future.

Whoever succeeds Justice Powell on the Supreme Court will probably serve well into the 21st century. The Senate should confirm Justice Powell's successor only if we are persuaded that the nominee has both the commitment and the capacity to protect freedoms the American people have fought hard to win and to preserve over the last 200 years.

When the framers of the Constitution met in Philadelphia two centuries ago, they decided that the appointment of the leaders of the judicial branch of Government was too important to leave to the unchecked discretion of either of the other two branches. They decided that the President and the Senate must be equal partners in this decision, playing roles of equal importance. The 100 Members of the U.S. Senate, like the Chief Executive, are elected by all the people. And all the people have the right to expect that we will approach our task with care and concern for the importance of this decision for the future of our Republic.

I cannot vote for Judge Bork unless I can tell the people of Vermont that I am confident that if he were to become Justice Bork, he would be an effective guardian of their fundamental rights.

The people of Vermont have a right to know that as a Supreme Court Justice, Robert Bork would aggressively defend their freedom to think, speak, and write as they please—without the threat of censorship or reprisal from any level or branch of government. Based on the record before me, I cannot tell the people of Vermont that Robert Bork would champion their first amendment rights to free speech.

The people of Vermont have a right to know that as a Supreme Court Justice, Robert Bork would prevent Government from intruding into the most intimate and private decisions of family life, as the Constitution provides. Based on the record before me, I cannot tell the people of Vermont that Judge Bork recognizes their right to privacy as one of their most fundamental liberties, and that he will act forcefully on that recognition.

The people of Vermont have a right to know that as a Supreme Court Justice, Robert Bork would comprehensively uphold the constitutional right to be free of unfair discrimination by any branch or level of government. Based on the record before me, I cannot tell the people of Vermont that Judge Bork will unstintingly employ the equal protection clause of the 14th amendment to block government actions based on sexual discrimination and other forms of unfounded prejudice.

From my own studies and from the hearings, I know much about Judge Bork and his judicial philosophy, and I am not convinced that the nominee will protect those freedoms into the next century. Therefore, I must exercise my constitutional duty to vote against the nominee.

As Senators decide how to vote on this nomination, much will be made of the subject of "confirmation conversion." This phrase summarizes some of the reasons why I have found this decision so difficult. But like any catch phrase, it may suggest different things to different people. Some of these connotations may be misleading.

Two weeks ago, Judge Bork told the Judiciary Committee many things he has never told anyone else before—at least not in public—about his approach to fundamental constitutional issues. The issue is not whether he was candid in those aspects of his sworn

testimony which seem to contradict so many basic thrusts of his prior writings and speeches. Judge Bork testified under oath, and I have no reason to think that a man of such integrity would have testified with less than complete truthfulness. The real issue is what weight the Senate should give to these newly expressed views.

There is a pattern to the new views that Judge Bork disclosed for the first time at the hearings. His evolving thinking on free speech questions, for example, has come to rest at a point near the consensus that was reached by the Supreme Court and by most legal scholars some 20 years ago. On constitutional questions that still excite controversy within the legal mainstream—for example, the right of marital and family privacy—Judge Bork's views have scarcely changed at all.

This pattern shows that Judge Bork's views are now different from some of the more isolated positions he previously sought to defend. But it also shows that, at this point in his long career, he still does not demonstrate a passion for vindicating the individual rights of Americans that matches his passion for a rigorous and coherent legal theory of the Constitution.

A key element of the issues the Senate must confront on this nomination is whether Judge Bork's newly announced perspectives are likely to overpower the deeply considered and well documented intellectual habits of a long career as a legal philosopher. Our focus, once again, must not be limited to what Judge Bork now says about the established precedents he so forcefully attacked in the past. Our focus must be on the judicial philosophy that Justice Bork would bring to the constitutional controversies of the 21st century.

Many distinguished lawyers testified before the Judiciary Committee on this nomination. But a nonlawyer, the novelist William Styron, went to the heart of the matter when he said that the Senate must decide whether Judge Bork's newly expressed views reflect "a matter not of passing opinion but of conviction and faith." Measured against that standard, Judge Bork's testimony of earlier this month mitigates some of his previous statements, but does not erase them from the record which the Senate must consider.

When a nominee for a Cabinet position comes before a Senate committee for confirmation hearings, it is not unusual for Senators to seek specific commitments as to actions the nominee will or will not take if confirmed. Senators may even condition their vote on these commitments. But a lifetime appointment to the Federal judiciary is entirely different from an appointment to an executive branch position. In the case of a nominee to the Supreme Court, it would be improper for members of the Judiciary Committee to seek such commitments, and it would be unthinkable that any nominee would make them. The committee's job is not to extract commitments, but to exercise judgment about the probable course of the nominee's long-term performance on the Supreme Court. Recent changes in the nominee's views, whether or not they are considered "confirmation conversions," form an important part of that judgment.

Mr. President, as I stated here on the Senate floor last month and again today, 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. During the confirmation hearings that are now winding up, we heard a great deal of testimony, both from the nominee himself and from other witnesses, about many aspects of Judge Bork's judicial philosophy.

But three issues stand out. Each is drawn from a phrase from the Constitution that evokes a core value of the American system of self-government: "freedom of speech," "liberty," and "equal protection of the laws." I am not persuaded that Judge Bork is philosophically committed to the historical role of the Supreme Court to protect these core values against actions by one of the branches or levels of government that would threaten the rights of individual Americans.

The first issue is one of freedom. The constitutional provision that embodies it is found in the first amendment: "Congress shall make no law * * * abridging the freedom of speech." The history of judicial interpretations of this general prohibition underscores how essential this freedom is to our constitutional system. It is the freedom of every American to think, speak, and write as we please, on any subject and in any medium, without the threat of censorship or reprisal by any branch of government at any level.

This is a freedom that every American holds dear. But it has a special meaning for me. As the son of a Vermont printer, I grew up in a family which venerated this freedom above almost any other. So when I began to read Judge Bork's interpretation of the first amendment, I was disturbed and alarmed.

The question of free speech was the centerpiece of the most significant and most widely cited law review article written by the nominee on the issue of judicial interpretation of the Constitution. Three strands of Judge Bork's view of the first amendment concerned me. First, he emphatically asserted that "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." Second, Judge Bork argued that "within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the Government or the violation of any law." The third theme of Judge Bork's views on free speech that I found troubling was developed in greater detail in some of his subsequent speeches and articles, in which he argued that the first amendment should not prevent State and local governments from punishing people who speak, even on "explicitly poltical" topics, in a way that the majority of the community finds "offensive."

To understand why I was so concerned about these views, it is worth reminding ourselves what freedom of speech really means under the law today. In case after case, the Supreme Court has been called upon to apply the general words of the first amendment to a variety of concrete factual situations. Those cases have established the practical contours of freedom of speech in each of the areas questioned by Judge Bork.

First, consistent with the first amendment, these cases affirm that, in America, all kinds of speech are protected: Speech that directly concerns the process of self-government, and also speech that has nothing to do with politics. The candidate on the stump and the orator on the soapbox may speak without fear of government censorship or reprisal. But so also may the scientist in the laboratory and the entertainer on the stage or screen, large or small. The author of a best-selling novel is protected by the first amendment; so is the poet publishing in an obscure journal. The painter, the sculptor, the composer may follow their muses wherever they may lead, free of the fear that official disfavor may squelch or constrain their creativity.

Second, a series of Supreme Court cases affirms that government may not arbitrarily suppress even speech that confronts government with a challenge to its legitimacy or with advocacy of disobedience of law. Only when such speech presents the danger of imminent lawless activity may it be curbed.

Finally, it is clear that the first amendment forbids censorship not only when the government dislikes what we say, but also when it dislikes how we say it. When speech is not legally obscene, the majority of the community may consider it offensive, or even immoral, but the Constitution will not allow the majority to gag the minority—even a minority of one—on that account.

Taken together, these strands of the first amendment's free speech clause form the backbone of a system of freedom of expression unparalleled in any other nation. We sometimes overlook the vital part that this system has played in making America the most vibrant, creative, prosperous and confident society in the world today. Freedom of speech has guaranteed the diversity of thought that keeps our democracy vital as it enters its third century.

When Judge Bork testified before the Judiciary Committee 2 weeks ago, I questioned him extensively about each troubling aspect of his approach to the application of the first amendment guarantee of freedom of speech. His answers were detailed and comprehensive.

Judge Bork's testimony was most nearly reassuring on the question of first amendment protection for nonpolitical speech. Referring to the well established principle that speech is protected regardless of its lack of relationship to the political process, Judge Bork said, "That is what the law is, and I accept that law." While this testimony was welcome, it still must be read against the background of Judge Bork's prior statements on the issue.

Judge Bork may have long ago abandoned the "bright-line" distinction between protected political and unprotected nonpolitical speech, but his responses to interviewers as recently as this past May and June clearly state that the existence of first amendment protection should be affected by where speech falls in relation to a "wavering line" between speech that feeds into the "way we govern ourselves" and speech that does not, a line that must be drawn on a case-by-case basis.

When he came before the Judiciary Committee, Judge Bork conceded that this line, whether bright or "wavering," is irrelevant to the scope of the first amendment. By his confirmation testimony, Judge Bork accepted a consensus that has existed for decades.

On the question of protection for speech that advocates the violation of law, my questioning focused on Judge Bork's evaluation of the leading Supreme Court case on the subject, the 9-to-0 decision in the 1969 case of Brandenburg versus Ohio. Judge Bork sharply criticized this decision on a number of occasions and at least once described it as "fundamentally wrong." When I asked him about it, Judge Bork stated, for the first time in public that "the Brandenburg position * * * is OK; it is a good position." The next day, he gave a slightly different response to a question from Senator SPECTER: "I think Brandenburg * * * went too far, but I accept Brandenburg as a judge and I have no desire to overturn it. I am not changing my criticism of the case. I just accept it as a settled law."

Finally, on the question of whether a community can punish even political speech because it uses offensive words, the leading case, Cohen versus California, struck down a conviction of a young man for disorderly conduct for using a four-letter word to express his opposition to the Selective Service Act. Judge Bork consistently has criticized this decision, but his testimony on his current position was somewhat ambiguous. While he embraced the general principle that "no community can override any guarantee anywhere in the Constitution," he also reiterated his long-standing criticism of the reasoning of Justice Harlan in the Cohen case, stating "I feel precisely the same way as I did" on the occasions of his previous attacks on the decision.

The testimony on all three of these points is inconsistent with much of what Judge Bork had said on these topics as recently as a few months before he walked into the Senate Caucus Room as a nominee for the Supreme Court. A review of Judge Bork's decisions as an appellate judge in first amendment cases does not resolve these inconsistencies. Most of these decisions involve either speech that Judge Bork deemed political, and therefore indisputably protected, or issues rather closely controlled by Supreme Court precedent that any lower court judge is bound to apply. Interestingly, in the only majority decision by Judge Bork that the Supreme Court has ever decided to review, the nominee sustained a statute that permits the government to discriminate between competing speakers on political topics based on the content of the speech.

The overall picture presented by Judge Bork's free speech decisions and his writings on the subject belies the extravagant claim made by some of the proponents of this nomination that he is "at the forefront" of modern free speech jurisprudence. At best he is somewhere in the pack and running to catch up.

While the degree of inconsistency may be debated, the only purpose of this review of the past record is to aid in anticipating his approach to free speech questions in the future, if he is confirmed.

It is quite likely that in the future, some American will say, in a speech or a book or a television program or in some other medium, something that has nothing to do with the political process, but that nevertheless raises the ire of government. It is also likely that some speaker will advocate the disobedience of a law that he finds unjust, even if it is not in fact later found to be unconstitutional. It is equally likely that a future speaker will for whatever reason choose to express his views on political subjects in a manner that many others, perhaps almost all of us, find crude, shocking or offensive. And each of these events may well arise in a context of heated emotions, of social turmoil, even of crisis when our deepest attachment to freedom of even unpopular speech is most sorely tested.

Our first amendment forbids Government censorship or reprisal against these speakers. In our constitutional system, that is a matter, in William Styron's words, of "conviction and faith." The question before the Senate is the depth and strength of Judge Bork's attachment to these fundamental principles, which he so incisively criticized for years—and which he came to accept only recently.

Certainly, Judge Bork's forthright testimony before the Judiciary Committee makes this a close question. But in the end, I am not persuaded that Justice Bork would be an energetic and effective guardian of this most basic of our constitutional freedoms. Belated acceptance of these well established principles does not match what we expect of a Supreme Court Justice.

The second great constitutional theme which was explored in the hearings on Judge Bork's nomination is an issue of equality. The words of the 14th amendment to the Constitution are, once again, grand but general: "nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

The Judiciary Committee questioned Judge Bork extensively on his views on issues of racial equality, and of the powers of the courts and Congress to take steps to eradicate the racial discrimination that the 14th amendment was originally adopted to combat. To me, one of the most troubling aspects of Judge Bork's philosophy of equality under the Constitution is the application of this general language to a problem that modern Americans perceive in a far different light than was perceived by the authors of the 14th amendment: unfair governmental discrimination on the basis of gender.

The problem with Judge Bork's judicial philosophy in this area can be posed in simplistic terms: does he believe that the equal protection clause applies to women? The answer is equally simplistic. Of course women are included within the phrase "any person," and therefore a law that discriminates on the basis of gender can be challenged under the equal protection clause.

The more difficult question is this: by what standard should a court evaluate a challenge to law that discriminates between men and women? Is it comparable to a law that provides different tax rates for the sale of apples and oranges? That sort of distinction is almost never found to deny "equal protection of the laws." Or is the proper standard more like the

scrutiny that will be given to a law which treats members of different races differently, a form of discrimination which is virtually never permitted under the Constitution?

The Supreme Court precedents on this subject are more recent than in the free speech area, but they establish an important principle. As eight of the nine Justices agreed in a 1980 decision, laws that treat men and women differently will be upheld only if they "serve important governmental objectives" and use "means * * * substantially related to the achievement of these objectives." In other words, such laws are not always inconsistent with the 14th amendment, but they come into court with two strikes against them.

Judge Bork's statement on this issue prior to the hearing disagrees with this approach. From 1971, when he wrote that "the Supreme Court has no principled way of saying which nonracial inequalities are impermissible," to June 10, 1987, when he told an interviewer that he thought "the equal protection clause probably should have been kept to things like race and ethnicity," there was no indication that Judge Bork supported or even accepted the recent attitude of judicial skepticism toward laws that embody sex discrimination. His record as a judge on the D.C. Circuit Court of Appeals sheds little light on the issue, since he has written only one opinion in a case involving the treatment of sex discrimination under the equal protection clause, and in that case his decision did not reach the merits of the claim.

Judge Bork's testimony at the hearing fleshed out his approach to this question. He argued that the courts ought to ask the same questions of any statute challenged under the equal protection clause. A law that treats members of different groups differently would be sustained if there were a reasonable basis for the distinction, but would be struck down if a "reasonable basis" were lacking. Judge Bork concluded that this approach "would arrive at * * * virtually all of the same results that the majority of the Supreme Court has arrived at," using the existing methods of equal protection analysis in sex discrimination cases. "There is really no difference," he testified, "except in the methodology."

It was reassuring to hear that Judge Bork would have reached the same result—though by a different route—as the Supreme Court has reached in striking down state laws that reflect unfounded stereotypes about the proper role of women in modern society. But once again, our focus on his attitudes toward past decisions is useful mainly as an element of predicting the course toward which he would guide the Supreme Court in the future if he is confirmed. Viewed in that light, the nominee's testimony on equal protection issues raises some serious concerns. I will mention four here.

First, during the first century of litigation under the equal protection clause, the Supreme Court followed an approach to claims of sex discrimination that is disturbingly similar to the analysis Judge Bork presented to the Judiciary Committee. In case after case, the Supreme Court found it "reasonable" to bar women from certain professions and occupations, and otherwise to limit their opportunities compared to those available to men. Accordingly, it upheld state laws reflecting a level of blatant discrimination that would be quite offensive to the ideals of equality that we as a society hold today. Indeed, the Supreme Court never struck down a law that treated men and women differently until 1971, when, not coincidentally, it began to abandon the "rational basis" standard for measuring such laws against the equal protection clause. Perhaps it is mostly a matter of nomenclature, but Judge Bork's "reasonable basis" approach summons up unwelcome memories of the "bad old days" that are just as offensive to those concerned about women's rights as memories of the era of "separate but equal" are for people concerned about racial justice in our society.

The second problem is related to the first. To ask the Justices of the Supreme Court to decide, without further elaboration, what is "reasonable" discrimination is to invite a highly subjective decision. To use the facts of one celebrated case as an example, the Justices of the 19th century decided that it was "reasonable" for the State of Illinois to forbid Myra Bradwell from practicing law because of her gender. They reached that conclusion by using the same sort of unstructured, unpredictable analysis that Judge Bork says he would bring to the Supreme Court of the 21st century. Ironically, this method of applying the general words of the Constitution to the particular facts before the Court smacks of the free floating, "unprincipled" decisionmaking that Judge Bork has never ceased to criticize in Supreme Court precedents.

The unpredictability of this approach is a serious liability. This would be a concern not only to women who may wish to challenge laws that they believe are unfairly discriminatory. It would also be unfair to state and local governments, which every day consider actions that treat different groups of people differently because of gender or other factors. While the current state of the law may not provide as much predictability as these levels of government would like, it seems clearly preferable to a situation in which any distinction drawn by any government can be struck down whenever five members of the Supreme Court, for whatever subjective reason any of them might choose, decide that the distinction is "unreasonable."

The third problem with Judge Bork's "reasonable basis" approach to questions of constitutional equality can be illustrated by reference to one specific sex discrimination precedent which he has discussed both before and during the hearings. In 1976, the Supreme Court struck down a State law establishing a lower minimum drinking age for women than for men. Judge Bork said about this case in an interview last June that "when the Supreme Court decided that (this distinction) violated the equal protection clause, I thought * * * that was to trivialize the Constitution and to spread it to areas it did not address."

In response to questions from Senator DeConcini, Judge Bork commented as follows about this case:

> I thought, as a matter of fact, the differential drinking age probably is justified. * * * They had a lot of evidence about differential drinking patterns and resultant troubles, automobile accidents and so forth, upon which they based that differential.

Although the nominee refrained from offering a final opinion on whether the case was properly decided, he said enough to raise another concern about his approach to the entire subject.

Whatever the Justices of the past thought was "reasonable," and whatever the Justices of the future might think is "reasonable," it is disturbing that Justice Bork might find "reasonable" a law that treats individual men and women differently based on overall statistical evidence about men and women as a whole. That approach does not bode well for a principle that lies close to the heart of our constitutional commitment to equality under law: that the contribution of every American citizen should be limited only by his or her own efforts, and not by generalizations about the gender or other group to which he or she belongs.

This raises a fourth problem with Judge Bork's newly articulated views on equal protection. Supreme Court precedents have established the axiom that laws that treat members of different races differently are almost never constitutional. But surely it is possible to make accurate statistical generalizations about different racial groups. Taken as a whole, black and white populations differ in life expectancy, for example, or in the prevalence of certain diseases. If such statistical generalizations are enough to establish a "reasonable basis" for a discriminatory law, then the prohibition against laws that make racial distinctions could logically be in jeopardy.

In the final analysis, what troubles me about Judge Bork's testimony on

the issue of constitutional equality is not its inconsistency with his previous statements on the subject, although certainly some inconsistency exists. Rather, I am concerned about how a Justice with his judicial philosophy would respond to an ever more powerful and beneficial trend in American society: The drive to eliminate unfounded barriers to full participation in the society, not only by racial minorities and women, but by members of other groups disadvantaged by prejudice, ignorance, and superficial stereotyping.

We must ask ourselves what forms this trend will take in the constitutional controversies of the 21st century. In a nation whose birth was announced with the proclamation of the "self-evident truth" that "all men are created equal," we can be sure that claims for a fuller and broader meaning of equality before the law will be pressed. Based on the record before the Senate, even including the new perspective provided by Judge Bork's own testimony, this nominee's conception of the equal protection clause is not broad and dynamic enough to reassure me that as a Justice of the Supreme Court, he will respond to these claims in the way the American people have a right to expect.

Our Nation, in Abraham Lincoln's words, is not only "dedicated to the proposition that all men are created equal"; it was also "conceived in liberty." The ideal of liberty as embodied in our Constitution provides the third theme for the Judiciary Committee's examination of Judge Bork's judicial philosophy.

As with freedom and equality, our Constitution speaks of liberty in the most general terms. The fifth amendment states that "no person shall * * * be deprived of * * * liberty * * * without due process of law." The 14th amendment directs a similar command to the States. As the Court applied this general language to a series of cases in our country's history it defined the meaning of the liberty our constitutional system was designed to protect.

These cases give life to a powerful American ideal that is more implicit than explicit in the words of the Constitution. Perhaps the ninth amendment comes closest to expressing it: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But liberty is not just a group of rights; it is also an essential set of limitations on the power of government.

The Supreme Court's delineation of constitutional liberty may be found in an important series of 20th century cases. These precedents recognize that in some aspects of the lives of individuals and families, the Government has no legitimate power to intrude. Government is fenced out of those parts of our lives. We sometimes refer to the doctrine these cases establish as the right to privacy, but Justice Louis Brandeis' famous phrase more accurately describes constitutional liberty: "the right to be let alone."

These precedents do not draw the boundaries of our liberty with crystalline clarity. But they do identify points within the sphere of private and family decisionmaking where government must "let us alone."

It is fitting that, in a debate which leads to a referendum on the future of our constitutional ideals, most of the points of liberty identified by these precedents concern our children. How shall we educate them? What shall we teach them about our culture and our heritage? Shall we bring that heritage to life by having children live with their grandparents? Shall we marry and have children at all, and if so, when? Under our system, these are all decisions that, within certain limits, we are at liberty to make as we choose, without the unwanted intrusion of government.

These are also precisely the precedents which Judge Bork has most incisively and consistently criticized, for the very reason that they are not specifically rooted in the literal text of the Constitution. He has called these precedents "unprincipled," "utterly specious," "intellectually empty," and even "unconstitutional." This last criticism is part of Judge Bork's assertion that "nobody believes the Constitution allows much less demands" some of these decisions, which, in his words, "could not have been reached by interpretation of the Constitution."

These statements from Judge Bork's speeches and articles, both before and after he became a judge, are not contradicted by his actions on the bench. In those rare cases in which constitutional privacy issues came before him, he has continued to criticize these precedents. This is not improper, so long as he carried out his responsibility as a lower court judge to apply the precedents faithfully. While the testimony on this issue conflicts, I believe he has fulfilled that obligation as a U.S. circuit judge.

But Judge Bork's nomination to the Supreme Court requires the Senate to examine Judge Bork's philosophy of constitutional liberty in a different light. As a lower court judge, he is bound by precedent, even precedent he considers fundamentally illegitimate. As a Justice of the Supreme Court, he will have the power, and in some instances even the duty, to vote to overturn precedent that he believes the Constitution does not "allow, much less demand."

Thus, two issues of liberty are important in this nomination. First, what is Judge Bork's philosophy on this question? Have his views changed from those he has expressed with such consistency and forcefulness over the past decade and a half? Second, what does he think of the power of precedent for the Supreme Court? What consequences does his philosophy hold for the future of constitutional liberty?

The record on the first question is clear. Judge Bork's views on the role of the Supreme Court in defining constitutional liberty have not changed in any substantial degree.

His testimony on this subject did clear away some underbrush that might obscure the main issue. He emphasized the distinction between his personal views and his conception of the commands of the Constitution. For example, the Connecticut law which the Supreme Court struck down in the 1965 case of Griswold versus Connecticut made it a crime for a married couple to use contraceptives. Judge Bork reiterated his conviction that this was a "nutty" law; but as he told me in response to a question at the hearing, "Merely the fact that it is a dumb law gives the Court no additional power because there is no statement in the Constitution that no State shall make a dumb law."

Judge Bork also emphasized that he was criticizing Griswold and other precedents for the reasoning employed by the courts, and not necessarily for the results reached. Perhaps the same result could be reached by another route. As he told the committee with respect to Griswold, "I have never tried to find a rationale and I have not been offered one. Maybe somebody would offer me one."

Neither of these points reflect any significant change in Judge Bork's judicial philosophy. I never thought that Judge Bork's personal views on the statute struck down in Griswold, or indeed any similar policy matter, have any relevance to the merits of his nomination. His personal views on contraception are immaterial.

And the distinction between rationale and result is not particularly meaningful. The result of Griswold is history, and the flow of history has left that particular "nutty" statute stranded on a shoal of the past. What is most important for the future is the rationale of the decision, and how it will be applied, expanded, or rejected when the next case, and the next and the next, inevitably come along.

Judge Bork still challenges the legitimacy of Griswold and all the other cases defining a constitutional right of privacy. He testified, "If I decide that I am going to protect liberty * * * I have to define it without guidance from the Constitution—what liberties people ought to have and what liberties they ought not to have * * * I became convinced that it as an utterly subjective enterprise * * * I do not

want judges, including me, going around, saying, 'You have this liberty, you do not have that liberty * * *.'"

Judge Bork continues to maintain, with fervor and force, that the Supreme Court cannot give real content to the general concept of constitutional liberty, as contrasted with the specific guarantees of the Bill of Rights and other constitutional provisions. Judge Bork continues to defend an isolated position.

One knowledgeable witness before the Judiciary Committee asserted that "not one of the 105 past and present Justices of the Supreme Court has ever taken a view as consistently radical as Judge Bork's on the concept of liberty—or the lack of it—underlying the Constitution." Whether or not that is so, it is certainly true that in modern times, the Justices have virtually without exception agreed that "liberty" is something more than observance of the specific limitations on Government that are literally spelled out in the Bill of Rights. They arrived at this conclusion by a variety of routes, and applied it differently in different cases. But I do not know of any who would accept the proposition that the liberty of Americans and their families goes only as far as the words of the first eight amendments to the Constitution, and no further. Indeed, I think the American people would find that narrow concept of their liberty profoundly disturbing.

What Judge Bork derides as an "utterly subjective enterprise" is what most of us would call the process of wise judgment. The role of a Justice of the Supreme Court in these cases is to draw lines, to shape contours, and then to tell Government, "This far you may go, but no further, into the private lives of the citizenry." To draw those lines requires a keen intellect, a deep understanding of history, a sense of justice, and that undefinable mixture of prudence and boldness we call good judgment. The issue for the future, and hence for this nomination, is not whether Judge Bork has those qualities, but whether he is philosphically committed to exercising them on behalf of the ideal of liberty so central to our constitutional system.

The question, then, is how a Justice Bork would use this rich history of the ongoing development of our constitutional liberties. Would he approach it as a conservative: conserve what is best in the precedents and build upon it to decide future clashes between the demands of the Government and the rights of the individual? Or would he take the activist approach of seeking to eradicate from our jurisprudence this chain of decisions that he still believes are profoundly misguided?

These are not questions to which Judge Bork's prior record gives us a definitive answer. After all, he has never before had any of the power—and will not unless the Senate confirms him—either to conserve or to reject the constitutional precedents of the Supreme Court. And the testimony of the nominee before the Judiciary Committee does not provide the definitive answer.

In my last opportunity to question Judge Bork at the hearings, I discussed with him this question of the power of precedent. I noted that earlier in the hearing he gave some examples of constitutional doctrines that were firmly embedded in our law. Judge Bork said then that regardless of whether these decisions were right or wrong, they "are now part of our law, and whatever theoretical challenges might be leveled at them, it is simply too late for any judge to try to tear it up, too late for a judge to overrule them."

Judge Bork's list of these firmly settled doctrines—of precedents he would respect even if he disagreed with them—was short but significant. It included the expansive interpretation of the Federal Government's power to regulate interstate commerce. It included the legal tender cases, authorizing the printing of paper money. It included the discrimination. It even included the free speech precedents culminating in Brandenburg versus Ohio, which until the hearing he had never publicly accepted as settled law.

I then asked Judge Bork about the most salient cases involving the constitutional liberty of the American people: "the cases based on a constitutional right to privacy in matters relating to procreation, child rearing and the like." I asked him whether he would include these decisions in his list of precedents that, right or wrong, were so firmly embedded in our law, and in the way we as Americans think about our rights, that "it is too late for the Supreme Court to tear them up."

Judge Bork replied as follows: "Senator, I have, I think, rather consistently testified that I am not going to answer that question because that is a highly controversial matter." He continued that if a right to privacy could not be more firmly "rooted in the Constitution," he would have to consider "whether this is the kind of case that should be overruled. And I have listed the factors that one would consider in deciding whether a case should be overruled. And I cannot go any further than that."

I do not criticize Judge Bork's reticence in answering my question. The purpose of a confirmation hearing for a Supreme Court Justice is not to extract commitments, but to exercise judgment about what the nominee is likely to do or not do if confirmed.

But Judge Bork's response does create a distinction. He already gave something resembling a commitment in response to another question. He said it was "too late to overrule" either the leading free speech cases or the cases addressing sex discrimination under the equal protection clause, even though he had consistently criticized those doctrines for years prior to the hearing. For Judge Bork, the cases defining a constitutional right to privacy are—even today—different.

On the issue of liberty, then, as contrasted with the questions of freedom and equality, Judge Bork did not accept the precedents. Nor did he assure us that he would reach the same result by a different route. Evidently, he continues to believe that by identifying a constitutional right to marital and family privacy the Supreme Court is not only taking the wrong path, but wandering off the path entirely, far from the signposts that can be read in the words of our Constitution.

This is what we know about Judge Bork's past views and his present thinking on the issue of liberty. But once again, our focus must be on the future.

The task of defining our liberties—of deciding where Government must stay its hand, and the individual be left free to make his or her own wise or foolish choices—is one of the most difficult tasks of interpreting the Constitution. History tells us that the decisions that the Supreme Court makes in the name of liberty are not always wise ones. Even today, there is much that any thoughtful American can disagree with in this line of precedent. But if the Supreme Court were to shirk the duty of making these decisions, of drawing these lines to define the spheres of Government power and individual rights, the results would be chilling—chilling for the American people to contemplate.

Government power and individual rights will continue to collide as we approach the new century. Technology will give Government an ever greater capacity to intrude into our homes, our families, even our bedrooms. And if we doubt whether Government will ever be tempted to realize this potential for instruction, we ignore the implications of today's headlines and the lessons of history.

When a majority of the community, acting through its elected representatives, oversteps its legitimate bounds, the results, in retrospect, sometimes seem amusing, trivial, even "nutty." But that does not mean that the majority will never repeat such mistakes. To the contrary, history teaches us that under the pressure of public turmoil or panic, the majority will in the future, as it has in the past, sometimes seek to channel the force of Government into collision with the rights of the individual. It may do so with the best of motives, with the most plausible of reasons, and with overwhelming

popular support. Where then can the individual turn for protection of a fundamental liberty, the right "to be let alone"?

History gives us the answer. The individual will seek to vindicate his liberty in the same forum to which black Americans turned when the majority refused to hear that separate is inherently unequal. It is the same forum to which disenfranchised voters turned when legislative majorities refused to heed the call for "one person, one vote." The future defenders of liberty will turn to the courts, the institution that must stand, in James Madison's phrase, as "an impenetrable bulwark" to protect our liberties against a powerful government with majority support.

If the Government action violates a specific guarantee of the Bill of Rights, the courts have a duty to put an end to it. But if the right involved is not specifically listed in the Constitution, but instead emerges from our shared ideals of liberty, then it is equally important that the courts vindicate it, not, in the words of the ninth amendment, "deny or disparage" it.

This is the ideal that the American people hold of the Supreme Court as the guardian, not only of their specifically enumerated freedoms, but also of the liberties that they have never surrendered to the Government. But as I understand the record before the Senate, this is not the concept of constitutional liberty that Judge Bork holds.

We cannot know the specific challenges to liberty that will confront us and our children in the years ahead. But we can foresee that new and complex developments in our society—genetic engineering and other new technologies, threats of terrorism, epidemics of disease and panic, to name only a few—will spawn difficult and important controversies. Those cases will test, more forcefully than ever before, our commitment to limited government and to the "right to be let alone." That commitment is embodied in the specific words of the Constitution. But it can also be found in the tradition of a Supreme Court that accepts the responsibility to give real meaning to the ideal of liberty.

Judge Bork has often said that American law lacks theory; it only has a tradition. That tradition may be uneven and inconsistent. Its structure may be blurred, not sharply drawn. But if the Supreme Court is faithful to that tradition, it can continue to be a powerful safeguard against the threats to liberty that may confront the Court in the decades ahead. The Justices of the Supreme Court must be true to that tradition. I am not confident that Judge Bork can meet that test.

The extensive hearings on the nomination of Judge Bork have examined in depth many other issues besides the three I have discussed today. The testimony we heard from dozens of accomplished public servants, legal scholars, historians, and other citizens was useful and thought-provoking.

I gave careful consideration to the testimony of former President Ford, former Chief Justice Burger, and former counsel to the President Lloyd Cutler. The essence of their testimony is that Judge Bork's philosophy poses no realistic threat to our constitutional ideals of freedom, equality and liberty. These distinguished Americans, and other supporters of this nomination, argue that the concept of the Constitution that this nominee would bring to the Supreme Court will strengthen its capacity to apply these values to the unknown cases and controversies of the future.

The witnesses on either side of this controversy may speak the language of certainty. But the real issue before us is one of probabilities and of risk. Many thoughtful and distinguished Americans have shared their versions of the future with us. But our duty is not to align with witnesses, however prestigious, who vouch for or against the nominee. Each Senator brings to this nomination what we know of Judge Bork's past record and recent testimony, but the question which we all seek to answer concerns the future. The task is for each Senator to make an independent judgment about how the confirmation of Judge Bork is likely to shape the rights, the hopes and the dreams of today's Americans, and of our children who will live most of their lives in the 21st century.

As we vote on this nomination, we must respond to the recommendation of the President. But we must answer, not to him, but to the people.

We must answer to the author, the artist, the orator, who draw creative sustenance from freedom of speech.

We must answer to the women who ask nothing more than the chance to compete equally in contributing to the wealth and wellbeing of our society.

We must answer to parents of every race and creed who dream of a better life for their children.

We must answer to the families who willingly respond to the just claims of Government, but who understand that they and their children are not creatures of the state, and that some decisions are too intimate and important to leave to Government.

We must answer to every American who recognizes that the majority may rule, but the majority is not always right.

I have made my judgment, and I am prepared to be accountable to my fellow Vermonters for it. I conclude that the confirmation of Judge Bork to the Supreme Court poses too great a risk for the future of the ideals—freedom, equality, and liberty—that "we the people" have embodied in our Constitution. This judgment is a prediction, not a fact, and if Judge Bork is confirmed I may be proven wrong. But after studying the massive record before the Senate, I believe that my judgment is correct.

Accordingly, I will vote against the confirmation of Judge Bork, and will actively oppose it on the floor of the Senate.

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

The PRESIDING OFFICER. Will the Senator withhold that request for a moment?

Mr. LEAHY. Yes.

## RESERVATION OF THE MINORITY LEADER'S TIME

Mr. LEAHY. Mr. President, I ask unanimous consent that the time of the distinguished Republican leader, Senator DOLE, be reserved for his use later.

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

## MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order there will now be a period for the transaction of morning business for not to extend beyond the hour of 9 a.m. with Senators permitted to speak therein for up to 1 minute each.

Mr. STEVENS addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Alaska is recognized.

Mr. STEVENS. Mr. President, may I ask my good friend if it is time to bring down the Interior bill?

Mr. BYRD. Mr. President, I ask morning business be closed.

The ACTING PRESIDENT pro tempore. With objection, it is so ordered.

Mr. FORD. Would the majority leader yield? I would like 1 minute. I understand we have 1 minute. That is all I want.

Mr. STEVENS. Yes. I yield the floor.

Mr. BYRD. I withhold my request.

The ACTING PRESIDENT pro tempore. The Senator from Kentucky is recognized.

## THE AVIATION TRUST FUND

Mr. FORD. Mr. President, I rise to say to my distinguished colleagues that we heard a great furor as it related to airline safety, near misses, needing a new communications system, large improvements in airport facilities, essential air service, truth in scheduling, and all of that.

For weeks and months the Aviation Subcommittee, of which I am chairman, and the Commerce Committee

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debt—could be fully paid off in a far cheaper currency—for 10 cents on the dollar. But the future credit of the United States would carry an enormous interest cost reflecting the fear of a future repudiation.

The inflation solution is tempting. It is the most traveled road for indebted nations. But it brings wide-spread economic chaos and no real solutions for the Federal Government.

## SEPTEMBER GOLDEN FLEECE GOES TO NATIONAL SCIENCE FOUNDATION

Mr. PROXMIRE. Mr. President, my Golden Fleece of the month for September goes to the National Science Foundation [NSF] for spending $9,992 on a study of "Bullfights and Ideology of the Nation in Spain." By supporting a trip to Spain and a year-long series of visits to bullfights around that nation, the NSF has given the American taxpayer a bum steer.

The summary of the project states:

This research proposes to examine the dialectical relationship between the categories "nation" and "region" in Spain as these are manifested through the polemical spectacles known as the national fiesta, the Spanish bullfights in their several formats. * * * The research will entail ethnographic descriptions and comparisons of the local vs. national bullfighting formats, and intensive interviews with informants to record their identification with, or rejection of, the various forms of bullfights, as well as other specific socio-political categories of Spain.

While the proposed budget includes $500 for a camera and accessories, the assumed daily expenses are relatively modest. The researcher will probably not be staying in very many five star hotels during visits to the bullfights in Seville, Madrid, Valencia, and other exciting Spanish cities.

The project is being undertaken by an obviously highly qualified researcher who speaks Spanish fluently having lived and worked in Spain.

I have no objection as such to a study of bullfighting as a cultural manifestation of the Spanish regional and national character; although I suspect that a few hours spent with Ernest Hemingway's writing would be better reading and would probably give just as much understanding of the Spanish culture.

What I do object to is, given the giant Federal budget deficit and the needs of other Government programs, the decision by the NSF to fund this study. Clearly it is time for the NSF to grab the bull by the horns and get its priorities stralght.

The bullfight study is a part of the NSF's anthropological science program whose budget the Foundation has purposed to increase by $640,000 to $8,220,000 next year.

I first raised questions about this and several other studies in the Appropriations Subcommittee hearings on the NSF budget. The NSF argued in favor of the studies and later provided me with additional information on them.

After examining the complete record, I continue to doubt the value of spending taxpayers money on two other studies but see the NSF's argument of some possible worth to the studies.

The first project involved spending $23,279 to study the cultural and social context of astronomical knowledge by two native groups in Indonesia. One group used the stars to do impressive feats of open seas navigation and the other studied the sky to predict the changing seasons for their primitive agricultural society.

The second project devoted $28,578 to study the role of nonmarriage in rural Irish family systems. Irish society has one of the highest rates of late and nonmarriage. A study of how these single adults fit into their families and culture might help us understand similar situations in our own Nation.

Funding these studies once again raises the question of priorities. The taxpayers cannot afford to fund every study on every subject everywhere in the world. To the question, Is this trip necessary? The NSF should more frequently answer with a resounding: No.

Mr. President, I thank my good friend, the leader, for reserving time for me this morning. I yield the floor.

## RECOGNITION OF SENATOR PRYOR

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Arkansas is recognized for not to exceed 10 minutes.

## NOMINATION OF JUDGE BORK

Mr. PRYOR. Mr. President, in article 2, section 2, clause 2, of the Constitution, the Members of this body were granted a unique and sacred responsibility—to advise and consent in nominations made by the President. Some scholars would argue this role to be a great and awesome power, or maybe even a stick to be held over the Executive.

I would argue it to be an obligation to our citizens. It is a time when we, as their elected voice, are given a responsibility to check an Executive decision by exercising legislative balance.

Today we reach one of those rare moments in our democratic process when the advise and consent role of the Senate becomes of ultimate importance. We are asked to consent to a lifetime appointment to our highest court.

Mr. President, as to the nomination of Robert Bork to the Supreme Court, I must state now that I cannot consent. I will vote against the nomination of Mr. Bork to become a Justice of the Supreme Court.

I will leave to the great legal scholars of our time the interpretation and translation of Judge Bork's opinions, writings, and speeches. I have no doubt as to his scholarly abilities or his general reputation as a brilliant legal mind.

No, I do not perceive him to be bad or evil. If he has an ultimate or hidden agenda, I do not know it. But I strongly believe that any lifetime appointment to a position that will affect the lives of every citizen of this land—and for generations to come—should have an additional qualification. It is something that seems to me to be absent from the makeup of Robert Bork. And that is "judicial temperament."

Robert Bork's nomination to the Supreme Court has divided not only the Senate but this Nation as well. This nomination has polarized America. It has divided groups and races. Where a Supreme Court nominee should—and must—trigger respect and admiration, his nomination has triggered passion and emotion.

Judge Bork is the most divisive nominee to have his name before the Senate in modern times. Mr. President, we do not need someone to divide us. We need someone to bring us together.

After writing mountains of opinions—and following a distinguished career in the law—Robert Bork is still an unknown. We ask ourselves on a daily basis in this Chamber, Who is Robert Bork? A shroud of uncertainty permeates his thinking. In fact, the more I read and hear of Mr. Bork, the less I know about him. If we named him today to our highest court, we could be embarking on a voyage into the unknown.

There is also something sad about the whole issue of Judge Bork's nomination. Here is a brilliant scholar, going through the agony of public hearings and public scrutiny. And yet we do not know him any better now than we did months ago. I would even submit the respectful opinion, Mr. President, that he does not know himself.

Having gone from extreme positions in his youth to unexplainable positions in later life, Robert Bork continues to wrestle with what he believes. Today he remains an unknown man with unknown beliefs.

Mr. President, I supported Justices O'Connor and Scalia, as well as Chief Justice Rehnquist. But the question of Robert Bork is not an issue of a person being conservative or liberal, Republican or Democrat. It is a larger question of temperament and understanding. It is like a large picture, with minute perimeters, that we are trying to bring into sharper focus.

Much of this exercise should be unnecessary. There are certainly good, qualified people throughout the country who could fill the requirements of this position, and they would and will command our respect and support for this nomination.

The hearings before the Judiciary Committee have just concluded. They have given our Nation a great education in the 200th year of our Constitution.

This public process has also afforded Judge Bork an opportunity to discuss his concept of what America is, and our citizen's individual relationship to its Government. He has made us think deeply and clearly about the purposes of the Constitution. And he has prompted us to examine the role of the Supreme Court in interpreting that Constitution.

In observing this process and watching the hearings unfold, my apprehensions have grown. At first, I could not overlook his great legal expertise. I then began to wonder if his presence on the Court would be an extension of our executive branch into the judicial arena.

I grew concerned as we heard the public response from those advocating "single issues." And it struck me that the great middle American voice was not coming through. But really, what is Judge Bork's principal basis for reaching decisions? Where does he stand on individual liberties? Where is he on individual privacy? Where does he really come down in interpreting that sensitive and delicate balance between rights of man and the limits of government?

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? The questions are many, Mr. President, and the answers are few.

We vote on many issues in this body during the course of our service. But there will be no more critical vote than on the issue of Robert Bork.

Mr. President, I hope there will be a good debate when his nomination reaches the floor. At that time we should afford our President the opportunity to have his nominee voted on, up, or down. I will take part in no filibuster regarding this nominee. And I pray that this body reaches a decision that is right and just—not only for our generation, but for those to come.

Mr. President, whatever time I have remaining I yield back to the distinguished Senator from North Carolina. [Mr. SANFORD].

I yield the floor.

## RECOGNITION OF SENATOR SANFORD

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from North Carolina, [Mr. SANFORD], is recognized for not to exceed 15 minutes, plus the time yielded to him by the Senator from Arkansas.

## IS JUDGE BORK A RELIABLE SCHOLAR?

Mr. SANFORD. Mr. President, like a diamond, a Supreme Court Justice is forever. He or she ought to be flawless. The position of Justice demands scholarship of the utmost integrity. This quality is the best guarantee we have of a Justice's performance. All other attributes fall in comparison.

I have carefully read or listened to the testimony. I have read many of Judge Bork's articles, interviews, speeches, and opinions, searching for the reliability of his scholarship.

Scholarship is definable and recognizable. Intellectual integrity is its essence. Scholarship is the relentless, uncompromising search for truth. Like a laser beam reaching for the unknown in the fine structure of atoms, the scholar reaches sharply through the maze of facts, fiction, propositions, and prejudices, always probing for the ultimate truth, eschewing half-truths and false conclusions. Scholarship is far more than academic skills acquired; it is a frame of mind, a way of life.

Thus, we must examine Judge Bork's credentials as a scholar, not just in name and profession, but measured against his performance as a scholar among scholars, a scholar of impeccable intellectual integrity, a scholar inflexibly dedicated to the search for truth, a scholar worthy of the Supreme Court. This is the test on which I have finally based my decision on how to vote—not his politics or his ideology, not the pressure from groups either pleased or displeased by his nomination, but a clear, stark question: Does he possess the qualities of pure scholarship that should identify a Justice of our Supreme Court?

Our Constitution was written in a society in which women were given second rate citizenship, generally only property owners voted, poll taxes had not been invented, and slavery was an accepted, if disputed, institution. Yet the drafters of the Constitution drew a document with the stated intention that it could encompass the perfecting of the democratic principles of the new republic. Chief Justice John Marshall set the course for the Supreme Court, and the United States has done a pretty good job of perfecting itself since the beginning. That this is always to be an unfinished job is symbolized by the unfinished pyramid on our national seal.

Some insist that such flexibility for growth and change is not contemplated by the Constitution. This is and has always been a legitimate position in jurisprudence. Judge Bork has many times espoused this judicial philosophy.

In cases involving individual rights, Judge Bork has repeatedly urged a "strict construction" of the Constitution and a narrow role for judges in interpreting it. He expressed these views with clarity in his Indiana Law Review article in 1971, where he argued that the Constitution should protect the will of the majority unless there is explicit protection for the minority provided in the Constitution. The elected legislative bodies decide the majority view, and if that is at the expense of individual rights, so be it, unless there is something in the Constitution specifically protecting the individual. (Bork, "Neutral Principles and Some First Amendment Problems," 147 Indiana L.J. 1 (1971)).

In keeping with this philosophy, Judge Bork has declared the Court was wrong when it struck down Virginia's poll tax—Harper versus Virginia—wrong when it denied States the power to enforce racially restrictive covenants—Shelley versus Kraemer—wrong when it banned literacy tests for voters—Katzenbach versus Morgan—wrong when it decreed one-person-one-vote—Reynolds versus Simms. Judge Bork also has declared there is no constitutional right to privacy.

The decisions by the Court, in these and similar cases, Judge Bork has contended, "Could not have been reached through interpretation" (Catholic University Speech, Mar. 31, 1982). In other words, the Justices just made up this law because that is what they wanted it to be. There was nothing in the Constitution to justify such decisions. He may be right.

My problem with Judge Bork is that he does not stick with his views.

Over and over I get the impression that he follows his narrow interpretation only when it leads to the result he wishes it to lead to.

Over and over I get the impression that Judge Bork already knows where he wants to go and then selects the path that will get him there.

That is not consistent scholarship.

Judge Bork applies his majoritarian, the-legislature-is-right views only when this posture furthers the goals he wishes to achieve. For example, he has consistently been opposed to accepting the majority will as expressed by Congress in conflicts between the legislative and executive branches of Government.

Where it suits his purposes, he has been willing to brush aside his majoritarian philosophy, and to overlook fairly explicit constitutional authority, for example, dealing with congressional military powers. Judge Bork has written that it would have been unconstitutional for Congress, during the

Vietnam war, to limit President Nixon's right to send troops from Vietnam into Cambodia, on the theory that the President retained full discretion over the deployment of military forces once Congress has authorized military action in the area (Bork, "Comments on the Legality of U.S. Action in Cambodia." 1971, 65 Am. Jur. of Int. Law, 79–81). He may or may not be right, but he is not consistent.

Again, ignoring the majoritarian voice of Congress, he has testified that the special prosecutor statute is, in his view, clearly unconstitutional, arguing that once Congress passes substantive laws, full prosecutorial discretion as to their enforcement rests exclusively with the President ("The Hearings Before the Senate Committee on the Judiciary: The Special Prosecutor," 93d Cong., 1st sess. (1973)). He may or may not be right, but he is not consistent.

Again taking a different view from that which he used to limit individual rights, Judge Bork, in the 1985 case of Barnes versus Kline, which was brought by the U.S. Senate and other individual representatives, dessented. He wrote: "We ought to renounce the whole notion of congressional standing." The will of the majority does not fit what Judge Bork wants in this situation. He denies Congress the means to exercise even a modest rein on the Presidency in situations where the executive branch has overstepped its bounds.

Judge Bork's advocacy of judicial activism in antitrust matters, his primary field of scholarship, is similarly inconsistent with this theory of judicial restraint. He is a proponent of a movement to reinterpret radically the antitrust laws to conform to the Chicago school of free-market economics, disregarding the intent of Congress. He rationalizes his actions by arguing that the true purpose of the antitrust laws is not to control monopolies, but to protect, to use his expression, the "consumer welfare," a term not found anywhere in the antitrust legislation and certainly not in the Constitution. His peculiar economic theory can be served only if he abandons his majoritarian views, and more. So he does, charging that Congress is "institutionally incapable of * * * fashioning a rational antitrust policy" (Bork, "The Antitrust Paradox," 412-413 (1978)). Apparently he will leave only the simple matters to Congress and to the people.

In perhaps his most vulnerable writing, a 1963 article published in the New Republic ("Civil Rights—A Challenge," the New Republic, Aug. 31, 1963), which he has since in large part retracted, Judge Bork passionately condemned the Public Accommodations Act. Rationalization of his untenable opposition prompted him to disparage "Southern politicians," who are not to be trusted to enforce the law, letting it "become an unenforceable symbol of hypocritical righteousness." This is shoddy scholarship—or worse.

He did not, in drawing up his assault, first define the ill that was being confronted by the new legislation. That would have been a scholar's first step. Open access is wrong, he begins, because we place a "very high priority" on freedom. Indeed we do. It was individual freedom, denied because of discrimination, that was the problem. He missed that point. To him, this lack of access by blacks was merely an "insult"—that is his word—and what weight ought to be accorded a mere insult when measured against the freedom of lunch counter operators to conduct their activities unfettered by laws designed only to satisfy, in his words, a "gratification" by "coercing * * * other private individuals?"

These people, "barbers" and "chiropodists" and lunch counter operators, cannot be perceived to "hold themselves out to serve the public," he argues, because it is clear that they do not hold themselves out as wanting to serve the part of the public that is, in his word, "Negro." The best evidence that they do not, he says, is the proposed law. There is nothing scholarly about that argument. Furthermore, and I have seen this time and time again, his inflammatory inclusion of "barbers" and "chiropodists" is a recognizable racist trick, and is hardly scholarly.

Finally, Judge Bork's concluding words were, "a question of personal freedom is inescapably involved * * *." Indeed it was. But his faulty scholarship never led him to discover which freedom it was.

At the Senate hearings on his confirmation as Solicitor General, he retracted his article on open accommodations. His reason: "It seems to me the statute has worked very well." It may have been the politics of the situation that forced him to change his mind, but it is the lack of scholarship in this article that still condemns him.

In the course of these hearings, and in his confirmation hearings for both Solicitor General and the Circuit Court of Appeals, Judge Bork has changed his positions on several matters. He reversed himself on civil rights. He reversed himself on the protection afforded by the first amendment. He reversed himself on the protection of women against discriminatory legislation.

On several occasions Judge Bork stated he is "about where the Supreme Court is" on issues where he has repeatedly attacked its decisions. In other instances, he stated for the first time that he agreed with the result in particular cases but disagreed with the reasoning. Perhaps, he offered, he could find some other theory under which to justify the result.

Judge Bork preaches "judicial restraint," and "original intent" and "neutral principles." But there is a crucial question demanded by his frequent conversions. Was he adhering to his professed philosophy the first time around, or the second?

Bruce Fein of the Heritage Foundation is quoted in the New York Times—September 27, 1987—as having said:

> The week has been a magnifice*** BAD MAG TAPE ***nt triumph for the liberals," Fein said after Bork testified. "The basic message sent by the hearings so far is that the courts are about where they should be, that no great changes are needed. Bork is bending his views to improve his confirmation chances, and it's a shame.
>
> His ambition perhaps exceeds his intellectual devotion. * * *

At the turn of the century, the story goes, an eager young man had applied for a schoolmaster's job and had ridden half a day, a long distance by buggy, to be interviewed by the local school board. The old chairman squinted at him through his rimless glasses and asked, "Young man, do you believe the Earth is round or flat?" This young man, who wanted this job so badly, quickly replied, "I can teach it round or flat—however you want it!"

In the course of his public life Robert Bork has been a socialist, a libertarian, a conservative, and now, most recently, a moderate. There is no way to predict what he will be as a member of the Supreme Court. I certainly agree that rigidity of thought is generally an undesirable characteristic, that some flexibility is a good thing, and that changing one's views is a sign of intellectual development. But thinking should evolve, and scholarship should remain constant, with a dedication to the integrity of the pursuit of truth.

I have always been inclined to adhere to the John Marshall approach. Under well-established precedent of the Senate's role in Supreme Court confirmations, I could vote against Judge Bork because his views are so far different from what I believe is right. But I will not vote against Judge Bork for that reason.

I said in July:

> I am going to vote on my general impression, once I have carefully followed the hearings. The Constitution requires me, as a Senator, to 'consent' to Supreme Court appointments. I take that duty seriously. I will consent or not to nominees as I judge their competence and their open-minded sense of fairness and justice, and their vision and concept of this nation.

I am convinced that Judge Bork, as measured by the consistency and quality of his scholarship, fails on all these criteria.

As 1 of 100 charged by the Constitution with shaping our Supreme Court

I have satisfied myself as to my responsibility. I cannot be a part of placing Judge Bork on the Supreme Court of the United States.

## ORDER OF PROCEDURE

Mr. BYRD. Mr. President, what is the next order?

The ACTING PRESIDENT pro tempore. The Senator from Texas is to be recognized for not to exceed 15 minutes.

Mr. BYRD. Mr. President, I ask unanimous consent that I may control the time of the Senator from Texas.

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

## HAPPY NEW YEAR

Mr. BYRD. Mr. President, I would like to take this opportunity to wish my colleagues a happy new—fiscal—year. Today marks the beginning of fiscal year 1988. In and of itself that is hardly newsworthy. But this year something newsworthy has happened. The new fiscal year has begun without the threats of Government shutdown that had become all too common at this time of year in the recent past.

I need not remind my colleagues of the long nights and occasional round-the-clock sessions that have marked many a continuing resolution in the past. This year, the Congress completed action on a short-term continuing resolution a week before the start of the new fiscal year. That is well ahead of many past schedules.

Of course, reliance on a short-term continuing resolution is not the ideal. Funding for the normal operations of Government should be accomplished through the regular appropriations bills. That is my goal this year.

Already the Senate has passed four appropriations bills. More are on the calendar. I expect that the Appropriations Committee will shortly report the remaining bills it has received from the House. With good fortune, and the continued cooperation of my colleagues, the President will receive all or most of the regular bills before the expiration of the current continuing resolution on November 10. That is my goal for this year.

Mr. President, there are other fiscal issues that we must face this year. Most important will be enactment of a reconciliation bill and other deficit reduction measures that will avoid the prospect of automatic, across-the-board spending cuts under the new Gramm-Rudman law.

In that regard, I was disappointed by the remarks of the President in his radio address last Saturday and again at the White House on Tuesday. Deficit reduction will only be achieved through cooperation, not confrontation. Unfortunately, I saw no sign of cooperation in the President's statements.

Mr. President, this Nation desperately needs to keep reducing the deficit. I know that most Members of this body, on both sides of the aisle, believe that. I hope that a similar sentiment will eventually prevail at the White House. Without the cooperation of both Congress and the President, the deficit will start rising again and the mountain of debt will become even steeper for our children and grandchildren to climb.

So, while I wish my colleagues a happy new—fiscal—year, I do so with the knowledge that much work lies ahead before we can call fiscal year 1988 a happy year.

## SENATOR BIDEN AND THE 1988 CAMPAIGN

Mr. BYRD. Mr. President, a few days ago, our colleague from Delaware, Senator BIDEN, announced the end of his Presidential campaign efforts. He continues as the chairman of the Senate Judiciary Committee and the junior Senator from Delaware. His credibility, as I said before, remains good with me and I am sure with the people of Delaware.

The Presidential campaign continues and as it does, we ought to be aware of how it affects our political process and the American people's sense of trust in their political leadership.

The recent decision of Congresswoman PAT SCHROEDER not to run—her frustration at the "isolation" of the process—highlights concerns that the process of choosing our nominee is more complicated and demanding than ever before. Clearly, it has changed.

For a great many years the process of choosing a Presidential candidate was very much an "in-house" affair of each political party. But running for President is no longer an "in-house" affair. Over the years the process of choosing a candidate has become more open, more involved, and more demanding.

In this upcoming election the demand for certainty and trust is even more pressing. This election is the first election in over 20 years when no incumbent President is running for office. Candidate "x," for most Americans, a candidate of unknown quality, will be the next President of the United States.

And, underneath the surface tranquility of public sentiment there is an increasing anxiety, a hidden anxiety, about our Nation's future. The American people have no clear sense of the future. They know a price must be paid for today's tranquility. They do not know how or who will solve the mounting problems of the Nation that they see on the horizon.

This hidden anxiety has been compounded by the mistrust created by the Iran hostage deal. President Reagan's decision to betray the American people's trust, by selling arms to Iran for hostages has only made Americans even more cynical and demanding. The people want to know who they can trust and how the candidates will measure up.

The intensity of the media's scrutiny of the candidates is not just good journalism. It reflects a deeper anxiety, people's uncertainty about America's future, and their demand that when they elect their next President, their trust not be betrayed again.

Presidential campaigns are now defined by a great many variables—the candidates, the state of our economy, the Nation's security, complicated spending limits, the size and shape of the press corps, even by the latest advances in technology. With the use of satellites, airplanes, and television videos, candidates are always under scrutiny.

What is said on the west coast is back east in a flash.

Living in a fishbowl is not the easiest of lives, as every Member of the body knows, but it is a requirement that the founder of the Democratic Party, Thomas Jefferson, well understood. Jefferson, writing to one of his many correspondents in 1807, wrote, "When a man assumes a public trust, he should consider himself public property." The candidates are public property.

Hundreds of members of the press now follow the campaign with the zeal of football fans. Thousands of concerned Democrats are even now making judgments about supporting the candidates; hundreds of thousands. And, a great many of our fellow Americans will watch with interest, as we begin the process of choosing our nominee.

As this campaign heat up, it is important for all the candidates, of both political parties, their staffs, and their consultants to remember that one test of character is whether they treat each other with respect and decency.

As the excitement mounts and each campaign strives to win, there is always a tendency to overreach. But overreaching, doing anything possible to win, often violates the American people's sense of fair play.

My point should be clear. Regardless of who our party nominee is in Atlanta, the individual candidates now campaigning collectively set a tone about the character of our political party and the larger political process as well.

As JOE BIDEN said last Wednesday, "What's going to happen when the white, hot, heat turns on?" When the "White, hot, heat, turns on" all the Democratic candidates must set a tone that is positive, enlarging, and inclusive—reaching out to all Americans.

Mr. WARNER. Mr. President, I certainly concur in that; the Chair has been very careful. But as I understood, the Senator from South Carolina yielded back his time. We had given the time equally to him. It would seem to me such time as was yielded back in a sense of fairness would be equally divided.

The PRESIDING OFFICER. The Senator from South Carolina yielded time which was then split between the Senator from Virginia and the Senator from Arkansas. The Senator from South Carolina has no time remaining. The Senator from Virginia has no time remaining. The Senator from Arkansas has remaining 2 minutes and 53 seconds.

Mr. WARNER. Mr. President, I shall not make a further plea. I just make one last request of the majority leader. Under the original unanimous consent, from which we are now deviating to accommodate one of our colleagues on another matter, I was to make a motion to table. I would like to make that motion, and I ask the majority leader at what time, now that we are modifying the unanimous consent, that would I be recognized to make the motion to table?

Mr. BYRD. Immediately upon the conclusion of the statement by Mr. SPECTER.

Mr. WARNER. I thank the majority leader and I thank the Chair.

The PRESIDING OFFICER. Is there objection to the request propounded by the distinguished majority leader? The Chair hears none. It is so ordered.

Mr. BUMPERS. Mr. President, I know that in the remaining 2 minutes, no minds are going to be changed, but I do want to plead in case there is some lingering doubt in somebody's mind about this amendment, please, do not vote no on the amendment because you think the Senate by a simple majority vote would be ratifying a treaty which by the Constitution requires a two-thirds vote.

This is not a ratification of the SALT II Treaty. It simply uses the sublimits of 1,320 MIRV'd launchers as a cap on nuclear weapons. As I have said repeatedly, if this amendment is not tabled and somebody thinks 1,320 is not enough, offer an amendment and insert a new figure. If you think it is too many, insert a figure cutting the number. But do not hang on that legalism that somehow or other the Senate is violating the Constitution by ratifying an amendment.

Nothing could be further from the truth. We are simply saying there ought to be some cap. I do not know that there is anything sacred about 1,320 and I am not saying that. But I am saying this. When you consider that 1 Trident submarine represents 24 of the 1,320 permitted under this amendment, 1 Trident submarine has the firepower to destroy every single city in the Soviet Union with over 100,000 people in it—1 submarine; we have got 36 submarines; we have got ICBM's in silos; we have got bombers and cruise missiles and the MX missiles—how much is enough.

Mr. President, finally let me just close by saying people who oppose this amendment are people that I hear making the arguments in favor of SDI and that is something I do not understand. Every military planner in the pentagon will tell you the more Soviet missiles they have, the more warheads they have, the more capability they have of defeating SDI. You cannot have it both ways. You cannot say let the Soviet Union have all the missiles and warheads they want and vote for trillions of dollars for SDI at the same time. It is a contradiction.

So, Mr. President, for those and all the arguments I have made plus just being able to face your children and say I have done somehing to try to save this planet, which ought to be plenty for voting against this tabling amendment, I sincerely hope my colleagues will do so.

Mr. President, do I have any remaining time?

The PRESIDING OFFICER (Mr. DASCHLE.) The Senator's time has expired.

## RECOGNITION OF SENATOR SPECTER

The PRESIDING OFFICER. Under the previous order the Senator from Pennsylvania is recognized for not to exceed 10 minutes.

Mr. SPECTER. I thank the Chair and I thank the distinguished majority leader for arranging the unanimous-consent request.

## 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.

The PRESIDING OFFICER. The Senator's time has expired.

## NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEARS 1988 AND 1989

The Senate resumed consideration of the bill.

The PRESIDING OFFICER. The Senator from Virginia is recognized.

AMENDMENT NO. 825

Mr. WARNER. Mr. President, I move to table the pending amendment.

Mr. LEAHY. 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. The question is on agreeing to the motion of the Senator from Virginia to lay on the table the amendment of the Senator from Arkansas.

On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from California [Mr. WILSON], is necessarily absent.

Mr. BUMPERS. Regular order, Mr. President.

The PRESIDING OFFICER. Are there any other Senators who wish to be recorded?

Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 44, nays 55, as follows:

[Rollcall Vote No. 295 Leg.]

YEAS—44

| | | |
|---|---|---|
| Armstrong | Hecht | Packwood |
| Bond | Heflin | Pressler |
| Boschwitz | Helms | Quayle |
| Chiles | Hollings | Roth |
| Cochran | Humphrey | Rudman |
| D'Amato | Karnes | Shelby |
| Danforth | Kassebaum | Simpson |
| DeConcini | Kasten | Stennis |
| Dole | Lugar | Stevens |
| Domenici | McCain | Symms |
| Evans | McClure | Thurmond |
| Garn | McConnell | Trible |
| Gramm | Murkowski | Wallop |
| Grassley | Nickles | Warner |
| Hatch | Nunn | |

NAYS—55

| | | |
|---|---|---|
| Adams | Exon | Mikulski |
| Baucus | Ford | Mitchell |
| Bentsen | Fowler | Moynihan |
| Biden | Glenn | Pell |
| Bingaman | Gore | Proxmire |
| Boren | Graham | Pryor |
| Bradley | Harkin | Reid |
| Breaux | Hatfield | Riegle |
| Bumpers | Heinz | Rockefeller |
| Burdick | Inouye | Sanford |
| Byrd | Johnston | Sarbanes |
| Chafee | Kennedy | Sasser |
| Cohen | Kerry | Simon |
| Conrad | Lautenberg | Specter |
| Cranston | Leahy | Stafford |
| Daschle | Levin | Weicker |
| Dixon | Matsunaga | Wirth |
| Dodd | Melcher | |
| Durenberger | Metzenbaum | |

NOT VOTING—1

Wilson

So the motion to table was rejected.

Mr. BUMPERS. Mr. President, I move to reconsider the vote by which the motion to lay on the table was rejected.

Mr. LEAHY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The majority leader.

Mr. BYRD. Mr. President, I take the floor at this time to inquire as to whether it might be possible for us to have a cloture vote on the motion which I introduced on the Byrd-Nunn amendment. That cloture under the rule will occur tomorrow. I would hope we could vote on it today.

I also hope that we could dispose of the Weicker-Hatfield amendment in some way and get on with the finalization of the SALT issue and vote final passage of the bill today.

I wonder if I might inquire now of the distinguished Republican leader whether or not it would be possible to vote on the cloture motion this afternoon.

Mr. DOLE. Mr. President, if the majority leader will yield, there are actually two cloture motions filed: One on the Byrd amendment and one on the bill itself. The one filed on the bill was an effort—we adopted all the other amendments except the SALT amendment, war powers, and the Byrd amendment—and it was filed in an effort to bring debate to a close and go ahead and pass the bill without these added amendments.

I am wondering if it might be possible if we could agree to vote on cloture on the majority leader's motion, if we could also do the same with reference to the second cloture motion.

Mr. BYRD. Mr. President, I think that is a very logical approach from the standpoint of the distinguished Republican leader. I would understand that. There has been a great deal of debate on the war powers amendment. I do not presume to speak for the authors of the underlying amendment.

The cloture motion only goes to the amendment in the second degree.

As far as I am concerned as to this bill, that I am not interested in delaying, if we get the cloture vote, if we get cloture that is one thing. But on the matter of SALT and, as I say, I am not presuming to speak for the author of the underlying amendment, but as far as my own views are concerned on the amendment which I have offered on behalf of Senator NUNN and others if we could have a cloture vote on that, we have had a lot of debate on it, we have not had a great deal of debate on SALT, if we could dispose of the cloture motion on the war powers and then depending on what happens or what Senators may want to do on the underlying amendment, I would like to see us then proceed and get a finalization, if possible, on the SALT issue today and vote on final passage of the bill today, these being the only two remaining matters.

Tomorrow is Friday. I expect full attendance tomorrow because we all know that we are trying to reach a sine die adjournment in November or early December; hopefully at an earlier date than December. This bill has been before the Senate now off and on for months and months. I am simply wanting to at least get one matter out of the way at a time and as we do that perhaps we can more and more see the end in sight for the bill itself.

If we do not vote on cloture today, of course we have to vote on it tomorrow. But if the distinguished leader would consider with his colleagues letting us vote on cloture on the war powers amendment in the second degree today, that will at least tell us one way

which is campaigning with her husband BOB DOLE. I am supportive of that cause as well.

I do know that whatever course Elizabeth Dole will follow, she will follow it with much dedication, integrity, distinction, perseverance, and good will, and I wish her well on all of the challenges which she will undertake in the future.

Mr. President, I yield the floor.

## DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATION, 1988

### CHANGE OF VOTE BY SENATOR DOMENICI ON ROLLCALL VOTE NO. 288

Mr. DOMENICI. Mr. President, with reference to rollcall vote No. 288 on the Interior appropriations bill (H.R. 2712) the Senator from New Mexico is officially recorded in the negative. According to the tally in the well my vote should have been "aye." I believe I voted "aye," and I was improperly recorded as "nay." I ask unanimous consent that the RECORD be corrected to reflect an affirmative vote on the subject that I just described to the Senate. This will not affect the outcome of the vote in that on the vote there were only five negative votes, including my erroneous negative vote.

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

Mr. EXON. Mr. President, I would like to say there is no objection on this side to that. I understand that happens from time to time. As hard as they try up there, either we say the wrong thing or they make mistakes. We are happy to accommodate my friend.

Mr. DOMENICI. I thank my friend from Nebraska.

(The corrected rollcall vote is as follows:)

[Rollcall Vote No. 288 Leg.]

YEAS—92

| | | |
|---|---|---|
| Adams | Fowler | Mitchell |
| Armstrong | Garn | Moynihan |
| Baucus | Glenn | Murkowski |
| Bentsen | Graham | Nickles |
| Biden | Grassley | Nunn |
| Bingaman | Harkin | Packwood |
| Bond | Hatch | Pell |
| Boren | Hatfield | Pressler |
| Boschwitz | Hecht | Pryor |
| Bradley | Heflin | Quayle |
| Breaux | Heinz | Reid |
| Bumpers | Hollings | Riegle |
| Burdick | Humphrey | Rockefeller |
| Byrd | Inouye | Rudman |
| Chafee | Johnston | Sanford |
| Chiles | Karnes | Sarbanes |
| Cochran | Kassebaum | Sasser |
| Cohen | Kasten | Shelby |
| Conrad | Kennedy | Specter |
| Cranston | Kerry | Stafford |
| D'Amato | Lautenberg | Stennis |
| Danforth | Leahy | Stevens |
| Daschle | Levin | Symms |
| DeConcini | Lugar | Thurmond |
| Dixon | Matsunaga | Trible |
| Dole | McCain | Wallop |
| Domenici | McClure | Warner |
| Durenberger | McConnell | Weicker |
| Evans | Melcher | Wilson |
| Exon | Metzenbaum | Wirth |
| Ford | Mikulski | |

NAYS—4

| | |
|---|---|
| Gramm | Proxmire |
| Helms | Roth |

NOT VOTING—4

| | |
|---|---|
| Dodd | Simon |
| Gore | Simpson |

So, the bill (H.R. 2712) was passed.

Mr. HUMPHREY addressed the Chair.

The PRESIDING OFFICER. The Senator from New Hampshire.

## THE BORK NOMINATION

Mr. HUMPHREY. Mr. President, as a supporter of the Bork nomination, I was sorry to hear the speech of the junior Senator from Pennsylvania today. But the Senator, as a member of the Judiciary Committee, was at the hearing. And I would have to acknowledge in his case, and that of other Members, there was no need for a great deal of additional time-consuming study on his part.

I would hope other Senators would take a little more time in making a decision. The transcript of the hearing is very long, after all. The hearings comprised nearly 3 weeks. The committee has not even had time to issue a report. And a Supreme Court nomination is a very, very weighty matter. One hopes Senators will spend time studying the transcript and the committee report before taking a stand on the nomination.

Due process is a phrase that came up a number of times in the hearing. We have due process of our own in this body. It involves committee hearings and committee reports. It involves floor debate. All of this due process is designed to facilitate wise decisions by Senators. I know Senators want to act wisely in this matter. Surely, then, Senators will not want to short circuit the due process by which this body is supposed to function. Surely careful study and deliberation is in order.

I know some Senators are under immense pressure. The distinguished columnist, George Will, wrote recently about the political pressures on Senators in the Bork confirmation process. And there are immense political pressures. Pressures generated by a political campaign of unprecedented proportions in the context of Supreme Court confirmation votes. Indeed, so politicized has become this confirmation vote, George Will wrote, that some are "pioneering a constitutional wrinkle the framers neglected to provide—popular election of Supreme Court Justices."

Let us ponder those words for a minute. Let us savor those words for a minute because while the passage is brief, it is weighted with significance and meaning as is often the case with this writer, the columnist, George Will. Mr. Will notes in connection with all of this campaigning for and against Bork, and Will wrote that some are "pioneering a constitutional wrinkle the framers neglected to provide—popular election of Supreme Court Justices." It rings true to this Senator. This process has become so politicized in the last month that indeed the pressure on some Senators amounts to an attempt to institute the popular election of Supreme Court Justices. George Will is right, I believe. George Will's observation is correct, I am sorry to say. Special interest groups have generated so much pressure, Senators may well be swayed by such pressures rather than by a careful reading of the transcript built at a cost of so much labor by the Judiciary Committee of the U.S. Senate.

Will said:

> Reasonable people can disagree about the propriety of Bork's beliefs and the proper role of the Senate in confirmations. But surely some things * * * are lost when the ethic of routine political competition and transactions is extended to the solemn task of constituting a court.
>
> Today, fund-raising campaigns are financing media blitzes to shape opinion-poll results that will, the interest groups hope, reduce enough Senators to the status of passive electors in an electoral college sitting in the Senate Chamber.

Again, let us weigh those words. They ring true to this Senator:

> Today, fund-raising campaigns are financing media blitzes to shape opinion-poll results that will, the interest groups hope, reduce enough Senators to the status of passive electors in an electoral college sitting in the Senate Chamber.

Certainly, to the extent that we yield to such pressures, the pressures of special-interest groups who have sallied into this confirmation process, we become simple electors and the Senate becomes simply an electoral college. That is not the concept of the Senate. Electors do not need 6-year terms. We could serve for a few days only and fulfill the responsibility and function of electors. That is not our function. But it appears to George Will and to this Senator, and I suspect to many observers, that this politicization of the confirmation process indeed is turning Senators, to some extent, into simple electors and the Senate into a simple electoral college.

The vacancy to which we will consent or refuse to consent is not a vacancy on the U.S. "Court of Special Interests." It is a vacancy on the Supreme Court of the United States.

George Will goes on to say:

> Today's attempt to break the Supreme Court to the saddle of manufactured fictitious opinion is a more fundamentally radical attack of the Court than FDR's attempt to pack the Court by enlarging it. Packing was to be a one-time tactic that could not have been repeated regularly unless the Court's bench was going to be replaced by bleachers.

Mr. Will clearly implies here that if this new attack on the Court succeeds, there is no limit to future use of the

same campaign tactics whenever there is a vacancy on the Court.

Mr. President, I will have remarks to deliver in due time about my position on Judge Bork's confirmation. But I thought it well on this day, when a number of Senators have come to the floor and announced their position—prematurely, I believe, with all due respect—to dwell for a moment on the concerns of George Will and many others of what is becoming of this confirmation process.

This concern is one shared by many wise and temperate men and women of all parties. Will speaks of Senators becoming simple electors, of the U.S. Senate becoming a simple electoral college, completely in contravention of its independent role. He speaks of a radical attack on the Court. I believe it is something for us to think about.

Each Senator will come to his or her conclusion on the Bork nomination, but let us proceed with decorum and care. We have seen an effort by special interest groups to stampede this body, but let us not be stampeded. Let us at least take the time to examine the transcript of the hearings. Let us at least wait until a committee report is available. If we let pressure groups stampede us, we can be sure that the tactic will be repeated with ever greater intensity and with ever more political, ever more expensive campaigns mounted to influence the vote of Senators.

Mr. President, I ask unanimous consent to have printed in the RECORD the opinion piece by George Will, to which I have alluded in my remarks.

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

THE SCALE AND INTENSITY OF THE ANTI-BORK CAMPAIGN

Sen. Bob Packwood, an Oregon Republican, is an evenhanded moralist who, with fine impartiality, apportions his fervor on several sides of some issues. Today he is among those who are pioneering a constitutional wrinkle the Framers neglected to provide—popular election of Supreme Court justices.

Robert Bork's opponents are of three sorts: those who say he is dangerous because he is an "inflexible ideologue" (flexible ideologues are, presumably, preferred), those who say he is too changeable and those who, suffering cognitive dissonance in the service of their country, say both. Packwood, who will filibuster if necessary, says Bork is intolerable regarding "privacy," meaning abortion.

Now, no one expects Packwood or any other politician to be a martyr on the altar of consistency, but this is a bit thick coming from the man who, when opposed in an election by an anti-abortion candidate, was operatic in his denunciation of single-issue politics. Jack Minor, a reader of the Portland Oregonian, writes in a letter to the editor: "Is this the senator who said that the voters should not oppose him last election solely because of his pro-abortion stance because it should not be a one-issue campaign? Do I smell a hypocrite?"

Not really. Packwood's opposition to single-issue politics certainly does vary too much with the issue. But he also is showing fidelity.

He has sincerely supported and has received generous financial support from feminists. What is, however, dismaying about Packwood's current politics is the disappearance of an important inhibiting distinction. It is the distinction between fighting for friendly and worthy interests in purely political controversy, as Packwood did for Oregon's timber industry regarding tax reform, and putting one's political power at the service of constituents and others eager to guarantee certain results from judicial processes.

Reasonable people can disagree about the propriety of Bork's beliefs and the proper role of the Senate in confirmations. But surely some things—for starters, the ability to debate reasonable distinctions—are lost when the ethic of routine political competition and transactions is extended to the solemn task of constituting a court.

Today, fund-raising campaigns are financing media blitzes to shape opinion-poll results that will, the interest groups hope, reduce enough senators to the status of passive electors in an Electoral College sitting in the Senate chamber. Bork's supporters are now driven, against their correct sense of decorum, to arm themselves of a campaign, or else concede defeat. Such is the dialectic of the degradation of judicial institutions.

The scale and intensity of the anti-Bork campaign refute the premise that is supposed to legitimize the campaign. The premise is that there is nothing new going on, that the Senate has always "considered a nominee's judicial philosophy," as though that is what is going on.

This process has had its moments of unintended hilarity, as when the painter Robert Rauschenberg testified (by Lord knows what authority) on the tears and tremblings of America's artists—every paint-smeared one of them. In a statement that used words the way Rauschenberg uses paint (it was the rhetoric of random splatter), Rauschenberg announced that America's artists, who once cultivated an aura of Bohemian nonconformity, are remarkably "unanimous" in opposition to Bork. (Talk about a herd of independent minds.)

The anti-Bork army, which sometimes has attributes of a mob, has been swollen with organizations such as the Epilepsy Foundation of America, the United Cerebral Palsy Association, the Retarded Citizens Association, among others. Many Americans would be surprised to learn that their charitable support has been conscripted for the liberal onslaught on Bork.

The ease with which such groups have been swept together for the first time in such a campaign reflects, in part, the common political culture of the people who run the headquarters of the compassion industry.

Today's attempt to break the Supreme Court to the saddle of manufactured or (as in the Rauschenberg case) fictitious opinion is a more fundamentally radical attack on the court than FDR's attempt to pack the court by enlarging it. Packing was to be a one-time tactic that could not have been repeated regularly unless the court's bench was going to be replaced by bleachers.

The transformation of the confirmation process into a contest between massed battalions is a perverse achievement of people who, like Packwood, claim to be acting to protect the court from Bork's jurisprudence, which they say would leave all our liberties to be blown about by gusts of opinion.

## ORDER OF PROCEDURE

Mr. MURKOWSKI. Mr. President, I ask unanimous consent that I may proceed as in morning business for about 5 minutes.

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

## IN MEMORY OF ROBERT G. BLAIR

Mr. MURKOWSKI. Mr. President, Robert Blair died September 14, 1987, at the age of 62 in Kodiak, AK. I rise today in tribute to his life. Bob Blair's philosophy was hard work, love of family and love of his fellow man. He saw his share of adversity. His first child died at an early age. His first wife was killed in an automobile accident. He was a businessman, and his business ventures felt the effect of the roller coaster that marks the American economy. Bob reacted to adversity by renewing his life with even greater commitment and by devoting himself to his community. He expanded his ventures, and he helped those in need. He gave of his energy, his enthusiasm and his compassion; and his community, as well as his family and nation, were the beneficiaries of his life.

Bob's concern was as specific as ensuring a widow in his community had milk to drink, or helping rebuild the burned-out home of a neighboring family. His concern was as general as his active involvement in the American Legion, the Elks, Lions, VFW, Moose, and other organizations.

His commitment to life and his willingness to implement that commitment in the most personal way is perhaps best illustrated by his family. After remarrying, he and his wife raised 3 children from his first marriage, 5 from his second, and 20 Amerasian children he either adopted or sponsored. Twenty-eight children in all, Mr. President, named, James, Robin, Douglas, Kathy, Tony, Darrell, Raeann, David, Danny, Karen, Joe, Bobby, Lex, Dwayne, Steven, Heidi, Edward, Andrew, Sam, Norman, Alan, John, Dottie, Richard, Robert, Raymond, Gary, and Tommy. I can think of no finer way to transmit to the future the values of compassion and enterprises that embodied Bob Blair's life. Taking children into his home and raising them as his own was not a gesture; it was a commitment.

Mr. President, Bob Blair's philosophy was made concrete and tangible by his contributions to his community. And, perhaps more importantly, his philosophy was demonstrated in the intangible ways that touch the souls of those who knew him and took on

U.S. SENATE,
COMMITTEE ON THE BUDGET,
*Washington, DC, October 1, 1987.*

Hon. JOHN C. STENNIS,
*Chairman, Committee on Appropriations, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: This letter is to inform you of a revision in scorekeeping by the Committee on the Budget in connection with the effects on fiscal year 1988 of H.R. 1827, making supplemental appropriations for the fiscal year ending September 30, 1987, and for other purposes, Pub. L. No. 100-71 (July 11, 1987). Through reexamination of the treatment of mandatory and discretionary components of H.R. 1827 and other components of the 302(a) allocation to the Committee on Appropriations, we have determined that an adjustment of the accounting under section 302(a) of the Congressional Budget Act of 1974 is called for, having the effect of increasing discretionary spending available to the Committee on Appropriations by the amounts of $68 million in budget authority and $504 million in outlays.

It is of course the prerogative of the Committee on Appropriations to allocate this spending among its subcommittees and make appropriate accounting adjustments in their 302(b) spending levels.

Sincerely,

LAWTON CHILES,
*Chairman.*●

## THE NOMINATION OF JUDGE ROBERT BORK TO THE U.S. SUPREME COURT

● Mr. GLENN. Mr. President, the Senate has a constitutional role in approving or disapproving Judge Robert Bork to the Supreme Court. This particular appointment is undoubtedly one of the most important Senate confirmations we will have for a long time.

In assessing Judge Bork's nomination, my vote in the Senate must be decided on what I believe are the best interests of the Nation and the State of Ohio.

Having now made those judgments, I must in good conscience oppose the Bork nomination.

On a number of specific concerns, I do not believe Judge Bork's views reflect the feelings and values of most Americans and Ohioans. For example:

Individual rights: A primary role of the Supreme Court is to actively protect the fundamental rights of all Americans. In Judge Bork's view, the Court is limited to the exact wording of the Constitution in defending individual liberties, nothing more, nothing less. But in some cases, it is uncertain what the framer's intent was, or might be, in light of changing customs, morals, mores, and ethics now generally accepted by most Americans.

Civil rights: The legislation passed in the 1960's to guarantee the rights of black Americans was a long overdue remedy to decades of slavery and oppression. In Judge Bork's view, the legislation constituted "an extraordinary incursion into individual freedom." While black Americans were fighting for the right to sit at lunch counters and to stay in hotels with white Americans, Judge Bork was criticizing the Public Accommodations Civil Rights Act of 1964. Bork publicly stated his opposition to the Civil Rights law which opened public accommodations to people of all colors, implying this would infringe upon the rights of those who would discriminate to choose their own morality.

Women's rights: The courts have an important role to play in protecting women against discrimination. In Judge Bork's view, cases of sex discrimination should not receive heightened scrutiny under the equal protection clause of the 14th amendment. Consider how much worse off our mothers, wives, sisters, and daughters would be if Judge Bork's views had prevailed.

Privacy: Bork has stated that a right of privacy is not derived from constitutional materials. Specifically, Bork disagrees with the Supreme Court's decision on Griswold versus Connecticut, in which the Court found a right to privacy in the context of a married couple's use of contraceptives. Clearly this view jeopardizes all subsequent Supreme Court rulings predicated upon a privacy right, such as the right to choose to have an abortion (Roe versus Wade), and the right to be free from involuntary sterilization by the state (Skinner versus Oklahoma).

Congressional Access to Courts: Bork has ruled that Members of Congress have no standing to sue the executive branch in court. Under his view, Congress as an entity could not challenge the constitutionality of the executive branch's actions in the Iran-Contra affair; nor could individual Members have challenged the constitutionality of the Gramm-Rudman Act.

"One man, one vote": Bork opposes this Supreme Court ruling, stating that the principle runs counter to the text of the Fourteenth Amendment. Consistently, Bork opposed the Supreme Court's decision upholding the authority of Congress to curb the use of literacy tests in order to protect the right to vote.

The promise and the greatness of the American dream has always rested on the high premium we place on the rights of the individual. We're not the only country in the world to use "majority rule," but no other Constitution protects the fundamental human rights of individuals the way ours does. In protecting these rights, the Supreme Court has become the historic guardian of individual liberty.

But Judge Bork, for example, would have allowed States to ban contraceptives, to require voters to pay a poll tax, to enforce restrictive covenants, to outlaw abortion, and to sterilize prison inmates against their will, among other things.

While the above is only a partial review of the record, I don't believe that most Americans and Ohioans will see Judge Bork's views as falling within the mainstream of American judicial and legal thought that they want for their children and America's future.

I therefore urge my Senate colleagues to join me in rejecting his nomination.●

## THE HELMS AMENDMENT TO REPEAL THE DC INSURANCE LAW

● Mr. KENNEDY. Mr. President, yesterday's vote on the amendment proposed by Senator HELMS to the Appropriation Act for the District of Columbia concerns me greatly. This amendment allows for the repeal of a law passed by the District which imposes a 5-year moratorium on the use of the HIV antibody test by health and life insurers. Such action compels me to respond.

Under the principle of home rule, the District of Columbia has the right to legislate its own insurance regulations. Although the Home Rule Act does allow for congressional oversight of District laws, it must act within 30 days. More than a year has passed. Though Senator HELMS has put this question before the Senate before, this measure has not made it through Congress. Either there is home rule or there is not. I object strongly to this action at this late date. For Congress to have acted now makes a mockery of home rule.

I am also opposed to this amendment on the merits. The AIDS crisis demands immediate attention. We must do everything within our power to help stop the spread of this deadly virus. We must reach out with compassion and care to those who have been exposed to the virus or stricken by the disease. The public and private sector must work together to find a way to provide health services for the growing AIDS population. It is estimated that the direct cost of health care for people with AIDS will swell to $16 billion or more by 1991. Abandonment by insurers of people infected with the AIDS virus is not an adequate or acceptable response.

The District of Columbia has tried to deal wisely and compassionately with one of the most complex issues involving AIDS, and the Congress should not have overridden that decision.●

## NAUM MEIMAN

● Mr. SIMON. Mr. President, in recent months our perceptions of the Soviet Union have undergone rapid change. Glasnost has inspired a new openness in many areas of Soviet policy. This is to be commended. For me a particularly encouraging step has been the release of several longstanding refuseniks.

It is, however, only a step. Many more steps must be taken. For every refusenik released many more remain behind. Among them is my good friend, Naum Meiman.

If further progress is to be made, the recent releases cannot be taken for granted. Glasnost is not an irreversible process, as recent criticisms by two

does the Louis Harris Poll to which I referred tell us? It tells us plenty. Do the American people have an opinion on hostile takeovers? How about the business community? What is their view? The reaction is a real eye opener. Here it is:

First, among the groups affected by hostile takeovers which group did the American public feel rated the principal concern? The poll measured the concern among five key groups: Stockholders, top management, employees, the community where the company is located, and the firm's customers. The result was quite a surprise. When asked which are "affected a great deal," employees come through as far more important than any other group: 59 percent say a great deal, 50 percent say the same for the community, 44 percent cite the customers, 43 percent, the top management, and 42 percent and last—the stockholders. This was true in all categories of persons questioned when asked what group needed to be protected the most, the public as a whole said employees by a 63-percent margin. And get this—the stockholders said employees needed protection the most by a 65-percent margin, top business executives picked employees as most deserving of protection with a 49-percent vote, and as might be expected 67 percent of the employees thought employees should be protected most.

The poll concluded that few in the country as a whole feel that stockholders are the only relevant parties in a hostile corporate takeover.

In the responses to the extreme proposition that for the hostile takeover to succeed it should command 80 percent of the vote of stockholders. The total public supported this position by a landslide vote of 77 to 19 percent.

This poll was conducted by the Louis Harris organization in the first 3 weeks of January 1987. The organization interviewed a cross-section of 1,751 adults. It separately interviewed 682 top business executives. This included 265 top executives among the Business Week 1,000 top corporations, 217 among companies in the $40 to $400 million size group, and 200 from the $5 to $40 million size group.

Mr. President, I want to thank my good friend, the majority leader, once again for being so gracious and I yield the floor.

Mr. BYRD. Mr. President, my good friend is welcome.

RECOGNITION OF SENATOR MC CAIN

The ACTING PRESIDENT pro tempore. Under the previous order the distinguished Senator from Arizona, Mr. MCCAIN, is recognized for not to exceed 5 minutes.

Mr. McCAIN. Mr. President, I believe that the distinguished majority leader had allowed me 15 minutes. If I might find out if that is correct? If I could have the attention of the majority leader?

The ACTING PRESIDENT pro tempore. I say to the distinguished Senator from Arizona the order was 5 minutes.

Mr. McCAIN. Could I have the attention of the majority leader?

The ACTING PRESIDENT pro tempore. The Chair would say of the action of the majority leader, under the previous orders his schedule was such that the 9 o'clock hour would be the time when we would have the vote and if the Senator from Arizona should take 15 minutes, that would extend beyond the hour of 9 o'clock.

Mr. BYRD. What was the question the Senator addressed to me?

Mr. McCAIN. In discussion with the distinguished majority leader yesterday, the leader was kind enough to extend me the courtesy, or see if he could arrange the courtesy of 15 minutes for me yesterday? The President stated I have 5 minutes.

Mr. BYRD. Yes, the distinguished Senator asked me for 15 minutes. I had a piece of paper given to me last evening indicating that the Senator wanted 5 minutes, so I entered the order in that fashion.

Mr. President, I ask for unanimous consent the Senator be given 15 minutes.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered, and the Senator is recognized for 15 minutes.

Mr. McCAIN. Thank you. I would like to again express my appreciation for the many courtesies extended to me, such as this example, by the majority leader.

## THE NOMINATION OF JUDGE ROBERT BORK

Mr. McCAIN. Mr. President, each of us in the Senate has had a great deal of time and an ample supply of advice to help us decide how to vote on Judge Bork's nomination for the Supreme Court. This process has been made more difficult for some of us by extremely intense special interest group lobbying, and in some cases outright distortion, disinformation, and hysteria in trying to generate opposition to Judge Bork. I would like to explain why I am going to vote in favor of confirmation, and why I do so without any hesitation.

I believe that what the Senate should appropriately examine in a nominee are: Integrity and character, legal competence and ability, experience, and philosophy and judicial temperament. I believe Robert Bork is well qualified in all four respects, and that view is shared by the vast majority of people who have observed Judge Bork in his capacity as Solicitor General and Federal Court of Appeals Judge. In fact, former Chief Justice Warren Burger testified before the Senate Judiciary Committee that: "I know of no person who meets those qualifications better than he does."

Let me take the criteria in order. First, integrity and character. Judge Bork's honesty, integrity, and diligence are above reproach. The only issue that has been raised in this context is whether he acted properly in following President Nixon's 1973 order to fire Archibald Cox during the Watergate investigation. There is no finding that Bork was ever guilty of improper conduct. In fact, during that difficult episode, Robert Bork displayed courage and statesmanship and helped protect the integrity of the Watergate investigation. After determining that it was legal for him to discharge Cox, Bork informed Attorney General Richardson and Deputy Attorney General Ruckelshaus that he intended to resign as soon as the firing was completed. Richardson and Ruckelshaus persuaded him to stay because they thought it was important to have someone of his integrity, stature, and knowledge to continue on in the Justice Department. That decision helped prevent large-scale resignations that would have hurt the Department and the subsequent investigation. And Bork immediately safeguarded the investigation from any interference and kept it on track. In short, the attack on Robert Bork for this difficult act is simply without merit. In fact, Elliot Richardson testified before the Judiciary Committee last week in strong support of Bork's confirmation. Trying to use Watergate against Judge Bork is a transparent, political refuge for those seeking to use any arguments they can think of.

Next, let us consider legal competence and ability. Even his strongest critics do not claim any shortcoming here. He was a professor at Yale Law School for 15 years; Phi Beta Kappa; honors graduate from the University of Chicago Law School. He was Solicitor General from 1973-77, representing the United States before the Supreme Court in hundreds of cases. He was unanimously confirmed by the Senate in 1982 for the Federal Court of Appeals for the D.C. Circuit—receiving the American Bar Association's highest rating. In that capacity as a Federal appeals judge, not one of the more than 400 opinions that he has authored or joined has even been reversed. In addition, the Supreme Court has reviewed 6 of the 20 cases in which Bork filed a dissenting opinion—and the Court agreed with Judge Bork in all 6. This distinguished record, when added to the fact that Judge Bork has been in the majority in 95 percent of the cases he has heard as a Federal judge, demonstrates that he is not some intellectual "loose cannon on deck," or a quixotic or mav-

erick jurist, but is a thoughtful, reasoned jurist. He is not out to rechannel the mainstream of American jurisprudence.

Next, let me touch briefly on experience. I have discussed that a little already, but in the peculiarities of this particular confirmation process, Judge Bork's experience is especially important. That is because much of the criticism of Judge Bork arises from writing and commentaries he made many years ago as an academic. He has defended this academic record, but has also recanted some of his older statements, such as a statement of the 1960's that he did not believe the "commerce clause" of the Constitution was a valid source of power for Congress to outlaw racial discrimination in public accommodations.

I will go into my observations about Judge Bork's judicial philosophy in more detail later. My point here is that, it is one of the objectives of an academic to be critical, often provocative; Robert Bork's record of Federal service, first as Solicitor General and then as a Federal appellate judge, is critically important in order to determine his abilities and performance. We have a track record on Robert Bork under these circumstances—circumstances which are far more reliable indicators of his approach to being a constitutional decisionmaker than an academic article in the 1960's or the 1970's. This 9-year record in Government shows that Robert Bork is hardly a radical, but is rather a very thoughtful judge in sync with the vast majority of his colleagues on the bench.

Finally, I would like to discuss Judge Bork's philosophy and judicial temperament—for that is where the only honest disagreement and debate can lie on this nomination.

First, and most importantly, is the question of Judge Bork's view of the role of the judiciary. Judge Bork is clearly a believer in judicial restraint. He believes that the courts should not create social policy or arbitrate social policy disputes unless the Constitution clearly speaks to the issue. He believes that in our republican form of government such decisions are properly left to legislatures elected by the people, not Federal judges appointed for life. I have no problem with that view, because I wholeheartedly agree with it.

Now, some of my colleagues are so result oriented that they appear anxious to embrace judges who are willing to bend and shape the Constitution to fit a particular social agenda. That should trouble people of all political stripes. No matter how much we may like the result of a case, we should never feel comfortable creating new constitutional precedents out of whole cloth and binding future generations simply to accomplish a particular end.

Not only is that an inappropriate use of judicial power, but it leaves legislatures incapable of changing the outcome. Congress and State legislatures cannot change Supreme Court rulings when they are based on constitutional grounds, as opposed to statutory interpretation. That is fine when the Court ruling is based on a clearly intended constitutional right. But that is wrong when a fair reading of the Constitution shows no such right was within the realm of intentions. That is all Judge Bork is saying.

Let us take two prime examples—the two Judge Bork has received the most criticism for. The right of privacy and the equal protection guarantee of the 14th amendment.

The right of privacy was created by Justice Douglas in the Griswold case and was used as the basis of the later Roe versus Wade abortion case. It was created by a Supreme Court opinion which struck down a Connecticut anticontraceptive statute and found various "emanations" and "penumbras" throughout the Constitution which warranted the leap to creating a new right that has still never been fully defined. No one, including Judge Bork, argues that the Connecticut law was appropriate. Judge Bork even testified that there were other ways to strike down the law.

What he—and many constitutional scholars—objected to was creating such a new constitutional right when that right could not be found or derived from one of the provisions of the Constitution or our Bill of Rights. And he objected to creating a right that has no definition or clear limits. For example, does such a right prohibit a legislature from outlawing production and use of drugs in your own home? Does such a right prohibit outlawing prostitution?

The point is that just because one might be comfortable with the result of the Griswold case, does not mean it was well-reasoned or good law. The fact that Judge Bork has criticized its reasoning does not mean he is opposed to privacy or contraceptives. It simply means he is willing to point out the obvious problems with the Court's reasoning.

One should remember that, if our courts are free to go beyond the terms of our cherished Constitution to create new constitutional mandates that some might find acceptable, the Supreme Court in later years could use that free-roaming power to create mandates we do not like. Neither course is sound. The only sound course for the courts is to apply the law as it is written, not create it as they might wish it to be.

That same reasoning used in the Griswold case led to what must be the clearest example of judicial "legislation"—the abortion case of Roe versus Wade. Whether one is pro or antiabortion, or whether one approves or disapproves of the result of the decision, it is difficult to argue that the Court's opinion is not constitutionally suspect. The Court found that this new constitutional right of privacy forbid the States from regulating abortion during the first 3 months of pregnancy, authorized limited regulation of abortions during the second 3 months, and authorized States to severely regulate or prohibit abortions during the last 3 months. Furthermore, these constitutional rights could be subject to change as medical technology changed and advanced.

This may or may not be how a legislature should decide how abortions should be regulated. But to argue that the Constitution says this is nonsense. And to establish constitutional rights that can vary as technology changes is nonsense.

Again, the issue is not whether Bork is antiabortion or antiprivacy. The question is this: Is Robert Bork unfit for the Supreme Court because he believes this decision is logically and constitutionally flawed? I think not.

Let us take the other area where Judge Bork's views have been grossly distorted and criticized—the equal protection clause of the 14th amendment, which says no State shall "deny to any person within its jurisdiction the equal protection of the laws."

The majority of the Court has developed a "three-tiered" approach to equal protection analysis, which Bork has thoughtfully criticized. The Court divides people into various groups and then applies different standards of protection depending on what group you are in. "Suspect" classifications, including racial groups, are given "strict scrutiny" by the Court. A second tier of groups, including sexual classifications, is given "intermediate scrutiny." Other group classifications need only have a "rational basis." Judge Bork has criticized this for good reason. The Court has never adequately explained the criteria by which groups are included or excluded in these different categories. The Court, in fact, has been inconsistent in making such groupings and applying these tests. Judge Bork says we should apply the equal protection guarantees equally to all persons, and that any distinction made by classifying people must pass the same test of reasonableness. He's further said that racial discrimination would never be reasonable or permissible in his view, and that sexual classifications would very, very rarely be reasonable or permissible. That, it seems to me, is a defensible position.

In his testimony, Judge Bork has defended himself and his views well. Of course, we must protect minorities and even majorities from societal discrimination. But this does not mean that,

because he has criticized the methodology the Court's used, he is any less committed to full and fair enforcement of the equal protection clause. All it means is that he is a smart and outspoken enough legal scholar to point out some of the very real problems with the Court's legal reasoning.

Before I conclude, I would like to comment on some of the opposition to Judge Bork. I have no problem with my colleagues voting against Bork if they truly believe he is unfit for the Supreme Court—although I personally cannot conceive of how you could reach that conclusion. I do have a serious problem, with the tactics of distortion, hysteria, and politicized paranoia that many of the special interests have used and exploited to oppose this man.

They have tried to label him as a lawbreaker for his performance of his orders in the Watergate investigation. Wrong.

They have tried to say his confirmation means contraceptives will no longer be available, that abortions will become illegal, that homosexuals will lose their rights, that minorities could be discriminated against, that women would lose their equal protection guarantees. Wrong, wrong, wrong, wrong, wrong.

Let us deal with reality. The opponents of Robert Bork—who unanimously supported confirming Justice Scalia, who is probably more conservative—have made this a political contest. Why? Maybe, because they have not been able to devise a domestic policy agenda that has enough popular support to pursue. So they have created a monstrous paper tiger out of Robert Bork—a fearful, loathesome embodiment of injustices from the past—that they want to strike down in righteous wrath.

Well, baloney.

The Supreme Court starts its new term next Monday—and it does so with a Justice missing. Why? Because the Judiciary Committee delayed Judge Bork's nomination for a longer period than any other Supreme Court Justice in recent history. Judge Bork's nomination had been sitting in the Senate for 70 days before the committee even began its hearings. Well, enough time has passed. Let us stop delaying, and let us get a vote promptly. The American people deserve a Supreme Court with nine Justices.

I believe Robert Bork will be an outstanding Justice and contributor on that Court.

He is a thoughtful and extremely well qualified lawyer and jurist. He has impeccable integrity. He is experienced. He espouses the proper role of the courts—to apply the law and the Constitution, not find ways to second guess legislatures when they exercise their legislative authority. And he is committed to ensuring that the Constitution is applied fairly and rationally to all Americans.

The phone calls and letters I have received from the thousands of Arizonans who have contacted me are almost 2 to 1 in favor of confirming Judge Bork. There is no question where those people are on this issue. As my dear friend and esteemed predecessor in the Senate, Barry Goldwater, told me yesterday: "I would be appalled if the Senate didn't confirm a man who's so exceptionally well qualified. The Senate would lose it's self-respect if it turns Bork down." Indeed, Mr. President, I do not know how any American who has closely and fairly studied this man's record and heard his testimony could help but think that Robert Bork deserves our support and will be a great Supreme Court Justice.

Thank you, Mr. President.

The ACTING PRESIDENT pro tempore. The Senator's time has expired.

## RECOGNITION OF SENATOR BENTSEN

The ACTING PRESIDENT pro tempore. Under the previous order, the distinguished Senator from Texas [Mr. BENTSEN] is recognized for not to exceed 15 minutes. The Senator from Texas.

Mr. BENTSEN. Thank you very much, Mr. President.

## NOMINATION OF JUDGE BORK

Mr. BENTSEN. Mr. President, on July 1, 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.

Millions of Americans feel very strongly about the Bork nomination. They fervently embrace or emphatically reject his outspoken views on some of the basic issues in our democracy—issues like privacy, equality, and the way our Constitution is interpreted.

The Bork nomination has assumed an added significance in the minds of many Americans. As successor to Justice Powell and the potential "swing vote" on the Supreme Court, Robert Bork will, if approved by the Senate, be in position to exercise vast influence over every aspect of American life well into the 21st century.

At the time Judge Bork's nomination was announced I resolved to withhold judgment—and comment—until the Committee on the Judiciary had completed its hearings. I wanted to hear Judge Bork testify and respond to the committee. I wanted to hear the opinions and testimony of jurists and representatives of those who felt most threatened by—and supportive of—Judge Bork.

Those hearings have been completed. I have heard Judge Bork. I have listened to the testimony. I have weighed the arguments pro and con and I have decided to oppose the confirmation of Robert Bork as a Justice of the Supreme Court.

Mr. President, I would like to take just a few moments this morning to explain some of the key factors that influenced my decision to vote against Judge Bork's confirmation. One point that came in clearly through the static of the committee hearings was Judge Bork's repeated belief that he cannot properly read the Constitution as recognizing a general right to privacy since no particular provision of the document specifically grants such a right.

I happen to agree with a former Supreme Court Justice named Louis Brandeis who wrote that the makers of the Constitution "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

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 a constitutional right to privacy—especially in the home.

The case that most vividly demonstrates my differences with Judge Bork on the issue of privacy in the home is Griswold versus Connecticut. In that case the Supreme Court struck down a State law that banned the sale or use of contraceptives, even by married couples. Judge Bork has called that decision "unprincipled." And as recently as 1986 he suggested that he did not think "there is a supportable method of constitutional reasoning underlying the Griswold decision." I could not disagree more. I do not think Government has any business intruding into the American home.

Civil rights is another area where Judge Bork and I have profound differences that make it impossible for me to vote for his confirmation. 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.

In 1963 he suggested the public accommodations bill pending before Congress contained a principle of "unsurpassed ugliness" since it would coerce white restaurant and hotel owners to serve patrons they would prefer not to serve. A year earlier in 1962, the first major hotel in Houston to be integrated had opened for business. As head of the company that owned that hotel, I find such a statement repugnant.

In 1968, in 1971, and in 1973 he criticized "one-person, one-vote" decisions by the Supreme Court. In 1973 and again in 1985 Judge Bork attacked the Supreme Court decision, Harper versus Virginia Board of Election, that outlawed the use of a State poll tax as a prerequisite to voting. He continues to hold this position.

Just as a personal aside, Mr. President, I want to point out that back in 1949, when I was a Member of the House of Representatives, we voted on a constitutional amendment to outlaw the poll tax. Only two Members of the Texas delegation voted for that amendment—and I was one of them. So I admit to being a little upset when almost 40 years later, we have a nominee for the highest court in the land who throws legal darts at decisions outlawing the poll tax.

In a very fundamental and very significant sense, America has set its house in order when it comes to civil rights. Sure, I know many people would argue that we still have a long way to go. But even they would agree that we have made major, irreversible progress. That progress was purchased at a price. We all looked hard at ourselves, we made changes and sometimes those changes were traumatic. But they have had time to sink in and take hold and be accepted.

I question whether very many Americans—black, white, Hispanic or others—want to turn back the clock and revisit those questions. 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. Now what we need to do is consolidate our progress and keep moving forward.

My third point of disagreement with Judge Bork concerns his interpretation of the equal protection clause of the 14th amendment. According to Judge Bork—as recently as 4 months ago—the equal protection clause should be "kept to things like race and ethnicity." The Supreme Court disagrees. I disagree. Millions of American women disagree. We believe that the equal protection clause should also protect women against discrimination in the workplace.

I am aware that in his testimony before the Senate Judiciary Committee, Judge Bork beat a tactical rhetorical retreat. He reversed field and allowed that the equal protection clause should apply to "everyone." Well, that is fine as far as it goes, but it is precisely that kind of new-found reason that has raised troubling questions about Judge Bork's so-called confirmation conversion.

Obviously, Mr. President, Judge Bork has a keen legal mind. He works hard and has written copiously. He has a flair for the language. He has earned his reputation as something of a "Legal Lone Ranger," with a talent for investing almost any position, no matter how farfetched, with a patina of intellectual respectability.

Some witnesses have even testified that is the only way to rise in the rarefied intellectual ether of Yale University. And that may be true.

But it is also true that a feisty, ironclad consistency has been the trademark of Judge Bork's career, at least until this summer.

It concerns me, and perhaps it may even trouble Robert Bork's supporters, that he demonstrated more flexibility in 5 days before the committee than in the previous 25 years.

Those who would like to see Judge Bork confirmed by the Senate have frequently made the point that he is a "law and order judge." I agree and I commend Judge Bork on his strong stand in this area. If an abiding commitment to law and order was the only point at issue, I would have no problem voting for Robert Bork.

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.

I also want to emphasize that I am not opposed to placing conservative judges on the Supreme Court. I voted for Justice O'Connor. I voted for Justice Scalia. I voted for Chief Justice Rehnquist. And if the administration is looking for a talented, respected, conservative Supreme Court nominee in the near future, I recommend that they take a close look at someone like Fifth Circuit Court Judge Pat Higginbotham of Dallas who has all of the talent and none of the controversy that surrounds Judge Bork.

Mr. President, I cannot in good conscience vote to confirm Robert Bork's nomination to the Supreme Court. I have profound disagreements with the nominee on issues as basic as privacy in the home—civil rights—and the equal protection clause of the 14th amendment. I have doubts about his new-found flexibility.

Judge Bork is a controversial, ideological nominee who is staunchly opposed by so many ordinary citizens from so many walks of life. In my judgment he is not an appropriate choice for the Supreme Court and I urge my colleagues to join me in opposing this nomination.

Mr. President, I yield back the balance of my time.

The ACTING PRESIDENT pro tempore. Who seeks recognition?

## RECOGNITION OF SENATOR SIMPSON

The ACTING PRESIDENT pro tempore. Under the previous order the distinguished Senator from Wyoming [Mr. SIMPSON] is recognized for not to exceed 10 minutes.

Mr. SIMPSON. Mr. President, I thank you.

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## THE NOMINATION OF JUDGE ROBERT BORK

Mr. SIMPSON. Mr. President, I have the greatest respect for Senator BENTSEN. He is an extraordinary man. There is no one more respected here in this body. So I am disappointed to see that he too has decided to reject Judge Bork.

I thought I would just speak for a few moments this morning regarding that nomination as I have witnessed several of my colleagues pronounce their decision to reject Robert Bork—to reject him completely. Those decisions have come yesterday, they have come today, and they came only 1 day following the close of the public committee hearings on the nomination. That is the most disappointing part of it.

I do not wish in any way to be misconstrued in doubting the sincerity of those who have already stated their opposition here on this floor. But I am concerned that such actions may lead other Senators into a hasty decision on the nomination.

I refer to it as the "defection-of-the-day mode." Yet, those who have spoken, and sincerely so, were not on my list as ever being for Judge Bork, but simply always "willing to listen."

The Judiciary Committee engaged in many hours of testimony and discussion on the Bork hearings. But that is only the first step in the fulfillment of the Senate's duty to "advise and consent." That is the irony of the situation. We have not even done anything in the Judiciary Committee. On next Tuesday, the committee will vote on the nomination of Judge Bork, and then that nomination will be taken to this floor for complete and thorough debate by the full body of 100. We have never had that yet. Eighty-six of us have never even been in the full debate.

So I urge my colleagues who have not had the opportunity to fully review the committee hearings and the transcript to do so. I urge my colleagues to withhold judgment and to review the committee report after its completion—and that has not yet been compiled—for further explanation of the events which have transpired in the committee room on this very important matter. That seems odd to me—not to have reviewed the transcripts, not to have reviewed the report.

So I say respectfully to all my colleagues: I do hope and trust you will collect all of your facts, review the transcripts, read the report, ask what portions of his background disturb you. My hunch is that it will be something he said in 1963, which has been well explained, on civil rights. As I have said many many times, there are three present Members of this body who voted against the civil rights bill, and they are not lesser people to us at all, not one whit. They are superb people in this Senate. We do not keep score on them.

There was more discussion of the 1971 Indiana law review article than there was of the Constitution of the United States during the committee debate, and that was disappointing, because he prefaced all that with the statement that it was informal; that if it was to have been more balanced and more thorough and more complete and more well researched, he would have written a book. But let me tell you, I heard enough about the Indiana law review article of 1971 to last forever. As I say, there was more reference to it than there was to the Constitution of the United States.

So I hope my colleagues will do that and will listen. That is called fairness. I think that is all we call it, and we all know that, because in our own lives, and especially our political lives, we have suffered slings and arrows aplenty.

This nomination is politics, pure and simple politics, nothing more. There will be others, and there have been some before, but this one is the quintessential politics. This is the selection of Supreme Court Justices by Roper poll and Harris poll and Gallup poll. I do not think that is what the Founding Fathers had in mind some 200 years ago when they asked us here to perform our role of advice and consent.

As my lovely friend from Texas has just said, so many citizens from so many States are so disturbed about this. Who would not be? I have never seen such an extraordinary campaign of misinformation, distortion, and lies—and I use that word very carefully. I do not ever try to misuse the word "lies." That is much more than loose facts.

If I were a young lawyer living in Cody, WY, which I was at one time, and raising my babies, and doing my business, and coaching the Little League, and going to the Rotary Club and the Chamber of Commerce, and I picked up the paper—the Casper Star-Tribune or the Billings Gazette, or whatever, it might be in Wyoming—and read the full-page ads of "The People versus Bork," and the reference to the young, pregnant woman, and the fact that there would be an invasion of the bedroom, an invasion of privacy, and no rights of privacy for a woman, and if I hear Gregory Peck—and that is a powerful ad of his, I would be deeply alarmed. I have been a great admirer of his, and thus there is another irony: that great movie of his "To Kill A Mockingbird," was about fairness and prejudice; and his ad is harsh and alarming and distorted. and it has helped to prejudice the American people against Judge Bork. That is the way it is.

If I had seen those things while I was busy with my life as most Americans are—they are not really paying attention, but they read and they watch and they have seen all this—and they are frightened. Who frightened them, and with what? They were frightened with emotion, fear, guilt, and racism. As I say, if I had been in that situation, I would have turned to Ann and said: "Better write our Senator. We don't want a guy like that. Keep that man off the Bench."

That is reality. That is all being spread by those public interest groups who are obsessively opposed to this nomination and were waiting for Judge Bork to surface as soon as Justice Scalia attained the Bench.

Eighty-six of our remarkable colleagues need to get into this debate, whether they are for Bork or opposed to Bork, and then the American people will know a little more than they do now.

It was former Attorney General Griffin Bell, a man for whom I have the deepest admiration, a very special man I have learned to know, who said in testimony before the committee that when he woke that morning and read the papers, a poll showing that a majority of the people were against Judge Bork, he was struck that America might be abandoning its constitutional process for confirming judges by getting away from the very thoughtful and reasoned decisionmaking of the U.S. Senate and turning, instead, to the polls for their constitutional role of advice and consent.

He also eloquently reminded us that it was Mr. Thomas Jefferson who was of the opinion that in a representative form of government, Senators are the elected ones and that we owe the people of this great country our "best judgment." That was Thomas Jefferson.

The best judgment does not mean what is the best polling data or who is pushing hardest or who is raising more hell. Judgments here should be drawn after a careful review of facts and opinions and the transcripts and the report on each side, from both sides of the aisle, and not in response to the latest poll or a television ad or by weighing the mail. People are doing that now. They are weighing the mail. I hope the American public knows that is going on, too.

So, this remarkable institution, this U.S. Senate, is directed to give its advice and consent. That means we do that with 100 of us out here debating. That has not been done. I think it would be eminently fair to do that.

So let us continue with the process which has really only just begun, and let us move now to a vote in the committee, then move the nomination to the floor for consideration by this entire U.S. Senate. Only after those necessary steps are completed will we then have a vote on whether to actually provide our honest advise and consent to the nomination of Judge Bork as the next Associate Justice of the U.S. Supreme Court.

I urge a bit of calm and restraint and deliberate reasoning in an atmosphere that would be free of emotion, fear, guilt and racism, stirred up by the various interest groups and regrettably on both sides of the issue.

So I thank you, Mr. President, and I hope that all of us will look forward to a very interesting debate where we can deal with the issues without the requirement of pollsters to assist us in our constitutional work.

I thank the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Kentucky using his prerogative as a Senator suggests the absence of a quorum.

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 (Mr. WIRTH). Without objection, it is so ordered.

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## NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEARS 1988 AND 1989

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of the unfinished business, S. 1174, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 1174) to authorize appropriations for fiscal years 1988 and 1989 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal years for the Armed Forces, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

(1) Bumpers Amendment No. 825, to limit the operational deployment of certain strategic offensive nuclear weapons systems and launchers.

(2) Dole-Warner Amendment No. 839, to provide that the United States shall not be obligated to abide by the provisions of the SALT II Treaty, in whole or in part, unless and until (a) the Senate has amended the Treaty so as to give it legal force if it were ratified; (b) the Senate has given its advice and consent to the Treaty; (c) the Union of

Without objection, the bill is deemed to have been read the third time.

The bill having been read the third time, the question is, Shall it pass?

So the bill (S. 866), as amended, was passed.

Mr. NUNN. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. WARNER. I move to table the motion to reconsider.

The motion to lay on the table was agreed to.

Mr. NUNN. I thank the Chair. I thank my friend from Virginia. I notice my friend from Virginia voted for us several times. I thank him for those votes.

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

Mr. BYRD. Mr. President, I ask for the regular order.

The PRESIDING OFFICER. Regular order is requested.

Under the previous order the Senate will proceed to the consideration of the bill S. 1394 which the clerk will report.

The legislative clerk read as follows:

A bill (S. 1394) to authorize appropriations for fiscal year 1988 for the Department of State, the United States Information Agency, the Board for International Broadcasting, and for other purposes.

The Senate proceeded to consider the bill.

The PRESIDING OFFICER. The Chair recognizes the majority leader.

Mr. BYRD. For the information of Senators, it is my intention not to have any rollcall votes after 3:30 to 4 today, but I would like to see the Senate make progress in the meantime on the State Department authorization bill. After 3:30, 4, it will be my intention to set up a period for morning business so that Senators might speak as long as they wish on other matters. I know there are some Senators who wish to speak on the Bork nomination. But I would hope that during this period between now and, say, 3:30 at least the Senate could stay on the State Department authorization bill.

The Senator from Rhode Island and the distinguished ranking manager have worked hard in the committee. This measure has been on the calendar a long time. Every time I turned one corner, I would find the chairman meeting me and importuning me, adjuring me, beseeching me, urging me to get on to this State authorization bill. Moreover, we cannot take up the State-Justice-Commerce appropriation bill until this bill has been passed. So it is important that we get some progress made today.

However, I promised Mr. BAUCUS that I would seek consent for him to speak out of order for 10 minutes or 5 or 6 or 7, somewhere along there, and I would hope then that we could wait until 3:30 at least before other Senators speak on the Bork nomination.

So I ask unanimous consent that the distinguished Senator from Montana [Mr. BAUCUS] may speak any time up to 10 minutes. That will give other Senators time to prepare for taking up the State Department authorization bill. Some Senators may have amendments and so on.

The PRESIDING OFFICER. Is there objection?

Mr. HELMS. Reserving the right to object, if the majority leader will be so kind as to include the same provision for Senator HECHT, there will be no objection.

Mr. BYRD. As a matter of fact, the Senator does not need unanimous consent, Mr. President. I am just trying to lay out the matter in a framework that will hopefully assure the managers of that bill that they will not be interrupted so much during this afternoon. But the Senator does not need consent and he can speak longer than 10 minutes.

Mr. HELMS. We will just have an informal agreement. Senator HECHT can have 5 minutes as well. I agree you do not need unanimous consent in either case.

Mr. BYRD. We would need unanimous consent if we prohibited Senators from speaking on other matters during the next 2½ hours.

Mr. HELMS. That is true, and I am willing to enter into that if the majority leader will propound it and include Senator HECHT.

Mr. BYRD. I will do that.

Mr. HELMS. I thank the Senator.

Mr. BYRD. I ask unanimous consent that speeches be germane to the matter before the Senate, the pending business, with the exception of Mr. BAUCUS and Mr. HECHT.

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

Mr. BYRD. And then I would like to indicate to the Senate it is my intention soon to move to the Verity nomination. I do not intend to so move this afternoon but Senators should be aware of my intention to move to that. Possibly I could move to it today and vote on it Monday or vote on a cloture motion or something by next week. So I am just informing Senators that is going to be a matter to come before the Senate—soon.

Also, the catastrophic illness measure, I have tried for weeks to get that matter up. I tried before the recess, and the objection was that there were matters that needed to be worked out on it, "Let's wait until after the recess." After the recess I tried and have not been able to get it up. So I may make that motion this afternoon and put a cloture motion on it, which would mean that sometime next week we would vote on that cloture motion. I do not want to catch anybody unawares, so I am laying it out on the table for that purpose.

Mr. HELMS. Will the Senator yield?

Mr. BYRD. Yes.

Mr. HELMS. There will not be any necessity for a cloture motion on the Verity nomination so far as this Senator is concerned, or any other Senator, to my knowledge. I say to the distinguished majority leader that I discussed this nomination with the President just a little while ago down at the White House. The only reluctance I had about it was the nonreceipt of information that I had requested for 2 years. The President assured me they were going to work that out, so I think we can move on.

Mr. BYRD. Very well.

Mr. HELMS. There will be some discussion, I say to the majority leader. I do not think anyone is going to filibuster; certainly I am not.

Mr. BYRD. I thank the distinguished Senator. I yield the floor.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, I very much thank the managers of the bill, as well as the majority leader, for working out this agreement.

Mr. PRYOR. Mr. President, the Senate is not in order.

The PRESIDING OFFICER (Mr. CONRAD). The Senator from Arkansas is correct. The Senate is not in order.

The Senator from Montana.

## NOMINATION OF JUDGE BORK

Mr. BAUCUS. Mr. President, the brilliance of our constitutional form of Government rests on the pillars of three separate but equal branches of Government and on the written constitutional protection of the people's basic rights. The President speaks with one voice and is elected by all the people. The Congress speaks with many voices but it, too, is elected by all the people. The Supreme Court, by virtue of the appointment and confirmation powers of Federal elected officials, is in effect an extension of the collective conscience of the United States.

Thus, when the Senate decides whether to confirm a Supreme Court nominee, it is not beholden to the concerns of the President but to the deepest concerns and needs of the people. This is particularly true given the lifetime tenure of a Supreme Court Justice and the need for a Justice to staunchly defend the people's constitutional guarantees, including free speech, equal protection under the laws, religious freedom, due process under the laws, and the rights of privacy.

Like all Supreme Court nominees, this one will significantly affect all of us and our children. He is likely to serve well into the 21st century. He

will exercise extraordinary power and he will affect us directly, for as Judge Bork stated in his confirmation hearings, in deciding individual cases, someone gets hurt.

The people of Montana have elected me to represent their views and to exercise my best judgment. In deference to the nominee and in order to give him his day in court, I felt it only proper to reserve my judgment until after the completion of the Judiciary Committee hearings. It was during those days of exhaustive questions to Judge Bork, both by opponents and by advocates of his confirmation, and particularly during his answers to those questions, that my views began to take shape. Upon reading the transcript of that hearing, I now have reached my conclusion.

It is clear that Judge Bork is competent. He is a distinguished legal scholar. He has served as Solicitor General of the United States and on the U.S. Court of Appeals.

The American Bar Association has given him its highest possible rating. It is less clear, however, that he possesses the requisite judicial philosophy to be entrusted with constitutional powers over our lives.

Although some suggest that the U.S. Senate should not pass upon the judicial philosophy of a nominee, I believe that the Senate not only has a right but an obligation to do so. Just as the President may consider judicial philosophy in his appointment, so may the Senate in its confirmation. Indeed, the Constitutional Convention debates make this clear.

It is true that a Senator should not oppose a nominee who does not expouse that Senator's own particular judicial philosophy, but it is equally true that a Senator may determine whether a nominee is committed to the protection of basic constitutional values of the American people.

What are those basic values? One is the separation of powers of our Federal Government. Another is freedom of speech. Another is equal opportunity. Still another is personal autonomy: the right to be left alone.

It is generally agreed that a Supreme Court Justice should not make the law but, rather, interpret the law according to the plain meaning of the words either in the Constitution or in the statute.

Judge Bork, in fact, states that a Justice should look to the meaning of the words according to the original intent of those who drafted them.

I, too, believe that original intent is critical. Judge Bork's view of original intent as applied to the separation of powers I believe is mixed. He definitely is correct in saying that Congress may not by statute deny a court jurisdiction over constitutional questions. In fact, he so testified before Congress against a bill that would limit Supreme Court jurisdiction questions dealing with women's reproductive rights.

On the other hand, his views of the power of executive privilege as applied in the Watergate era causes grave concern.

It is Judge Bork's view of original intent, more precisely his use of original intent in civil liberties cases, equal protection cases, and rights of privacy cases, that I find most disturbing.

Whether it is his interpretation of free speech, antidiscrimination laws, or the right of people to basic privacy, I find that Judge Bork's view of original intent is too narrow.

It is true that our Founding Fathers did not consider free speech as it applies to the times and technologies of the 1980's. Neither did they know of the hopes and aspirations of minorities and their meaning almost two centuries later. And certainly they were unaware of the scientific and medical techologies of the future as they apply it to the rights of privacy.

Judge Bork's voluminous writings and views on these basic rights tend to say that, because the present application of those rights were not considered at the time, they should be much less protected. I do not think that is what our Founding Fathers intended. Our Founding Fathers were people, ordinary people. They struggled mightily to escape tyranny, and to forge a new way of life based on the dispersal of power and on the constitutional protection of basic rights and liberties.

It is my strong view, and I believe it is the view of the American people, that the meaning of those values intended by our Founding Fathers would include many more of the rights of free speech, equal protection, and privacy than Judge Bork would find. It is because that disparity is so great and its consequences so critical to the core strength to our country that I find this nomination very disturbing.

His change of position on many of these issues during the Judiciary Committee hearings also does not provide much comfort. Growth and the ability to change one's views is often a mark of maturity. Yet, the degree of change, and the manner in which those changes were stated are not very convincing. In fact, it even raises additional questions. It is, therefore my belief that it would be unwise to entrust our constitutional values to this nominee. Judge Bork should not be confirmed.

I yield the floor.

Mr. HECHT addressed the Chair.

The PRESIDING OFFICER. The Senator from Nevada.

## ENERGY AND WATER APPROPRIATIONS

Mr. HECHT. Mr. President, in a few days the Senate will consider the energy and water appropriations bill. Attached to that bill is a provision that makes major changes in the Nation's high level nuclear waste program. This provision is identical to the one that the Energy Committee recently reported out as part of budget reconciliation, and as a freestanding bill, S. 1668.

S. 1668 would depart from the current program requiring three sites to be studied for a high level nuclear waste repository. Instead, S. 1668 would have the Energy Department characterize one site at a time. There are many who believe that my State, Nevada, would be pushed to the head of the line if these provisions are signed into law.

The chairman of the Energy Committee has been very skillful in promoting this legislation. Attempts to stop the bill have failed in the Energy Committee, they have failed in the Appropriations Committee, and the outlook for a long, drawn out battle on the floor of the Senate is uncertain at best.

I have opposed the chairman's bill in committee, and I will fight it when it reaches the floor of the Senate. My opposition is based on my belief, after extensive discussions with members of the scientific community, a tour of nuclear facilities in Europe, and study of methods used by other nuclear nations, that deep geologic disposal of spent fuel rods is not the safest, most cost-effective, or energy-efficient way for our country to deal with high level nuclear waste. The right approach is what is called the complete nuclear fuel cycle. This involves long-term storage and reprocessing of spent fuel, recycling the energy so it can benefit our Nation. It was a mistake for our Nation to stop reprocessing nuclear waste. Every other major nuclear nation in the world reprocesses. Reprocessing is the answer, not deep geologic disposal of spent fuel.

Reprocessing is the direction our Nation should be headed in, not the direction that is the primary thrust of this legislation. Deep geologic disposal has not been proven safe or effective. Reprocessing and above-ground storage, on the other hand, are in active use at nuclear facilities around the world.

As this legislation is debated, there will be lots of discussion about where a repository should be located. The problem is, we will be debating the wrong question. The question is not where we should put it, but, why we should have one at all.

During the course of the coming debate I will be an active participant. My purpose will not be to obstruct the

tempt to put something together that avoids the sequester.

I must say that I also believe that if we are interested in getting the President of the United States involved, we have to put something of value to him on the table, and I do not know how we do that. We are not doing that by sending domestic appropriation bills through one at a time, then, in some mysterious way saying we are going to save money someplace.

DEFENSE IS THE KEY TO COMPROMISE

The best way to keep the President in the White House and have nobody talk to anyone here in Congress is to fail to start indicating what level are we going to fund defense this year. I suggest that if it is the low tier in defense, and I am talking technical language here for fellow Senators—they know what that is—under the budget resolution, I would point out that the appropriators have borrowed from it, to the tune of $500 million. So there is already $500 million less for defense, but, Mr. President, if we are talking about low tier defense appropriations, you need $12.5 billion in taxes together with what I have just described as the other savings.

If you are talking about high tier defense appropriations, you need $17.5 billion in taxes to meet the $23 billion mark.

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from Florida retains 2 minutes on his 10 minutes.

Mr. CHILES. Mr. President, I will yield 30 seconds.

Mr. DOMENICI. So I am suggesting that some way or another we have to start talking about the serious issue of where are we going with defense, how much do we intend to fund it for, are we going to find any other savings anywhere in the domestic side of this budget anywhere before we really will get the President interested in talking. I hope we can do that because I think we ought to avoid the sequester.

The PRESIDING OFFICER. The Senator from Florida.

Mr. CHILES. Mr. President, I think that the gist of the conversations both by myself and my distinguished colleague from New Mexico, who has perhaps pointed out a little more of the details of some of the problems, suggest that we should not wait until October 20. We should be trying to start these talks now.

I think that you have to have some leadership from the House and the Senate as well as from the administration in order to do this. It is always the chicken and egg.

How do you get something done if you do not know what the other side will take? Rather than wait for this thing now, it seems like we should be doing something. There are still people who do not understand that at least for now the sequester is the nuclear deterrent of the budget process and the whole idea is to have enough respect for its destructive force that we will do the responsible things to try to avoid it.

It kind of concerns me when I hear people say just forget about making those tough choices and let sequester do the job. It is like saying it is so much trouble to dig the hole, we will just use a stick of dynamite to blow the hole. Of course you get a hole that way. And if there is anybody left around, of course, they are in the hole.

So it seems the whole idea that we want behind the sequester is to make us all feel surrounded and then maybe we will get together and try to fight our way out of it. I think we are surrounded now. I think that is very clear. I hope some other people understand that.

The Senator from Florida is ready, and I hope with my colleague, to sort of go anywhere and talk to anybody and try to join any group that will try to begin to work on this process. I think it is so essential that we do not waste time between now and October 20 to start that process.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from New Mexico.

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## NOMINATION OF ROBERT BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT

Mr. BINGAMAN. Mr. President, this morning I announced that I would vote against the confirmation of Judge Robert Bork for the position of Associate Justice of the U.S. Supreme Court. At this time, I wish to explain the reasons for my decision in a little more depth for my colleagues.

Mr. President, this Nation is at an economic crossroads. Over the next 5 or 10 years, the President of the United States, the House of Representatives, and this U.S. Senate will have to continue to confront the critical question of how we are to reverse the trends which signal major structural problems in our economy: my colleagues have just alluded to one of those, higher budget deficits, higher trade deficits, and a declining standard of living. Our highest priority over the next decade is to debate and decide upon strategies for making this Nation once again economically prosperous in a global, very competitive international marketplace and to ensure that all of our children, including our daughters, and our Hispanic, native American, black, and poor children, fully participate in that prosperity.

The economic challenge ahead of us will require an almost single-minded commitment, an unwavering will, and great perseverance. We will have to focus our time, energy, hard work, and other resources on building stronger families, giving our children a quality education, helping women to become full and equal participants in our economy, retraining our displaced workers, and exploiting our research and new technologies to produce greater economic opportunity and a higher standard of living for all of our people. And we can only meet this challenge if all of our people—including our women, our racial minorities, and our poor—can confidently know that they will eventually enjoy their fair share of that economic prosperity. We simply cannot afford to risk an era of social strife and division that will either distract us from this central challenge or shatter this confidence.

And that is why I must oppose the nomination of Judge Bork. For if the Senate confirms his nomination, I believe that we will risk spending a substantial part of the next decade not debating these key questions, but rather debating legislation that attempts to restore previous Supreme Court precedents or to correct future Supreme Court decisions that do not follow the logic of existing Supreme Court precedents.

We will run the risk that in the areas of family privacy and equal protection of the laws for women and racial minorities, old wounds will be reported, and strife and division among large segments of our people will demand our time, energy, and concern. Instead of consolidating the national consensus we have achieved on the need for personal and family privacy and for equal protection for women and minorities, and building on that consensus to focus the Nation's collective will on the great economic task ahead, we may risk destroying that consensus. We may risk shattering a unified commitment to meeting our economic challenge. We may end up spending much of our precious time, energy, and concern fighting each other over issues which have already once been settled instead of competing as one nation in the international marketplace.

I have only come to these conclusions after the Judiciary Committee hearings ended on Wednesday of this week. I have followed those hearings closely, I have reviewed summaries and reports of committee testimony, and I have read transcripts of testimony given by Judge Bork himself. Although we cannot know with certainty what cases the Supreme Court will confront in the future and how Judge Bork will vote on any particular case, I have concluded that in confirming him, we run the substantial risk that we invite an era of internal dispute and disaffection. And I am not willing to run that risk.

Clearly, if Judge Bork still holds to his writings when he makes decisions on the Court, my concern is well-

grounded. His professional writings over the past 25 years—the very peak of his adult life—would seem to require him to vote to overrule or modify countless Supreme Court decisions about family privacy and equal protection of the law. But I do not hold him to those writings. Rather, I have reviewed the modifications and qualifications he has offered the Judiciary Committee, and I take his hearing testimony at its face value. But I still conclude that the risk we take in voting to confirm his nomination is unacceptable.

Judge Bork has repeatedly criticized cases which have defined a sphere of personal liberty protecting certain aspects of personal and family privacy. Those cases upheld the right of married couples to use contraceptives, the right of parents to make decisions about how to bring up their children, the right not to be sterilized against one's will, and others. As recently as March 31, 1982, Judge Bork said that in "not one" of the privacy cases "could the result have been reached by interpretation of the Constitution." In his words, these cases are "indefensible," "intellectually empty," and "unconstitutional," because Judge Bork could not find the right of privacy specified in any particular provisions of the Constitution.

Judge Bork essentially reaffirmed that view in his testimony before the Judiciary Committee. He said the right of personal and family privacy was "undefined" and "free floating." In testimony about the Griswold case, which recognized the right of married people to obtain and use contraceptives, he stated that he still could find no acceptable constitutional authority for the holding. He indicated that he was unsure whether the ninth amendment could be the source of such privacy rights even though, as recently as 1984, he had said with some conviction that judges may be required to "ignore the provision" and "treat it as non-existent," as though it were "nothing more than a water blot on the document." He apparently could not rely on Justice White's alternative view that the equal protection clause would compel the holding in Griswold. He could not subscribe to former Chief Justice Burger's view that even though "the rights of association and privacy, * * * as well as the right to travel, appear nowhere in the Constitution, * * * these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees."

Finally, Judge Bork's testimony reveals no commitment to treat the personal and family privacy cases as established, settled law. In fact, when pressed to list those lines of cases which he had criticized but which he viewed as so established as to preclude their being overturned, Judge Bork excluded the privacy cases.

During the hearings Judge Bork surprised many Senators when he attempted to reverse his long-established position on the application of the equal protection clause of the 14th amendment. Less than 3 months ago he had said that "the equal protection clause probably should have been kept to things like race and ethnicity," thus recently reaffirming his long-standing view that the Supreme Court "should refer the rights of women * * * to the political process." But at the hearings he said that now he was of the view that the equal protection clause applied to women as well as people of different races, provided that it only protected all of them against "unreasonable" legislative classifications.

This supposedly new "reasonable basis" test gives me no comfort. In fact, it alarms me more. It represents a significant step backward from both the strict and intermedicate judicial scrutiny tests now applied by the Supreme Court to cases involving race discrimination and discrimination against women, respectively. As a lawyer, I know how easy it is to concoct a rational basis for any legislative act. For example, as recently as 1961 the Supreme Court held that a state's exemption of women from jury duty was a "reasonable classification" because women are "still * * * the center of the home and family life," "despite their enlightened enmancipation." And we should remember that the Plessy Court relied explicitly on a reasonable basis standard to uphold racial segregation.

At the hearings Judge Bork insisted that his "reasonable basis" standard was somehow more strict than the "reasonable basis" test used by the Supreme Court in past cases. But he could not be specific about this, and I was not convinced. To me, Judge Bork's newly discovered "reasonable basis" test would provide less protection than the Supreme Court now offers women, Hispanics, native Americans, blacks, other minorities, and the poor.

Thus, it is possible that if Judge Bork is confirmed and his views prevail on the Court, the protections which we have long taken for granted regarding personal and family privacy and the aspirations of women, racial minorities, and the poor could be severely undercut. But what is the probability that any such effect, and the consequent public outcry and debate, may in fact occur? In my view, the probability is strong.

I have already noted that Judge Bork's testimony specifically excluded the personal and family privacy cases from those so well established as to preclude their being overturned. Judge Bork also testified that he would be an "originalist judge," and we should remember that only 9 months ago he said "an originalist judge would have no problem in overturning a nonoriginalist precedent, because that precedent, by the very basis of his judicial philosophy, has no legitimacy." He did say at the hearings that a Supreme Court decision should be overruled if it were "clearly" wrong and capable of generating "pernicious" consequences, but those vague terms mean different things to different people. At bottom, Judge Bork seems to me much more likely than most justices to vote to overturn precedent in the numerous cases which he has criticized.

Although I will vote "no" on the issue of Judge Bork's nomination, I will not cast any vote to sustain a filibuster or to otherwise delay or prevent us from resolving the issue. The filibuster is becoming a recurring syndrome in this body; its use is reaching epidemic proportions. It is now becoming the common recourse of any group of Senators who find themselves in a minority on any significant issue to launch a filibuster to frustrate the will of the majority. The result is that we in the Senate do not get to the critical issues which face us. We do not work the will of the people.

And now the prospect of a filibuster on the nomination of Judge Bork not only threatens the effective operation of the Senate, but also holds another branch of government hostage. The Supreme Court's fall term begins on Monday, and any filibuster will only delay the day when the full complement of nine justices can attend to its caseload.

Therefore, we owe the President what is due him under the Constitution: our advice on his nomination of Robert Bork. If the majority consents to the nomination, so be it. But if the majority will not confirm him, we need to ask the President to select another nominee for our prompt consideration. The challenge we face as a nation during the coming decade requires a degree of national consensus which we have seldom enjoyed in the past. I have confidence that the President can select a nominee whose judicial philosophy matches his own yet whose view of the Constitution will help to bind us together as a nation and not hinder our efforts to meet that challenge.

Thank you, Mr. President. I yield the floor.

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## LUPUS AWARENESS MONTH

Mr. SHELBY. Mr. President, October is Lupus Awareness Month. Lupus is a mysterious disease of unknown cause. Yet, it affects 500,000 Americans and strikes 16,000 new cases each year. It affects more Americans than does muscular dystrophy or leukemia. It is the most serious disease of young

women—90 percent of its victims are women, stricken primarily in their childbearing years. I have become aware of Lupus since my wife was diagnosed as having a Lupus-related diseases some 12 years ago. I want to share this awareness today with the Senate and the American people.

Lupus is a chronic anti-immune disease—it strikes an individual's immune system, causing it to produce too many antibodies. These antibodies—which protect against infection in healthy people—attack the internal organs and normal tissue of Lupus patients.

There are two types of Lupus. The first type, discoid Lupus, affects only the skin. This is the mild form of the disease. The second type, systemic Lupus, or SLE, affects the internal organs and systems of the body. This type is more severe. Antibodies in this case attack the vital organs—such as the kidneys, brain, and heart. Patients suffer flareups that can be very serious, followed by periods of remission.

As I stated, the cause of Lupus is unknown, so there is no cure. Thirty years ago, patients with Lupus had little hope of living a few years. There has been much progress in the study of Lupus, fortunately. Thanks to biomedical research. Earlier diagnoses and more effective treatments are possible for patients with Lupus. Consequently Lupus victims are living longer and having more productive, nearly normal lives.

In fact, a very significant breakthrough in the study of Lupus was discovered this year, according to the National Institutes of Health. Dr. Gerald Weisman and his associates, from New York University Medical Center in New York City, found that levels of C3A, a human blood component, rose significantly months before a flareup of the disease.

Thus, successive measurements of the blood factor, C3A, may be a tool to predict the patient's next flare-up. There is now hope, for the first time, preventative measures can be taken. I am grateful for the progress of these researchers.

I am also grateful for the Lupus Foundation of America, who for the last decade, has been largely responsible for furthering the study of the disease. This year, the Lupus Foundation of America awarded 18 research grants and 10 student fellowships for the study of Lupus' potential causes and cure.

The outlook has improved considerably. Research advances in the last 10 years have brought about improved treatment, disease control, and better diagnostic methods. Lupus has become a chronic disease rather than the acute and fatal disorder it was thought to be. But Lupus is still an enigma. More awareness and understanding of the causes of Lupus is essential in finding its cure.

Do not forget: October is Lupus awareness month.

I yield the floor.

## SUPREME COURT NOMINATION OF JUDGE BORK

Mr. ROCKEFELLER. Mr. President, the Senate Judiciary Committee has recently completed its extraordinary and searching hearings on the nomination of Judge Robert Bork to be a Supreme Court Justice. Those hearings were a model of thoroughness, fairness, and balance. They gave Senators and the country a chance to learn about Judge Bork and his views. They also provided us with an unusual opportunity to reflect on our Constitution, the role of the courts in our system of Government, and the nature of our constitutional rights.

This nomination has provoked enormous public interest and debate. The battle has been hard-fought, so intense that many have likened it to an election. Some have expressed the concern that the confirmation process is being fundamentally altered—and damaged.

In my view, nothing could be further from the truth. The decisions of the Supreme Court touch the lives of every American. The balance of the Court is close; its makeup profoundly affects the direction of the Court and our society into the next century. There would be something seriously wrong if people did not care a great deal about this nomination. Indifference and apathy about this nomination would be a danger signal about the vitality of our democracy. This battle, however it turns out, honors our Constitution and our commitment to full and vigorous public debate.

I intend to vote against the nomination of Judge Robert Bork to the U.S. Supreme Court.

Judge Bork's credentials as a lawyer and legal scholar; his experience as Solicitor General and appellate judge; the power of his intellect—none of these can be denied.

But ultimately, in my view, it is not Judge Bork's credentials that should be decisive. What matters are his views of the Constitution and the rule of the courts in our system.

Judge Bork's admirers seem split on who he is, and why we should confirm him. Many who welcomed his nomination have been uniformly hostile to everything the Supreme Court has done for the past 30 years. They see in Judge Bork one of their own: someone who would, at the very least, stem the judicial tide, and would preferably roll it back.

Others of his admirers have taken to describing Judge Bork as the foremost proponent of the doctrine of "judicial restraint"—a fair-minded, conservative judge in the tradition of Justices Frankfurter, Harlan, and Powell. We have heard this view frequently in recent weeks, as Judge Bork moderated many of his most controversial and longstanding views during the confirmation hearings.

I find no resemblance between Judge Bork's record over the past 25 years and the philosophy of Justices Frankfurter, Harlan, or Powell. In my view, his record places him far outside the mainstream of constitutional law—joined only by William Rehnquist in his unremitting hostility to civil rights and individual liberties in almost every possible context.

I will not itemize all Judge Bork's decisions and writings that trouble me. But on the landmark issues, the cases or legislation that have truly moved our country toward the ideal of equal justice—when it really matters—Judge Bork has always been wrong. He opposed the 1964 Civil Rights Act, terming its central provision, that public accommodations should be open to people irrespective of race, a "principle of unsurpassed ugliness." He opposed the decision which struck down the use of poll taxes, a time-honored device designed to block minorities from voting, because "it was a very small poll tax." He denounced the Supreme Court for upholding the provisions of the Voting Rights Act banning literacy tests, as "very bad, indeed pernicious constitutional law." And Judge Bork has always opposed the line of cases in which the Supreme Court has found that "one man, one vote" was an essential principle for fair and representative legislative bodies—describing it as a "straitjacket."

His views on these, and so many other important matters, never show signs of doubt. He is almost always forceful, outspoken, absolutely certain—and terribly wrong. His brilliance is harnessed in support of a philosophy that is harsh, restrictive, extreme, and insensitive. He seems unwilling or unable to recognize that in our system, the courts exist to protect the rights of individuals and minorities against hostile legislative majorities. That is the special province of the courts, and the special genius of the Constitution.

Very frankly, I do not find the "moderate" Judge Bork to be very convincing. The effort to sell him as a moderate is somewhat demeaning to the strength of his views, and what he has stood for, all these years. He became celebrated because of his views; he was nominated because of his views. President Reagan and Attorney General Meese knew what they were doing, and why they were doing it.

They threw down the gauntlet. They picked a nominee who shared their view of civil rights, individual liberties, the Constitution, and the Supreme

Court. They tried to enshrine their view of the Constitution, so that the Supreme Court would reflect those views for years to come. Feeling strongly as they do, they have every right to try to do it.

But they should not be surprised when they find themselves in a battle. This nomination really is a referendum on some very important issues and ideals. And this nomination is in trouble for a straight-forward reason: because the majority of the Senate, and the majority of Americans, apparently don't share the view of the Constitution and the Supreme Court embraced by Judge Bork, Attorney General Meese and President Reagan. Confronted with it directly, most Americans do not want to roll back the clock, or repudiate the progress made toward equal justice at such great cost for so many views. They do not embrace Judge Bork's unusual views about the first amendment, the 14 amendment and the right of privacy. They do not believe that the Government is always right every time that Government authority collides with the constitutional rights of individuals.

We are having an historic battle over the nomination because everyone understands what's at stake.

Because of what is at stake, people are deeply and intensely involved. Because of what is at stake, I oppose this nomination and hope that it will be defeated.

Mr. President, I yield the floor.

Mr. DANFORTH addressed the Chair.

The PRESIDING OFFICER. The Senator from Missouri.

## ODE TO THE CARDINALS

Mr. DANFORTH. Mr. President, during our 200-year history many eloquent words have been spoken on the floor of the U.S. Senate, but every so often an event occurs that is so momentous that it deserves a special effort. Therefore, the following:

The score was close, two runners on,
The crowd was sitting tight.
Up stepped Dan Driessen, took a ball,
Then slammed one into right.

The crowd it roared, a throaty cry,
Expressing its delight,
As Smith and Coleman crossed the plate,
The Cardinals took the night.

Just another vic'try, folks,
One of 94 in all,
But quite enough to take the East,
Bring on the Giants: Play ball!

For Cardinal fans, 3 million strong,
The season's been a treat.
Since May our Redbirds were on top,
It's really been a feat.

Despite sore arms and broken legs,
(the dugout's safe no more),
The Car-din-als have battled on,
And thrilled us to the core.

The Redbirds had their ups and downs,
At times we were concerned.
But when the stakes were at their height,
The other teams got burned.

The Mets of Gotham challenged us,
They thought us on the ropes.
But, when they came to watch us play,
Their dreams went up in smoke.

The heroes of my hometown team,
are legion, this is true.
So let me pause, for just a sec,
To give a few their due.

To speak of guys like Coleman,
With feet so sure and fleet,
No cannon-armed outfielder,
Can to the plate him beat.

And then there is the Wizard,
Of Oz, as he is known.
The infield is his kingdom,
And short-stop is his throne.

Magicians, there are many,
But Wizards, there are few.
And when the Giants come to town,
You'll see what he can do.

Our pitchers have been brilliant,
Upon their arms we've soared,
And, done it, we can proudly say,
Without an Emery board.

Matthews, Tudor, Cox and Forsch,
Together with MaGrane,
Have stood their ground, upon the mound,
We simply can't complain.

Relievers, they have saved us,
Let's give them each a hand,
Worrell, Dayley and Dawley,
Who've pulled us out of jams.

Jack Clark with his bazooka,
It's hidden in his bat,
How else, the other pitchers say,
Could he hit the ball like that?

Herr, McGee and Pendleton,
Have all made awesome plays,
With Pena and Oquendo,
They've made our summer days.

And then of course there's Whitey,
Who's led us to this point.
Let's pray, my friends, that Candlestick,
Ain't near a pasta joint.

Before we get excited,
That the pennant race is done,
Let's bear in mind that next we face,
The Giants who've also won.

The Giants are a wily bunch,
And skilled in baseball ways,
But 'gainst the Cards, their only hope,
Is bring back Willie Mays.

I am a Redbird fan, my friends,
St. Lou's the team for me
And if there is a better club
I dare you to Show Me!

Mr. President, I yield the floor.

Ms. MIKULSKI addressed the Chair.

The PRESIDING OFFICER. The Senator from Maryland.

## ON THE NOMINATION OF JUDGE ROBERT H. BORK

Ms. MIKULSKI. Mr. President, 2 days ago the Judiciary Committee concluded its hearings on the nomination of Robert Bork. I followed those hearing carefully. Since then, I have reviewed Mr. Bork's testimony, and that of other witnesses who appeared before the committee. Finally, I went back and read the Constitution, paying particular attention to the amendments the testimony focused on: The 1st amendment; the 9th amendment; the 14th amendment.

After all, in the final analysis, these hearings have been about the Constitution as much as anything else. And in reading the Constitution, I came to the conclusion that Robert Bork and I have such fundamentally different views about what that Constitution means that I must oppose his nomination.

I am not a lawyer, and I am not a constitutional scholar. But I do not believe that one needs to be a lawyer, or a constitutional scholar, to know the meaning of equality, or understand the essence of liberty. My understanding of the Constitution is based on the fundamental American belief that all men and women are, in fact, created equal, and share certain inalienable rights.

I will oppose the Bork nomination because I do not think Mr. Bork shares those beliefs. And even if he does, I do not believe they would guide his actions on the Court.

This nomination has focused attention on the core constitutional values 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. As such, 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 job.

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 irretreivable.

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.

## NOMINATION OF WILLIAM VERITY

Mr. D'AMATO. Mr. President, I rise today to oppose the nomination of C. William Verity as Secretary of Commerce. Frankly, Mr. President, I find his nomination by this administration surprising. It lacks the kind of sensitivity that I think is necessary if we, as the leaders of the free world, are going to be accorded any degree of credibility by our allies when we talk about human rights and fundamental freedoms. It seems we have difficulty in carrying through on our words.

It seems to me that Mr. Verity's record shows a consistent pattern of insensitivity and public opposition to the fundamental principles upon which our policies are supposed to be grounded.

Mr. Verity's previous expressions of opposition to linkage between Soviet trade credits and trade status and Soviet human rights violations, including its poor record on emigration, runs directly counter to the President's own policy objectives. As cochairman of the U.S.-U.S.S.R. Trade and Economic Council, Verity specifically opposed the Jackson-Vanik and Stevenson amendments tying expanded trade with the Soviet Union to Soviet human rights conduct. His statements in reference to emigration of Soviet Jews was absolutely unconscionable and shocking. Let me quote: "The American Jewish community can never be satisfied on this matter. Their desires will ever be escalating."

Maybe, Mr. President, Mr. Verity is right on one thing. The American Jewish community should not be, nor should any community, nor should America be satisfied with Soviet responses to our complaints about Soviet human rights deprivations. These violations have continued to take place not only in the Soviet Union and have not only affected Jews but also Pentecostals and Baptists and Catholics in the Ukraine. I think Verity's statements are outrageous and unacceptable, particularly from someone who will be representing the Nation as a Cabinet member, as the Secretary of Commerce.

I have closely reviewed Mr. Verity's statements during his confirmation hearing before the Committee on Commerce, Science, and Technology. I have also read with care his written responses to questions that I had submitted to him for the record, and I am not satisfied. To be honest, Mr. President, I am more concerned now than I was before he testified.

His responses confirm in my mind that his underlying views have not changed since he stated his opposition to Jackson-Vanik, the Stevenson amendment, and the issue of linkage between trade and Soviet international behavior. His new assurance to the committee that he would uphold Jackson-Vanik because it is the law of the land, was grudging. The entire thrust of his confirmation testimony reflected his overriding desire and intent to increase United States-Soviet trade, regardless of the impact on any other policy objective.

I have spent the past 2 years as Chairman of the Commission on Security and Cooperation in Europe, better known as the Helsinki Commission. In the course of my tenure as Chairman, I have had the honor and privilege to meet many of the Soviet dissidents. They are, I believe, genuine moral heroes of our age. When I read Mr. Verity's remarks, I hear the words of Natan Shcharansky and Yuri Orlov. I recall Andrei Sakharov's remarks on the differences between the Soviet's closed, totalitarian society and the open societies of the West. Mr. President, I know whom I trust and believe.

Mr. President, let me read into the record just part of a communication which I received from the Colorado Committee of Concern for Soviet Jewry. It is a partial transcript of a radio interview which Mr. Verity had on Radio Moscow. This interview took place on March 7, 1984.

On the issue of the Congress and the Jackson-Vanik amendment, the transcript indicates that the following were Mr. Verity's own words:

> I think the Jackson-Vanik amendment was one of the terrible mistakes that was made by American politicians. I believe that the Jackson-Vanik amendment can be amended so that it won't have the effect that it has had now.

I wonder what he means by that, Mr. President. Does it mean that maybe we have been able to help the plight of some we otherwise would not have been able to help, or does it mean that we should give up our quest for respect for human rights and human dignity?

He goes on to say:

> I just don't know how at the moment we can amend the Jackson-Vanik amendment but there's a lot of talk about it in the States. I think the business community would like to eliminate the amendment because it's just a barrier to trade to the Soviet Union and it does no good.

Mr. Verity's emphasis on increased United States-Soviet trade is sadly misplaced. It undercuts and ignores the sacrifices made by Soviet dissidents and refuseniks and people who seek freedom and liberty throughout the world. It undermines years of careful diplomacy in the Helsinki process by which we and our allies have fought for better Soviet human rights compliance. It sends absolutely the wrong signal to the Soviets and to our allies as we enter the final phase of the Vienna review meeting of the conference on security and cooperation in Europe.

After reading Verity's views, what will the Soviets think of our diplomats' efforts to achieve improvements in Soviet human rights performance?

What will other nations' leaders think about the United States and its concerns in this area? I think it would be impossible for other nations to believe that the United States is committed to those principles.

When a Cabinet officer makes public statements advocating giving to the Soviets the thing they want most from us—access to the products of our economy along with trade credits to finance their purchase—without requiring meaningful changes in Soviet internal practices, it is very possible that they will give Mr. Verity's views more weight—disregarding our diplomats' representations regarding United States policy. If that happens, we might as well throw the Helsinki accords into the trash.

I believe that the American people put human rights ahead of trade and profit. Mr. Verity's past statements that our human rights efforts constitute interference in Soviet internal affairs exactly echo Soviet positions taken to blunt Western human rights concerns.

While he may say he no longer believes this, I find that it's hard to believe that many of my colleagues will stand idly by while his drive to expand United States-Soviet commercial relations undoes the struggles of those in the Soviet Union and the West seeking real Soviet adherence to their international human rights commitments.

Mr. Verity's lack of sensitivity to the public interest apparently extends to this Nation's own security as well. Under his leadership, Armco Inc. agreed to sell a $353 million steel mill to the Soviet Union. That plan was terminated by the Presidential trade embargo imposed by then-President Carter in response to the Soviet invasion of Afghanistan. Mr. Verity's remarkable response was to complain bitterly about the President's policy.

Mr. President, steel from that mill would have gone directly into Soviet armor, bombs, and bayonets. This is the man to whom the administration would entrust the authority to guard against Soviet acquisition of advanced American and Western military and dual use technologies. Any person who would place increased trade with the Soviet Union on the same plane as our national security would not be this Senator's choice to be our next Secretary of Commerce.

People of the United States deserve a Secretary of Commerce who can tell the difference between the public interest and corporate interest. William Verity's consistent record of insensitivity to any values beyond the balance sheet, raises the most serious questions as to whether he is such a person. I am disappointed, disturbed, and firmly opposed to his confirmation.

Mr. President, I am not going to belabor the point, but let me say that I have communicated with my colleagues by a letter dated October 1 in which I expressed my concerns and my opposition to Mr. Verity being confirmed as the Secretary of Commerce.

In addition, I sent a letter on October 2 to a number of my colleagues on the Helsinki Commission, including the information that was provided to me in the transcript of Mr. Verity's remarks, which I think really indicates how Mr. Verity feels about the issue of human rights. I do not think we should have a Secretary who says, "Well, if it is the law, I will uphold it", but who does it in a grudging way. I do not believe that Mr. Verity intends to see to it that those principles are carried out and are lived up to.

I will tell you something else, Mr. President. For those of my colleagues who say, "Well, he is only going to be in office for the balance of this term, a little more than 1 year; Therefore, what is the sense of raising one's voice," I say that is a rather sorry admission. I think we owe it to the people of this Nation and to this administration and, yes, even to our President to call to his attention the nominee's shortcomings. It is not good enough that he may be a friend of the President. I think we have to look to his record, and his record is a sorry tale when compared to what this Nation stands for and is all about.

For those reasons, Mr. President, I intend to not only oppose this nomination but to work as vigorously as I can to bring these facts, this information, and these concerns to the attention of my colleagues, I think that if they have an opportunity to examine them closely, they may reconsider their positions.

Mr. President, I ask unanimous consent to print in the RECORD following my remarks, a partial text of Mr. Verity's Radio Moscow interview and Mr. "Dear Colleague" letter dated October 1, 1987.

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

TRANSCRIPT OF MR. C. WILLIAM VERITY, JR. ON RADIO MOSCOW

Source: Radio Moscow, North American Service English language, shortwave.

Broadcast Date: March 7, 1984.

Time: 6:45, 8:45, 10:45 p.m. EST.

[Condensed text; ellipses show deletions.]

• • • Announcer. In 1951, at the height of the Cold War, the U.S. withdrew Most Favored Nation status from the Soviet Union. As a result, this country lost the standard trading rights granted by the United States to the vast majority of countries • • • Mr. Verity comments on this in the following way:

Verity. It is true that the, the tariff or the duties, uh, for Soviet products on the American market is higher than they are on other European countries. In 1972, a uh trade agreement was made in which one of the purposes was, uh, to grant Most Favored Nation to the Soviet Union. I believe that is a possibility and I believe it should be done • • •.

• • • Announcer. In spite of the importance of exports to the United States economy, the Congress passed the Jackson-Vanik amendment to the Trade Reform Act of 1974 which prevented Soviet-American trade from any substantial expansion. Mr. Verity holds the following view of this discriminatory trade legislation:

Verity. I think the Jackson-Vanik amendment was one of the terrible mistakes that was made by American politicians • • • I believe that the Jackson-Vanik amendment can be amended, uh, so that it won't uh, have the effect that it's had now. I just don't know how at the moment that we can amend the Jackson-Vanik amendment but there's a lot of talk about it in the United States. I think the business community would like to eliminate the amendment because it's just a, a barrier to trade with the Soviet Union and it does no good.

• • • Announcer. Mr. Verity also mentioned that despite the present difficulties in Soviet-American trade, the Soviet side is willing to do its best to stabilize it and hopefully to expand. Mr. Verity goes on to say:

Verity. I find that they would like to deal, with uh, with the United States. I think there's a friendship between our two countries, particularly between people. We like each other. They know that's it's more difficult to deal with the United States right now, and they'll tell us that, that uh, really because of "your unreliability and the political problems it's easier for us to deal with France or Italy or Japan. But nevertheless we would like to deal with you and • • •.

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U.S. SENATE,
*Washington, DC, October 1, 1987.*

DEAR COLLEAGUE: I write today to ask that you join me in opposing confirmation of Mr. C. William Verity, nominated as Secretary of Commerce.

My opposition to Mr. Verity derives from his demonstrated opposition to fundamental principles governing our policy toward the Soviet Union. Mr. Verity has, in the past, strongly opposed the Jackson-Vanik and Stevenson amendments tying Soviet Most-Favored-Nation trade status and trade credits to improvements in Soviet Jewish emigration levels. His grudging about-face on this issue during his confirmation hearing was not persuasive.

However, Verity's views on Jackson-Vanik and the suffering of Soviet Jewry are symptomatic of something larger—his narrow commitment to expand U.S.-Soviet trade without regard for any other policy objectives.

Preparing for the Geneva Summit, President Reagan set forth four touchstones of U.S. relations with the Soviet Union: bilateral issues, human rights, arms control, and regional problems. The President called for parallel progress on all of these issues as a condition for improved relations between our two nations.

Mr. Verity doesn't share these linked priorities. Human rights is, from his own statements, a secondary matter. He shows little understanding of, and certainly little enough sympathy for, the cause of dissidents and refuseniks who have struggled for years against Soviet repression in seeking to exercise rights guaranteed under international documents freely signed by Soviet leaders.

I am particularly concerned that Mr. Verity's confirmation would mark an effective end to linkage of the policy principles the President established as the basis for our relationship with the Soviet Union. His attitude strikes at the very foundation of the Helsinki Accords and its linked provisions concerning security, trade, and human rights, upon which so many have placed so much hope.

If the Senate confirms Mr. Verity, it will be sending the wrong message to the Soviet leaders: the wrong message to those in the Soviet Union still struggling for human rights and the right to emigrate; the wrong message to friends of human rights both here and abroad; and the wrong message to the signing nations of the Helsinki Accords, whose representatives are now gathered in Vienna, Austria, to chart the future course of the Helsinki Process. That message will be that we are placing profit ahead of principle and commerce ahead of liberty.

I ask you to join me in opposing Mr. Verity's confirmation. If you desire additional information, please have your staff contact either Jim Wholey at 4-8350 or Mike Hathaway at 4-8362.

Sincerely,

ALFONSE D'AMATO,
*U.S. Senator.*

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## THE NOMINATION OF JUDGE ROBERT BORK

Mr. WIRTH. Mr. President, over the past several months, this Nation has engaged in a lengthy, detailed debate over President Reagan's nomination of Robert Bork to assume the title of Associate Justice of the Supreme Court of the United States. Judge Bork would fill the vacancy created this summer by the resignation of Justice Lewis Powell, Jr., a conservative jurist widely considered to be the "swing" vote on a Court frequently split 5 to 4 on crucial decisions regarding the fundamental rights and liberties of the American people.

This national debate has, in my opinion, provided Americans with a firsthand look at how the "checks and balances," built into the Constitution by our forefathers, work to ensure that no single branch of Government—however popular or currently acclaimed—may wield power without due measure of constraint and scrutiny. That this event should occur during the 200th anniversary celebration of our Constitution has only underscored its significance.

What is less fortunate, however, has been the intensely devisive nature of the debate. Seldom, since the fight for civil rights erupted in our streets more than two decades ago, have our emotions as a nation so captured us in

dealing with a public issue as we have seen in the struggle over Judge Bork.

Although I regret the polarization that has occurred during this process, I nonetheless believe that America is better served by a far-reaching debate over the fundamental principles upon which our democracy was founded than by the polite rubberstamping of a nominee who will become the crucial fifth vote on a deeply divided nine-member Court.

As Justice Holmes noted in his most famous opinion regarding the Constitution's protection of free speech,

> The ultimate good desired is better reached by free trade in ideas—the best truth is the power of the thought to get itself accepted in the competition of the market.

For the last 2 months, I have closely examined the record compiled by Robert Bork over the past 25 years and have carefully listened to the testimony and debate. I have concluded, as a result, that I cannot support his nomination. I do not believe that he sufficiently understands the meaning and power of our traditions of individual liberty and social equality, two concepts fundamental to our country, and upon which our citizens base their trust in our democratic form of government.

At the beginning of this process, I compiled a list of criteria against which I intended to measure Judge Bork's qualifications.

I ask unanimous consent that those be included in the RECORD at the conclusion of my remarks.

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

(See exhibit No. 1.)

Mr. WIRTH. Mr. President, the purpose was to develop a framework for my examination of the immense amount of information that I knew would need to be digested. Primary among these considerations was a review of the nominee's judicial philosophy, temperament, view of the law, and beliefs about the role of the Supreme Court.

As I sorted through the avalanche of analyses of Judge Bork's record, I found myself increasingly disturbed by his judicial philosophy, which I could not square with many of his opinions. Most alarming was a clearly discernible pattern that by its very consistency would seem unattainable by any judge diligently applying "neutral" principles in his approach to the law.

Moreover, as I listened to the hearings and studied the nominee's opinions and articles, it became increasingly clear to me that here was a judge who considered as "incorrectly decided," "unprincipled," and "unjustifiable" many of the major Supreme Court decisions that had guided this Nation along the road toward greater social justice for more than 30 years.

My objection to Robert Bork goes beyond my disagreement with many of his positions. I am discomfited and concerned that while he will strive to be literally correct in his application of the law—as he reads and interprets it—his decisions too often appear to be morally bereft. For all of his legal scholarship and ability to dissect the letter of law, I am unconvinced that Robert Bork grasps the spirit of our laws.

As a result, I fear he would be unable or unwilling to protect certain precious American values, such as freedom of speech, access to the courts, and equal protection of the law. Despite his assertions of moderation and of great reverence for settled law, Robert Bork has spent a significant portion of his career criticizing some of the most fundamental tenets of American jurisprudence. I do not see how he could avoid being swayed by his own powerful arguments.

I am also extremely uncomfortable with the inconsistency in his application of his philosophy of judicial restraint. His insistence on a precise "originalist" reading of statutory and constitutional provisions is often at odds with his opinions. Judge Bork appears to be able to discover either a strict or expansive interpretation of the law, depending on which agrees with his personal beliefs; the much discussed consistency of his positions and philosophy disappeared under the intense scrutiny of this fall's hearings.

He also insists on judicial deference to majoritarian rule by the legislatures and the power of regulatory agencies to fulfill their mission. Yet, judging from his record, he does not insist on consistent deference, having demonstrated on a number of occasions a willingness to overrule or deny the authority of the legislatures and agencies whenever he happens to disagree with their intent.

Judge Bork has repeatedly stated his objection to the notion that there is a right to privacy rooted in the Constitution. While many justices and legal scholars have disagreed about the scope of a right to privacy, Judge Bork has persistently argued that, under our Constitution, there is no right to privacy.

I am also deeply troubled by Judge Bork's views on antitrust law. In this area, in particular, his philosophy of judicial restraint gives way to an activism that borders on a rigid hostility toward Congress, which he considers "institutionally incapable" of the "consistent thought" that "a rational antitrust policy requires." His narrow-minded pursuit of economic efficiency at the expense of consumer interests and the American tradition of competition place him at odds with every major antitrust law of the 20th century—an untenable position for a judge whose guiding principle is one of judicial deference.

The record compiled by this judge, both on the bench and in his extrajudicial writings, leads me to believe that the power of citizens to obtain information about their government, challenge government decisions that endanger cherished individual liberties, the public health or the environment, and gain access to the courts would be severely threatened if he were to join the Supreme Court. I would like to expand on this issue, which has not received the emphasis in the hearings as have others, but is especially important to the State of Colorado.

The right of citizens to challenge governmental action is especially important to the people of my State. Congress has set this Nation on a course of cleaning our air and water and protecting our citizens for exposure to toxic chemicals. Congress also has entrusted to executive agencies the management of our public lands, which include the priceless treasures of our national parks, and the sweeping vistas of our national forests.

Many times, the citizens of Colorado and the Nation disagree with the way in which these agencies carry out their statutory duties—whether it is a decision about clear-cutting on the national forests, reducing air pollution in Denver, or protecting vital wildlife habitat. Individuals and groups can, of course, take their appeal to the Congress, and can express their disagreements at the ballot box. But I believe that the people of this country also have a right to have these disputes resolved in the Nation's courts of law.

In a multitude of Federal laws, such as the Clean Air Act and the Clean Water Act, the Congress expressly conferred upon citizens the right to use the judicial process to enforce these important laws. At the same time, the Federal courts have recognized that access to the courts is as vital for protection of environmental values as it is for protection of our economic well-being.

I am especially troubled at the pattern of Judge Bork's decisions on this question of standing. Judge Bork frequently has argued that many cases, including environmental cases, should not be heard by the Federal courts. Judge Bork's application of the doctrine of standing threatens to close the doors of the Federal courts to these disputes—and to these citizens.

And, although I heard him repeatedly stress that he had since moderated his views and now found many of those decisions to be correct—or too deeply rooted in our society to be overturned—I became increasingly concerned. I could not imagine a defensible answer to the question of what had motivated him to write such blistering attacks on fundamental Ameri-

can values in the first place, nor could I rationalize the facility with which he disposed of those unpopular views before the Judiciary Committee.

Unfortunately, the Supreme Court is not as well known to many citizens of our Nation as are the legislative and executive branches of the Federal Government. But known or unknown, our Constitution and the governmental system which rests on it give tremendous power to this body of jurists. Subject only to the power of impeachment in the case of a flagrant abuse of power or impropriety, and to their own consciences, the members of the Court sit for life in final judgment of cases brought under law and the Constitution. The Court can change fundamentally, and has on more than a few occasions, the very fabric of our society by its decisions.

The placement of a justice on the Court is of such consequence that I believe it should be done only when the evidence is clear and convincing that the nominee is cognizant and fully respectful of those liberties and privileges of citizenship which set this Nation apart.

The testimony of Judge Bork and all of those who testified in his behalf, and all the written material presented by those who support his nomination, did not provide such clear and convincing evidence in my opinion. To the contrary, I am left with grave doubts in many areas and a pervasive feeling of discomfort with the nominee.

Having reached such a conclusion, I believe a Senator would be violating the trust of those who elected him to vote to confirm the nomination. And so, I am unable to cast my vote in support of Judge Bork's confirmation.

EXHIBIT 1

CRITERIA FOR EVALUATION OF SUPREME COURT NOMINEES

(1) Does the nominee have the intellectual capacity, competence and temperament to be a Supreme Court Justice?

(2) Is the nominee of good moral character and free of conflicts of interest?

(3) Will the nominee faithfully uphold the Constitution of the United States?

(4) What is the nominee's vision of what the Constitution means?

(5) Are the nominee's substantive views of what the law should be acceptable with regard to the fundamental rights of the American people?

(6) What are the nominee's view of the role of the Supreme Court and of Supreme Court Justices?

(7) Would the confirmation of the nominee alter the balance of the Court philosophically and if so, is that balance in the best interests of the American people?

(8) Are the nominee's views well within the accepted, time-honored and respected views of legal tradition?

## McKENDREE METHODIST CHURCH

Mr. SASSER. Mr. President, two Sundays ago, it was my distinct honor to address the congregation of the McKendree United Methodist Church in Nashville, TN.

McKendree has long held a special place in the history of Nashville and this year, along with the Constitution of the United States, McKendree celebrates its 200th birthday.

Since 1787, McKendree has served the spiritual needs of its membership and its community. Organized just 3 years after the famous Christmas conference in Baltimore, in which the American Methodist Church was formally founded, McKendree's membership first met in Nashville homes.

In 1790, a building was erected in what is now the town square. It was the first church building in Nashville.

From these humble beginnings, McKendree embarked on a course of bringing the light of Christ to this new nation and new frontier.

Even before George Washington was sworn in as this country's first President, McKendree was ministering in the name of the Lord. And, as America grew, so, too, did McKendree. The church outgrew several buildings before settling at the present location of 523 Church Street.

When America began to look outward, beyond its borders to new frontiers and new challenges, so too, did McKendree.

The Reverend Fountain Pitts, an early pastor of the church, was in 1835 the second missionary to be sent into a foreign land by the Methodist Church.

In 1955, Bill Starnes, a missionary in Africa supported by the church, was instrumental in founding the Congo Polytechnic Institute.

McKendree has also made contributions to the political history of our Nation. James Polk, a President of the United States, was a member of the church and his funeral was held at McKendree.

The church served as a hospital facility during the Civil War.

No less than six Tennessee Governors were sworn into office at McKendree, including Andrew Johnson, in 1853.

So you can see that McKendree has played an integral role in all facets of community life and history in Nashville. Its members today carry on in the same fine tradition of service to community and country, the church a beacon for the people of Nashville.

The membership of McKendree are proud of that heritage, and rightfully so. The enthusiasm and zest for life has been passed on from generation to generation.

It can be seen in McKendree's continued commitment to servicing the needs of the community. It can be measured by the indomitable faith of its membership.

I extend my heartfelt thanks to the people of McKendree for the privilege of sharing in their 200th anniversary, and I wish them 200 more.

## CHARTERING OF U.S. TANKER "MARYLAND" TO KUWAIT

Mr. MURKOWSKI. Mr. President, yesterday, a rather extraordinary event occurred which I had an opportunity to call attention to last evening in this body, but there have been additional developments that I think warrant further expansion today.

Yesterday, the U.S. Maritime Administration announced the chartering of the U.S. tanker *Maryland*, a 265,000 deadweight tanker, to Kuwait. This is a ship that was built with U.S. construction subsidies. It laid idle for the last 5 years in the port of Portland, OR. In a very short time, it will go into a Portland shipyard.

The significance to this body is that it will be the first U.S.-crewed, U.S.-flagged vessel, U.S.-built vessel to go into the Persian Gulf, in November.

It will give our Navy an opportunity to convoy and protect truly the first United States vessel, the first time we have had a 100-percent American vessel in the Persian Gulf since the increased activity associated with the Iran-Iraq conflict.

I think it is interesting to reflect for a moment the good deal of debate that has taken place in this body in the last weeks involving our current posture on the War Powers Act—whether we should or should not invoke that act, from the standpoint of the President and the administration reporting to Congress for the necessary congressional consideration.

This started out as a debate over the issue of reflagging. We have not yet resolved the issue of reflagging by any means, but progress has been made.

Unfortunately, when the issue came up and the Government of Kuwait approached our Government with the idea of reflagging 11 Kuwaiti ships, it seemed that our attention was focused on our obligation to keep the oil flowing in the Persian Gulf. The role of the State Department, the Department of Defense, and the NSC was focused in rather narrowly, on responding to the interests of Kuwait, to ensure that the oil would continue to flow freely to the markets of the world.

I might add that as we address who the recipients are of Kuwaiti oil, there is some food for thought. As I recall, Western Europe gets about 35 percent of the Persian Gulf oil; the United States some 9 percent, although that has been inceasing; and the balance is going to Japan. But, truly, we were keeping the Persian Gulf sealanes open for the benefit of our allies. That was an appropriate consideration. But the real question of the appropriateness of reflagging foreign ships was

questioned at great length by this body, as it should have been. And there was a good deal of debate in this body. It is indeed unfortunate that the administration was not more sensitive to realities that there was indeed an alternative available and that alternative, Mr. President, was the fact that we had nearly 40 ships laid up built with U.S. construction subsidies, many of which were capable of serving in the Persian Gulf as truly U.S. ships built with U.S. taxpayers' money, to a large degree ready to be crewed by U.S. union crews who when asked what about the danger in serving in the Persian Gulf responded by saying that it was part of going to sea, so to speak, in the tradition of the American seamen to serve on ships in areas of danger, and the maritime unions in this country were prepared to man those ships.

Well, unfortunately, the administration really did not get its act together and as a consequence, we were not able to utilize the leverage we had, and the leverage is quite obvious to all of us, Mr. President. We had the extraordinary leverage of insuring for the benefit of the Kuwaitis the movement of their oil to market and what we could have asked them in turn was to put our ships to work.

Unfortunately, we responded to the Kuwaitis and have reflagged now 10 out of the 11 ships. But some of us saw fit, Mr. President, to go on to continue to press the issue, to urge our colleagues to not deviate to the point of getting the argument entirely over the War Powers Act but to bring it back to the focus of where we started, and that is to the reality that there is some validity in charity begins at home.

We have watched the Soviet role in the Persian Gulf where they did not see fit to reflag their ships. They simply offered their ships for charter to the Government of Kuwait. We saw Great Britain, with a tradition as a seafaring country if there ever was one, continuing the same policy.

Surely, we want to involve ourselves in assisting in the Persian Gulf. We will put some of our military capability in the Persian Gulf, but we will not reflag our vessels. You can charter our vessels. As a consequence we have watched our position deteriorate in one sense as far as participating in the commercial movement of that oil. Yet at the same time we have undertaken the obligation of providing an extraordinary amount of protection in the presence of the U.S. Navy with now some 30 to 40 vessels and some 15,000 personnel. Make no mistake about it, Mr. President, our military personnel are in the Persian Gulf today prepared to die, prepared to die, Mr. President, if necessary to keep oil flowing.

The significance is that we now had the first U.S. ship that is going to be hauling this oil. In this body, the Senate accepted by unanimous consent amendments urging the use of U.S. crew, flagged vessels, an alternative to the Kuwaitis' request of reflagging, and the merits of the debate that ensued.

I want to pay tribute today to a group, an agency of the Federal Government called the Maritime Administration, referred to as MarAd. They have been consistent in encouraging trying to get through the bureaucracy, trying to get through the perception that indeed is part of the American reality, to participate in the carriage of oil, and they have worked tirelessly, to encourage both the private sector, which has tankers available for charter and foreclose tankers such as the *Maryland*, which was leased to Kuwait within the last day. As a consequence of their persistence, we have seen that the conclusion of the lease has been done for consideration of $5 million for a 2-year period.

Mr. President, it is a right decision.

And we have further opportunities because MarAd is foreclosing on the *New York*, and that should be available in the next 45 days for consideration to any commerce for sale or lease.

There is the *Williamsburg* which is also laid up in a private firm, but the MarAd is interested in trying to lease that to Kuwait.

Mr. President, I would urge my colleagues to consider the merits of what is taking place. We are gradually beginning to penetrate and rightly so in the spirit of equity a role more than just the protection of oil in the Persian Gulf but an involvement of our own tankers.

We have had our flag for lease. We have been providing protection to ships that remain in the Persian Gulf. We have been in effect a party to a legal fiction in the reflagging issue, and chartering is an initial approach. It is a sound approach. It puts our maritime workers off the beach and on the ship where they belong.

I think we have an extraordinary opportunity now, and I would encourage our unions to use their contacts that we can press for more charters. We can press for more involvement.

We intend to be meeting next week with the Kuwaitis to explore the opportunity for more charters, and I think that this opportunity before us is one that will be with us for a short period of time.

As a consequence, Mr. President, I would again urge my colleagues to consider the merits of truly U.S. tankers in the movement of crude oil in the Persian Gulf and indeed the chartering of the first U.S. vessel, the *Maryland*, can lead us in the future relationships that involve our own best interest and gives the pride of our Navy the capability of protecting our own ships on the high seas where they certainly belong.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

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

## THE BORK NOMINATION

Mr. RIEGLE. Mr. President, I rise today to indicate my decision to vote against Judge Bork's nomination to the Supreme Court. In talking with my colleagues, I believe a growing bipartisan majority is reaching the same judgment and that Judge Bork will not be confirmed.

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 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 and has split the Senate down the middle and caused great division across the country.

For the first time in history, the American Bar Association 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, stated over a lifetime, show a remarkable insensitivity to minority people. It is not surprising that these groups find the prospect of Judge Bork on the Supreme Court personally threatening. These deep anxieties are something Judge Bork has created himself—with strongly spoken and written words over many years, that suggest the clock be turned back to notions long since rejected by our citizenry and our legal system.

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 others 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 should be filled by someone capable of having the confidence and support of a very broad cross-section of the American people. I think many prospective nominees were available who could have united the country rather than cause such intense division and anxiety. Former Senator Howard Baker is just one example that comes to mind.

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 competing arguments presented to the court. 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 unique in that the judge is also the jury. As in any jury trial, it is vital that the 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 that he has rigid views—and in some areas very extreme views—on many complex legal issues. 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 court with a fixed view—then the whole process of opposing sides presenting a case is rendered meaningless.

Another concern I have with Judge Bork deals with his central role in the "Saturday Night Massacre" when Richard Nixon fired Archibald Cox, the Special Prosecutor in the Watergate case in 1972. The firing of Cox—as later facts indicated—was for the purpose of continuing an obstruction of justice and to keep the truth from getting to the legal authorities and the American people.

Attorney General Elliot Richardson and William Ruckelshaus both resigned when ordered to fire Cox. Bork carried out the firing, which was a sad and shameful period of official law breaking and coverup. His role at that time raises serious questions about his fitness to serve on America's highest court.

This is a lifetime appointment. If we make a mistake in seating someone, we can't correct it. Having personally recommended nine individual Federal judges to lifetime appointments in Michigan, I consider this judicial approval responsibility to be among the most important duties I have.

It is our diversity that created our Constitution and our liberties. Those constitutional legal rights now preserve our diversity and give each of us our equal standing under the law.

This nominee falls far short in providing a sense of confidence that he understands and accepts these basic facts of American life and law.

I am hopeful the President will send us a replacement nominee who, like O'Connor and Scalia, can be confirmed with confidence—and with the broad support of the American people.

Mr. MURKOWSKI. Mr. President, I believe the majority leader is coming to the floor. I would yield the floor to my colleague from New York while awaiting the return of the majority leader.

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

The PRESIDING OFFICER (Mr. RIEGLE). 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.

## AGREEMENT SOUGHT ON IRAN EMBARGO BILL

Mr. HELMS. Mr. President, I advise the Senate that—with the cooperation of the distinguished majority leader and the distinguished chairman of the Foreign Relations Committee—we are now attempting to clear, and I'm confident we will clear, an agreement which would allow us to bring up on Tuesday, as a freestanding bill, the Dole amendment establishing an Iran import embargo—an amendment approved on the Defense authorization bill by a vote of 98 to 0.

It is the hope of Senator DOLE and this Senator that the agreement can and will be reached to take up this bill perhaps as the 9 a.m. vote scheduled for next Tuesday. Because we have already debated the measure on the Defense authorization bill, we do not anticipate scheduling any debate.

I also understand the House will take up very similar—perhaps identical—legislation next week, so it may be that we could get final congressional action on the measure, and have it on the President's desk, next week.

Again, that is the hope both of Senator DOLE and the Senator from North Carolina; and I want to express my appreciation to the distinguished majority leader, and the distinguished chairman of the Foreign Relations Committee, for their help.

## ORDER TO PLACE S. 1748 ON THE CALENDAR—IRAN EMBARGO

Mr. MURKOWSKI. Mr. President, I send the enclosed bill to the desk on behalf of Senator DOLE and the majority leader, Senator BYRD, and ask unanimous consent to place it on the calendar. I believe it has been cleared by the majority leader.

Mr. BYRD. There is no objection on this side, Mr. President.

Mr. MURKOWSKI. It is my understanding further that no amendments are to be in order on the bill and that there is an agreed-upon time of 9 a.m. Tuesday on the vote cleared by the Republican side.

Mr. BYRD. Yes. We will make that request.

Has the Senator sent a bill to the desk?

Mr. MURKOWSKI. I ask that it be put on the calendar.

The PRESIDING OFFICER. Is there objection to the request? Without objection, it is so ordered.

### UNANIMOUS-CONSENT AGREEMENT

Mr. BYRD. Mr. President, I ask unanimous consent that at 9:15 a.m. on Tuesday this bill (S. 1748) be made the pending business before the Senate, that no amendments be in order, that no motions to commit or recommit be in order, that there be no time for debate thereon, and that the vote occur immediately.

And may I say, before the Chair puts the requests, this is the same identical matter that we voted on on the Defense Department authorization bill. It is the Dole-Byrd bill to ban all imports from Iran. And so that is the reason why the request is being made that there be no amendments and no debate. We have had the debate before. But there is a request to have that amendment put on the State Department bill.

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

Mr. BYRD. Mr. President, I ask unanimous consent that it be in order to order the yeas and nays at this time on the bill.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. BYRD. Mr. President, I ask for the yeas and nays on the Dole-Byrd bill.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

## ORDER TO PLACE S. 1750 ON THE CALENDAR

Mr. MURKOWSKI. Mr. President, I send the enclosed bill to the desk on behalf of Senator STEVENS and Senator PRYOR and ask that it be placed on the calendar.

The PRESIDING OFFICER. Is there objection?

Mr. BYRD. Mr. President, there is no objection on this side.

# SENATE—*Tuesday, October 6, 1987*

*(Legislative day of Friday, September 25, 1987)*

The Senate met at 8:30 a.m., on the expiration of the recess, and was called to order by the Honorable JOHN BREAUX, a Senator from the State of Louisiana.

## PRAYER

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

Let us pray.

*For My thoughts are not your thoughts, neither are your ways My ways, saith the Lord. For as the heavens are higher than the earth, so are My ways higher than your ways and My thoughts than your thoughts.*—Isaiah 55:8-9.

Eternal God, full of love and mercy and grace, Your prophet Isaiah makes it very clear that man's thoughts and ways are inverted. In this brief moment each day which our Founding Fathers set apart for prayer—which has been honored by the Senate from its beginning—make this moment meaningful. Let it not be simply a routine formality which is gotten out of the way as quickly as possible. Help me, Father, to remember that I am addressing You, not the Senate. Grant that the thoughts expressed in this moment are Yours, not mine. Be present in this Chamber, in the buildings which surround it, and manifest Yourself to the Senators and all who labor here. Make a difference here, Mighty God. Give us the mind of Christ that the thoughts and ways of the Senate not only bless all peoples but please and honor You. May Your name be hallowed, Your kingdom come, Your will be done here as in heaven. Amen.

## APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. STENNIS].

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
*Washington, DC, October 6, 1987.*

*To the Senate:*

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable JOHN BREAUX, a Senator from the State of Louisiana, to perform the duties of the Chair.

JOHN C. STENNIS,
*President pro tempore.*

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

## RECOGNITION OF THE MAJORITY LEADER

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

Mr. BYRD. Mr. President, I will yield my place for now and reserve my time.

I understand that the acting Republican leader has a speech to make, and then he has to leave.

## RECOGNITION OF THE ACTING REPUBLICAN LEADER

The ACTING PRESIDENT pro tempore. The acting Republican leader is recognized.

Mr. RUDMAN. I thank the majority leader for his usual courtesy.

## NOMINATION OF JUDGE ROBERT BORK

Mr. RUDMAN. Mr. President, in this bicentennial year of the Constitution, the public has received, through two recent events, an unanticipated but invaluable education in the genius of that document. In the course of the Iran/Contra hearings and the recent Judiciary Committee hearings and with the help of technology, the issues of the separation of powers, Congress' oversight role, and the Senate's responsibility to advise and consent to Supreme Court nominations have been brought into clear focus for millions of viewers. Many may debate the nature of the impact of television on both sets of hearings, but no one can doubt that the public now has a better understanding of our Constitution—how our Government was designed to operate, how it can fall short of our expectations at times, and how the checks and balances of the three branches on each other ultimately stabilize our course.

In the past several weeks, this remarkable and ongoing seminar of sorts has focused on the nomination hearings of Judge Robert Bork to the U.S. Supreme Court. In the course of Judge Bork's appearance before the committee, the history of the Court and the people who have comprised it, as well as the development of the law in areas fundamental to individual liberty have been discussed and debated at great length and in great depth. Each Senator must now examine the record and his or her view of the role of the Senate in this process and reach a decision with respect to this nomination. I have done that, Mr. President, and have concluded that I will vote in favor of the confirmation of Judge Bork to the U.S. Supreme Court.

On the whole, this nomination process has been unique. It should not be viewed, however, as free from serious defect. For although the philosophy of Madison was cited extensively throughout the hearings, in my view, we learned less about Madisonian democracy than we did about Madison Avenue hyperbole. How to package the nominee appeared to be the principal concern of both sides of the debate. Commentators seemed confused as to whether the Robert Bork appearing before the committee was a "new and improved" product or one which, notwithstanding research and development, should be judged by his performance 20 years ago. Mr. President, we must not allow the solemn responsibility of choosing the guardians of the Constitution to be reduced to no more than dueling slogans and ad campaigns. The greatest challenge to any Senator in this debate then, is to put aside the characterizations of this man by both sides, and to reach his or her own conclusion with respect to Robert Bork's fitness for a position on the Supreme Court.

That is what I have attempted to do, Mr. President. I have examined the committee's record; a record which contains many enlightening exchanges between committee members and the witnesses, particularly the nominee. I have also read the numerous articles written by Judge Bork, his opinions from the bench, and the transcripts of several interviews with him.

From this review has emerged my own view of Robert Bork—a man of unquestioned integrity, intellect, and wit, but also a man who, in his dedication to a means of analysis, has sometimes failed to display what some believe to be an adequate degree of regret when the ends which are compelled by that methodology prove to be unpopular. I do not believe that the degree of the nominee's publicly expressed sensitivity ought to be a job qualification, although unfortunately it has become an issue in this nomination process. I do believe, however, that a nominee's judicial philosophy is an appropriate area of review for the Senate.

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

In this regard, I have serious disagreement with Judge Bork in several areas. His ironic acceptance of judicial activism in the area of antitrust law troubles me greatly. It is one thing for him to disagree with his judicial colleagues on issues which are necessarily relegated to the Court, such as those of justiciability and standing, it is quite another to ignore Congress will in areas such as resale price maintenance, merely because he assumes that Congress cannot sustain a coherent theory. That strikes me as substituting a judge's economic values for those of the legislature, something Judge Bork would decry in the area of social or moral values.

Additionally, Judge Bork's failure to find any significance in the presence of the ninth amendment in the Constitution is especially troubling for me. As a student of history and Senator from the State whose motto is "live free or die," I view the ninth amendment as particularly significant. It is the reminder that the people did not surrender all their rights to the new Federal Government—that they did not view it as necessary to recite the inventory of rights retained in a document which granted only limited authority to a central government. I am reminded in this regard, of Noah Webster's belittlement of the assumption that such rights had to be declared to be preserved. He advocated, in mock seriousness, that the Bill of Rights should include in it a statement that

* * * Congress shall never restrain any inhabitant of America from eating and drinking, at seasonable times, or prevent his lying on his left side, in a long winter's night, or even on his back, when he is fatigued by lying on his right.

Mr. President, I think Mr. Webster's sarcasm contains an important message about the colonial mind. I find it more persuasive than the theory that the ninth amendment was a mere water blot on that great document.

Mr. President, I have mentioned issues because my colleagues and constituents should understand that I support Judge Bork, even though I have serious disagreements with some of his theories. I must add, however, that we are in substantial agreement in many areas of the law. Insofar as we have areas of agreement and disagreement then, Judge Bork is no different than any of the Justices now on the Court, or Justice Powell for that matter. I doubt there is any nominee for the Court with whom I would agree on every issue.

Although the disagreements I have with Judge Bork have caused me some concern, I continue to be mystified by the notion espoused by some of his opponents that one man alone could reap havoc on settled areas of constitutional law. Where major shifts in Supreme Court philosophy have resulted in the overruling of major precedent, particularly in areas around which social institutions and expectations have grown, the Court has moved cautiously and, more often than not, has acted not by a simple majority, but by a substantial majority. For instance, Plessy versus Ferguson, upholding the doctrine of "separate but equal" remained the law of the land for 58 years. But when the Court overturned that decision in Brown versus Board of Education, it did so unanimously. In fact, it was the force of the Court's unanimity that helped assure the eventual acceptance of that decision by the public—a fact not lost on Justice Warren.

Given this fact of the functioning of the Court, I am left with the difficult task of deciding whether my disagreements with Judge Bork are so great, or Judge Bork's conclusions so lacking in credible support, that they disqualify him from the Court.

Balanced against these disagreements, I also have the record of Judge Bork on the District of Columbia Circuit Court of Appeals to which I must refer. It is at best an oversimplification to suggest that there is little precedential value in that record. For although it is correct that the circuit courts are bound by Supreme Court precedent in those areas wherein the Court has spoken, it is equally true that many of the cases that come before the Supreme Court are cases of first impression in which the circuit courts have often arrived at conflicting decisions. In those cases, the predilection of a circuit judge to activism, whether conservative or liberal, would be apparent. I see no evidence of the activism Judge Bork's opponents fear in his judicial record. In fact, the degree of agreement he has had with his more liberal colleagues is remarkable in light of the warnings we have heard to the contrary.

Mr. President, my statement today is necessarily a short one. Each of us will have an opportunity to discuss the committee's record and the nominee's credentials at greater length when the nomination is brought to the floor for consideration. It is my intention, at that time, to analyze fully for the record the opinions in which Judge Bork has participated while on the circuit court. That analysis will demonstrate that Judge Bork, although in the minority on certain issues, is well within the bounds of appropriate judicial philosophy.

In conclusion, Mr. President, I will vote to confirm Judge Bork. At the same time, I urge my colleagues on both sides of this debate to consider the implications of the way this nomination process has developed for the Court, the country, and the administration of justice. While we ponder ways to combat the growing public perception of Senate campaigns as no more than slick public relations campaigns and lament the impact of that image on the prestige of this great institution, we should consider whether this is an affliction we would want visited on the Supreme Court, as well. I think not.

I thank the majority leader for his courtesy.

The ACTING PRESIDENT pro tempore. The time of the acting Republican leader has expired.

The Senate under the previous order will recognize the Senator from Wisconsin.

Mr. BYRD. I continue to reserve my time until after the Senator from Wisconsin has spoken.

The ACTING PRESIDENT pro tempore. The majority leader reserves his time.

## RECOGNITION OF SENATOR PROXMIRE

The ACTING PRESIDENT pro tempore. The Chair recognizes the Senator from Wisconsin.

Mr. PROXMIRE. Mr. President, I thank the majority leader for his generosity.

## A TRILLION DOLLARS FOR SDI AND WHAT DO WE GET?

Mr. PROXMIRE. Mr. President, is it possible for this Nation to defend itself, at any cost against a nuclear attack by the Soviet Union? Could we conceivably devise and deploy a so-called strategic defense initiative which the Soviet Union could not overcome at far less cost by the time we deployed it? This Senator is absolutely convinced that the answer is a clear and emphatic: No. I hasten to add, Mr. President, that I have no doubt that we could afford the cost, high as it is, to research and develop, produce, and deploy a defense that would protect our country against the Soviet nuclear arsenal as presently deployed. And I stress as presently deployed. I arrive at that judgment based on a study by two experts.

Barry Blechman is the president of Defense Forecasts, Inc. Victor Utgoff is a deputy director of the Strategy Forces and Resources Division of the Institute for Defense Analysis. Recently Blechman and Utgoff completed a study for the Johns Hopkins Foreign Policy Institute. That study found that the most comprehensive and effective system could be completed on reasonably optimistic assumptions for about $770 billion in 1987 dollars. This is on the optimistic assumption that the interceptors in the system would have a 90 percent single shot probability of a kill. If this 90 percent probability were dropped to what may be a more realistic 80 percent, the cost of a thicker system would rise by about 30 percent to $1 trillion.

budget. Between 1980 and 1986, interest payments jumped from $52.5 billion to $136 billion. They now account for 13½ percent of the Federal budget.

In 6 short years, Mr. President, we have added more than $80 billion in interest payments to the Federal budget. It takes 37 cents of every individual income tax dollar to meet those payments in 1986. That 37 cents is like a hidden tax to each tax dollar. The President says he opposes taxes, but his fiscal policies cost $37 out of every 100 tax dollars. And, every one of those dollars is a dollar lost to education, or health care, or national defense. With that $80 billion we could take on the enormous burden of current nursing home care and still have billions left for bringing health care to our children. Or we could build more than 30 fully equipped Trident submarines.

What those funds could have meant for education. Mr. President, with that $80 billion we could promise every one of our 3½ million 18-year-olds 4 years of college. Or we could provide compensatory education to every child in need into the 21st century. We could double the salary of every schoolteacher in the country or we could double the number of teachers and bring average class size down to 12 youngsters. We could renovate every school building in the country or put a personal computer into the hands of every one of our 40 million children. Our pile of debt, Mr. President, has cost us a mountain of opportunities.

The sheer magnitude of the debt holds the budget hostage to the vagaries of interest rates. When interest rates go up, interest payments rise and more investments are shoved aside in favor of debt service.

A few days ago, I pointed to the hundreds of billions of dollars we have borrowed from the rest of the world over the past few years. The danger was not so much in what we borrowed but that the borrowed funds had not pushed the level of investment above its historical average.

The same rule applies to our national debt, Mr. President. If you invest, you are laying the basis for growth and prosperity that all can share. Over the past 6 years, we have borrowed more than $1.3 trillion. What have we gotten for it? Where are the new classrooms, the updated laboratories, the attack on illiteracy, the modernized airports, or the renewed national highway system? This is an economy, Mr. President, that runs on roads and research. And today we are still running in last decades's shoes.

In the past, when the Federal Government borrowed funds, the money flowed into capital investment, education, and research. In some administrations, much of the capital spending was used for military equipment or construction. In others, the emphasis has been more on civilian construction, education and commercial research and development.

The figures tell a clear story, Mr. President. In the Kennedy-Johnson years, for every dollar borrowed by the Federal Government $2.81 went into roads, military equipment or other capital investments. When investments in education and research are included, the figures show $4.81 invested for every dollar borrowed. The overall ratio drops in the Presidencies of Nixon, Ford and Carter—but by 1980, we were still investing more than $1.50 for every dollar we borrowed.

During the last 6 years, Mr. President, investments have simply not matched the pace of borrowing. For every dollar we borrowed over the past 6 years of the Reagan administration, Mr. President, we have put only 46 cents into military and civilian capital investment. Even taking into account investments in education and research, we are investing only 75 cents for every dollar we borrow.

As we all know, Mr. President, I have supported many of the President's efforts to strengthen our national security. Those investments help secure peace and stability here and abroad. Much of the world relies on the strength and security of America's defense umbrella.

But these investments do not boost economic growth or put new tools in the hands of the American working men and women. In terms of meeting the challenge of foreign competition, the Reagan legacy is a cloud on our future.

Look at the figures again. For every dollar we have borrowed in the Reagan era, only 41 cents has gone for investments in the civilian economy.

When he first came to office, the President raised a cry for new investment. He told us we were endangering our children by eating the seed corn of our economic future. What he has given us is a few years of feel-good consumption, little investment, and a burden of debt for the future. In his own terms, Mr. President, he has squandered much of our corn, set aside few seeds for the future, and mortgaged the field.

## RECOGNITION OF SENATOR ADAMS

The ACTING PRESIDENT pro tempore. Under the previous order, the Chair recognizes the Senator from Washington, Senator ADAMS, for not to exceed 15 minutes.

Mr. ADAMS. Thank you, Mr. President.

## THE NOMINATION OF JUDGE ROBERT BORK

Mr. ADAMS. Mr. President, I rise for the first time as a U.S. Senator to exercise the duty of advise and consent on a nominee for the Supreme Court—the most important duty a Senator has except the awesome responsibility to take this Nation into war.

The Senate will suspend ordinary politics in favor of a pure governmental process. We are required by the Constitution to resist being a rubberstamp, to do more than simply approve the President's choice. We are each required to reach an independent judgment about the qualifications of the nominee—to determine if the Senate will give our advice and consent to his appointment.

I have given the nomination of Robert Bork much thought. I personally attended the opening of the Judiciary Committee hearings and listened to Judge Bork state his case. Since then, I have reviewed the nominee's record and researched his decisions. I have come to my conclusion, grounded in conscience and based on my best understanding of the mission of the Supreme Court.

When the roll is called, ADAMS will cast the first vote against the nomination of Robert Bork as an Associate Justice of the U.S. Supreme Court. Confirmation of Judge Bork would move the Court in a direction that threatens the historic role the Court has played in protecting our individual liberties and preserving the separation of powers established by the framers of the Constitution. As Justice Black has said: "the courts should stand as havens against any winds that blow."

My views about rights and liberties have been shaped by the real world lessons that I have learned in three decades of public service.

As a U.S. attorney, my job was to prosecute. Yet, as a prosecutor, I learned about the awesome weight of Government prosecution and why defendants must have constitutional protections. It is real life that teaches we must have counsel for the defense.

As a Congressman during the Watergate episode, I saw the tragedy of appointed officials who believed the President was above the law, and the Supreme Court saved us from an imperial Presidency.

As an American, I share a commitment to the rule of law and the dignity of the individual.

Judge Bork is an articulate lawyer with a gifted mind. I can see him comfortably in control of a debating forum, an editorial page, or a law school classroom. I cannot see him in the Nation's most important courtroom imposing his academic theories on the real-world cases through which our rights and liberties are continually redefined.

Many have said, and I might join in that, they could possibly enjoy having Judge Bork as a friend or as a law

school professor, but would not want him to judge their case. I have this feeling.

Despite Judge Bork's evident intelligence, I am convinced that his confirmation would be detrimental to the ends of liberty and equality.

I am convinced that Judge Bork's view of the equal protection clause is inadequate and narrow. His views would require the law to tolerate discrimination based on gender, poverty, and citizenship.

I am convinced that Judge Bork's view of liberty under the Constitution is contrary to Supreme Court precedents that have developed in our more enlightened years. His narrow view of the Court's role in protecting individual liberty leads him to reject recently settled doctrines establishing a right of personal privacy.

I am convinced that Judge Bork's view of the role of Congress in implementing the 14th amendment would prevent this body from pursuing equality under law. Had we followed his logic, Congress would never have passed the Voting Rights Act and its amendments.

I am convinced that Judge Bork's view of the balance of power between the executive, legislative, and judicial branches is skewed toward an all powerful executive. Given his views, the War Powers Act, the Foreign Intelligence Act, and the Independent Counsel Act would all be constitutionally suspect.

I am still concerned, Mr. President, because I was in this Government on the night of the Saturday night massacre when the special prosecutor was fired. We have heard many explanations, but I cannot be satisfied that the Independent Counsel Act would be protected. He would give the Executive many of the imperial powers of George III that were so vigorously rejected by the framers of the Constitution.

Finally, I am convinced that Judge Bork's views are so deeply felt and his commitment to his logic so rigid, that he would be unable to serve as a fair and open-minded decisionmaker. Given what we know about his views—and we know more about his views than we have known about virtually any other nominee—I do not believe the Nation should take the risk that those views will become the law of the land.

Let me examine each of these conclusions.

Mr. President, the principle of equality under law has a long history in this country. Jefferson wrote it into the Declaration of Independence, Lincoln fought a war, and he and Martin Luther King Jr., lived for it—and died for it. Even after the Civil War and the addition of the 13th, 14th, and 15th amendments, we are still struggling to achieve the goal of equality under law. Judge Bork's confirmation would not aid or advance that struggle.

Let me put it directly: Judge Bork's history on civil rights is terrible. When the great issues of equality and civil rights were being debated, Robert Bork was on the wrong side.

First, Judge Bork strongly opposed the Public Accommodations Act of 1963, which banned segregation in public hotels and restaurants.

Second, Judge Bork has defended a poll tax despite the overwhelming historical evidence that poll taxes were used to disenfranchise blacks. The right to cast a ballot cannot be contingent on the wealth, or poverty, of the voter.

Third, Judge Bork sees no constitutional barrier to the enforcement by the courts of racially discriminatory covenants. Finally, Judge Bork maintains that the Supreme Court had no basis for establishing one-man/one-vote as our Nation's voting standard.

I do not believe that these views make Judge Bork a racist. I do not believe he is. His history, however, would seem to lead him to the same results for those so oppressed. The point is that every time we had to decide if we were to move forward or stand still, Judge Bork stood still. In one of his own articles, Judge Bork cited Eugene Rostow's admonition that Supreme Court Justices are "inevitable teachers in a vital national seminar." Yet, as we examine Judge Bork, he has always been in the back of the class.

To be sure, 10 years later, Judge Bork acknowledged that civil rights legislation has worked, and thus it wasn't such a bad idea after all. But what about the issues of tomorrow? Where will Judge Bork be then? Where will the Nation be if his views of the past overwhelm our vision of the future?

We can get a clue if we look at his position on one contemporary issue. In 1980, the Supreme Court held that even if a voting practice results in discrimination, it would not be unconstitutional unless the discrimination was intentional. That standard was clearly unacceptable, as discrimination is unacceptable. As a result, the Congress passed and the President signed into law the Voting Rights Act Amendments of 1982. That law made it clear that a voting practice is unlawful if it results in discrimination; intent is no longer a relevant inquiry. Judge Bork does more than disagree with the political wisdom of that act—his view suggests that our 1982 amendments are unconstitutional. He ignores the harm for the technique.

Judge Bork's concept of liberty also falls short of the mark.

Robert Bork does not recognize the right to privacy. Individual liberties are protected only where Bork can find a specific reference to them in the text of the Constitution. In his view, the goal of the Court and the mandate of the Constitution is to protect the freedom of the majority to impose its version of public morality upon society rather than protecting individual liberties against such domination by the majority.

The Constitution was written with two primary purposes in mind, however. First, the framers sought to establish the institutions of a workable National Government. Second, they were careful to preserve the rights and liberties of its citizens by limiting the power of that Government. As a natural result of those purposes, a well settled right to protection of personal privacy against Government attack has developed over the past 200 years. We have declared, as a matter of law and policy, that there are some matters of personal choice, such as the right to marry, or the decision to have children, or be safe in your home, that are immune from excessive Government intrusion. This right derives not from a technical search for specific constitutional text, but as part of the fundamental rights of all men and women, set forth in the Declaration of Independence and the Constitution.

I believe Judge Bork's constitutional theories point out a major flaw in his thinking. In his search for logic in the law, he inevitably loses sight of the human values involved in the situations presented. His logic forced him to oppose civil rights legislation: He thought the principle behind desegregating lunch counters might lead to other Government enforced associations. His logic forced him to reject the right of privacy because he cannot logically conceive of its limits. His rigid logic compells him to conjure up the most extreme example to disparage the most reasonable position. The truth is, all judging is line-drawing—weighing the lessons of precedent and the facts of the individual case to come to a just decision. And that is precisely what Judge Bork is unwilling to do.

Judge Bork, in his brilliance, ignores the commonsense lesson of Justice Holmes that

> • • • the life of the law has not been logic, it has been experience. • • • The law embodies the stories of a nation's development through many centuries and it cannot be dealt with as if it is contained in the axioms and corollaries of a book of mathematics.

A third area where Judge Bork holds firmly to rigid, misguided logic is his unsinkable allegiance to Executive power. Despite his professed adherence to "original intent," Judge Bork ignores the careful framework of Government established by the Constitution to create three coequal branches. Rather than accepting these checks and balances, Judge Bork would grant overwhelming power to the Executive.

For the past 2 months, we in the Senate have been debating the proper role of the Congress in foreign policy. There is no doubt that the framers of the Constitution meant to place the power to declare war in the hand of Congress. They knew that entrusting to the President the power to declare war as well as the power to conduct it would go too far in granting the President the powers of a monarch. In the aftermath of Vietnam, the Congress recognized that additional legislation was needed to fulfill the intent of the framers in maintaining this vital separation of powers. The War Powers Resolution was the result, and it is the law of the land.

Following his theories that the foreign policy powers of the President should be unbounded, Robert Bork believes that the War Powers Resolution is unconstitutional.

Bork's belief in unbridled Presidential discretion is seen in several other areas. In justifying the legality of President Nixon's bombing of Cambodia, Bork stated:

I think there is no reason to doubt that President Nixon had ample constitutional authority to order the attack [on Cambodia] * * * The real question * * * is whether Congress has the constitutional authority to limit the President's discretion with respect to this attack.

In opposing the Foreign Intelligence Surveillance Act, Bork concluded that it would be unconstitutional for Congress to require a judicial warrant before the executive branch conducts a wiretap of American citizens for national security reasons.

What is just as frightening as Judge Bork's acceptance of sweeping claims of Presidential power, is the fact that Judge Bork would not subject those claims to any review in the courts. As he has stated in a recent appeals court dissent: "We ought to renounce outright the whole notion of congressional standing." Where the claims of the Congress and the President come into conflict, Robert Bork would rule for the President each and every time. This would in time destroy the constitutional separation of power, which above all requires respect for the rule of law.

Mr. President, I began these remarks by stressing the Supreme Court's role as the guardian of individual liberties. Every one of us is a potential minority. And when the awesome power of Government is arrayed against us, it is the Constitution, and the Court's reading of it, that must save us.

I do not have confidence in Judge Bork's ability to be a part of the living legacy of the law. I trust him to read the words, I trust him to form the sentences; but I do not trust him to feel the flow of justice, to be moved by the power of its image, to accept the morality of its vision.

Robert Bork is a man of strong intellect and persuasive power. I believe his influence would move the Court toward unquestioned deference to the Executive. His influence would weaken the Court's defense of the individual against the power of the State and would slow the Court in its search for equality.

I am concerned that Judge Bork would have a destructive impact on the Court: One which could reopen wounds only partially healed in our society; one which would create turmoil in the functioning of our system of governmental checks and balances.

Judge Bork has been direct with the Congress and the country—he has told us what he believes and has indicated how he would rule. With that information before us, we are being asked to do more than confirm a Justice—we are being asked to pass on a given view of the Constitution and to acquiesce to a revolution of the Court. I do not share that view, I cannot accept it, and I will not endorse it.

For all these reasons, I will vote against the confirmation of Judge Bork to the U.S. Supreme Court.

## MORNING BUSINESS

The PRESIDING OFFICER (Mr. REID). Under the previous order, there will now be a period for the transaction of morning business for not to extend beyond the hour of 9:15 a.m., with Senators permitted to speak therein for not to exceed 3 minutes.

The majority leader?

Mr. BYRD. Mr. President, I understand Mr. DASCHLE was under the impression that he had a 10-minute order. Something happened in our communication setup. We had no word of that.

I ask unanimous consent that he be permitted to speak for not to exceed 10 minutes before the Senate begins the rollcall.

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

The Senator from South Dakota is recognized for 10 minutes.

Mr. DASCHLE. I thank the leaders.

## THE CONFIRMATION OF JUDGE ROBERT BORK

Mr. DASCHLE. Mr. President, the power entrusted to members of the U.S. Senate to pass judgment upon those in Government who maintain, implement and interpret constitutional principle is not one to be taken lightly.

It is not only a key to the delicate checks and balances incorporated in our democracy, but a profound responsibility given each Senator to bring law to life.

It is imperative, therefore, that political considerations be ardently avoided as one contemplates decisions such as these. Except when political affiliation becomes a statement of radical philosophical position, it has no place in the criteria to be considered for either nomination or confirmation to positions of authority in Government. While any President should be expected to appoint those to high office with whom he has a philosophical relationship, it is incumbent upon him as it is upon the Senate to base judgment upon criteria other than political allegiance.

I believe that there are three criteria which well serve the determination of eligibility of Presidential appointments.

Of these, the first is character. A nominee must inherently demonstrate sound personal judgment and unchallenged integrity to be warranted further consideration.

The second is intellectual capacity. The complexities, intricacies and nuances of statutory and constitutional law simply demand it.

My final criterion is philosophical acceptability. With regard to any governmental position, a Republican or Democrat with both integrity and intellectual capacity must lie within the spectrum of philosophical acceptability in a government based upon democratic principle. Those who occupy positions on the far left or the far right have no business being entrusted to implement or interpret the products of legislative or constitutional consensus.

Having applied these criteria during my initial months in the Senate, I have confidently supported the nomination of each and every individual sent to us by the administration. That includes Alan Greenspan, the Chairman of the Federal Reserve Board and William Sessions, the Director of the Federal Bureau of Investigation. Robert Bork is the first nominee to the U.S. Supreme Court that I have considered for confirmation.

I have now read much of Judge Bork's work. I have listened to countless witnesses who have testified at his confirmation hearing. I have considered the analysis of legal scholars and govermental leaders both past and present. I have reached my conclusions.

Robert Bork generally meets the test of character. There remain conflicting views regarding his role in the firing of Archibald Cox. His explanation of the events immediately following the resignation of his superiors is not totally convincing. In addition, his actions while hearing a controversial case in 1983 as a judge on the U.S. Court of Appeals brought another judge serving on the same court to accuse Bork of having "serious flaws in his character." However, taken in the context of decades of work, otherwise respected, these instances do not

convince me of the inappropriateness of this nomination on the basis of integrity.

Nor can the Bork nomination be challenged because of any doubt about intellectual capacity. His credentials are impeccable. His record, his writing and his wit ought to convince even the most ardent skeptic of his judicial ability and intellectual standing.

It is the last of my criteria which evokes concern. Does Robert Bork's philosophical nature place him within the spectrum of acceptability?

As one reads and rereads the Bork writings and speeches, his undeniable iconoclastic position becomes very clear.

Where on the specturm can one rightfully place an individual who argues that there is no constitutional right to privacy? That the first amendment protects political speech but nothing else? Who opposes the implementation of the Voting Rights Act and the equal protection clause of the 14th amendment? And claims that while racial minorities have certain constitutional protection, women do not?

The answer becomes clear. Where else but on the extreme right. Far outside the constitutional boundaries that even a William Rehnquist or Antonin Scalia dare to tread.

In recent weeks, Judge Bork has sought to modify these view, much to my surprise. His advisers were wrong to convince him to do so. Rather than defend his positions, he chose to change them. And he did so at the least opportune moment.

His "confirmation conversion" has come as a surprise to many of my colleagues. Expecting a dogmatically staunch defender of his much espoused, ultraconservative philosophy, the Senate witnessed an equivocal, nebulous and unconvincing nominee seemingly willing to explain away almost anything to satisfy his skeptics.

Whether it is "Bork the Original" or "Bork the Converted," he fails the third test. His position leaves me with grave doubt about his eligibility to serve on our Nation's Highest Court. I remain unconvinced that the "new" Bork will last, that we can expect him to overturn the decades of writing, of teaching and of speaking out as an aggressive defender of the ultraconservative cause.

The bitter divisiveness within our Nation which this nomination has caused is indicative of what will follow should Judge Bork be confirmed.

It is not necessary. Further, it is unwanted. Let us select as our leaders those who unite our people, not divide them. Those who build on constitutional principles, not dismantle them. Those who seek to engage the vision of our forefathers, not blind us with their own.

In the same bipartisan spirit that brought us the confirmation of Sandra Day O'Connor, of Antonin Scalia and William Sessions, let us nominate and confirm a new Justice to the U.S. Supreme Court.

I am prepared to participate as I have done before. But first I must vote against Judge Robert Bork.

I yield the floor.

## CONCLUSION OF MORNING BUSINESS

Mr. BYRD. Mr. President, I ask that morning business be closed.

The PRESIDING OFFICER (Mr. ADAMS). Morning business is closed.

Mr. DOLE. Mr. President, let me start by expressing my appreciation to the distinguished majority leader, and to the managers of the State Department authorization bill, for helping to insure Senate action on this legislation this morning.

### PROHIBITION ON IMPORTS FROM IRAN

The bill we will vote on at 9:15 is, word-for-word, the same as the Dole amendment to the Defense authorization bill, prohibiting the import into the United States of products of Iran. As the Senate will recall, that amendment was passed 98 to 0, just a few days ago.

The House is also scheduled to act on identical legislation later today.

Because we have already had substantial debate on this bill, and because it has received such an overwhelming positive response in the Congress, there is no need for additional debate before this morning's vote. But I do want to explain why I feel this new Senate action is needed.

### NEED "LIVE" VEHICLE FOR AMENDMENT

There are two simple reasons. First, the Defense authorization bill almost certainly will be "dead on arrival" [DOA] when it gets to the White House. It will be vetoed, and the Senate will sustain the veto. So the import embargo is not going to be enacted into law through that bill anytime soon. By passing the embargo as separate legislation, it can be on the President's desk tomorrow, ready for his signature.

### STATE DEPARTMENT NEEDS KICK IN PANTS

The other reason to move on this bill is to force the administration to face the issue squarely. If rumors are to be believed, there continues to be opposition to this import embargo in some parts of the administration, especially in the State Department. So it is doubly important that the Congress go on record overwhelmingly in favor of an embargo, and present the question to the administration in a fashion that it cannot be ducked, or bureaucratically swept under the rug.

Mr. President, I urge all Senators once again to support passage of this legislation; send it to the President's desk; and require the administration to act promptly—one way or the other—on this important issue.

Mr KARNES. Mr. President, I rise today to reaffirm my support for the proposal to prohibit imports from Iran. As my colleagues know, the Senate voted 98 to 0 to approve this proposal as an amendment to S. 1174, the National Defense Authorization Act. The Senate is to vote on the proposal as a free-standing measure later this morning.

It is appropriate that the Senate is taking this action. We need to send a strong signal to the Government of Iran that the United States will not tolerate its irresponsible behavior in the Persian Gulf. The fact is that American purchases of Iranian oil are directly funding that country's menacing activities in the gulf. Estimates are that the United States imports between $500 and $700 million of goods from Iran each year. This contradiction in U.S. policy toward the gulf should be remedied. The proposal voted on last week, and to be considered again today, provides that remedy. No longer should money obtained from Americans be used to purchase weapons to threaten American sallors in the Persian Gulf.

While some may be concerned that the action taken by the Senate may interfere with the administration's policy, I believe the administration will come to understand the value of sending a strong message to Iran. As the Senate minority leader stated last week, the proposal is offered in the spirit of cooperation. The other body is now moving forward with similar legislation. Between the Congress and the administration, we will be able to strengthen our policy toward the gulf by imposing this sanction.

Mr. President, I urge my colleagues in the Senate to once again voice their opposition to Iran's threatening action in the Persian Gulf and vote to impose a ban on Iranian imports.

## PROHIBITING IMPORT OF PRODUCTS FROM IRAN

The PRESIDING OFFICER. Under the previous order, the hour of 9:15 having arrived, the Senate will proceed to vote on S. 1748, which the clerk will state by title.

The legislative clerk read as follows:

A bill (S. 1748) to prohibit the import into the United States of all products of Iran.

The PRESIDING OFFICER. The yeas and nays have been ordered and the clerk will call the roll.

The legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Delaware [Mr. BIDEN], the Senator from Oklahoma [Mr. BOREN], the Senator from Tennessee [Mr. GORE], the Senator from Louisiana [Mr. JOHNSTON] and the

Senator from Illinois [Mr. SIMON] are necessarily absent.

Mr. SIMPSON. I announce that the Senator from Delaware [Mr. ROTH] and the Senator from Oregon [Mr. HATFIELD] are necessarily absent.

The PRESIDING OFFICER (Mr. REID). Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 93, nays 0, as follows:

[Rollcall Vote No. 301 Leg.]

YEAS—93

| | | |
|---|---|---|
| Adams | Garn | Moynihan |
| Armstrong | Glenn | Murkowski |
| Baucus | Graham | Nickles |
| Bentsen | Gramm | Nunn |
| Bingaman | Grassley | Packwood |
| Bond | Harkin | Pell |
| Boschwitz | Hatch | Pressler |
| Bradley | Hecht | Proxmire |
| Breaux | Heflin | Pryor |
| Bumpers | Heinz | Quayle |
| Burdick | Helms | Reid |
| Byrd | Hollings | Riegle |
| Chafee | Humphrey | Rockefeller |
| Chiles | Inouye | Rudman |
| Cochran | Karnes | Sanford |
| Cohen | Kassebaum | Sarbanes |
| Conrad | Kasten | Sasser |
| Cranston | Kennedy | Shelby |
| D'Amato | Kerry | Simpson |
| Danforth | Lautenberg | Specter |
| Daschle | Leahy | Stafford |
| DeConcini | Levin | Stennis |
| Dixon | Lugar | Stevens |
| Dodd | Matsunaga | Symms |
| Dole | McCain | Thurmond |
| Domenici | McClure | Trible |
| Durenberger | McConnell | Wallop |
| Evans | Melcher | Warner |
| Exon | Metzenbaum | Weicker |
| Ford | Mikulski | Wilson |
| Fowler | Mitchell | Wirth |

NAYS—0

NOT VOTING—7

| | | |
|---|---|---|
| Biden | Hatfield | Simon |
| Boren | Johnston | |
| Gore | Roth | |

So the bill (S. 1748) was passed, as follows:

S. 1748

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. FINDINGS.

The Congress finds that—

(a) the actions of Iran in continuing minelaying activities, launching Silkworm missiles against Kuwait and refusing to accept the United Nations-proposed ceasefire in the Iran-Iraq war are totally unwarranted and increase tension and the danger of a widening war in the Persian Gulf;

(b) in recent years, the United States, on annual average, has imported approximately $500,000,000–$600,000,000 worth of products of Iran;

(c) the provision of this hard currency Iran increases its ability to procure mines, Silkworm missiles and other armaments from foreign sources, thereby increasing its ability to sustain and escalate its war with Iraq and other irresponsible actions, such as minelaying;

(d) a formal policy of neutrality does not require the United States to ignore, or fail to respond to, provocations from either side in the Iran-Iraq war; nor to surrender the flexibility to shape our conduct in response to the policies and conduct of the belligerents in that war;

(e) in light of Iranian policy and actions in the Iran-Iraq war and in the Persian Gulf, it is not in the best interest of the United States to practice "business as usual" with Iran; and

(f) as the provisions of the Algiers accord make clear, Iran has no legal grounds to respond to any action by the United States, including the imposition of a prohibition on the import into the United States of the products of Iran, in the claims settlement process established under the record.

SEC. 2. PROHIBITION ON THE IMPORT INTO THE UNITED STATES OF PRODUCTS OF IRAN.

(a) Effective upon the date of enactment of this section, the import into the United States of all products of Iran is prohibited.

(b) For the purposes of this section, the term "products of Iran" means any article grown, mined, produced or manufactured (in whole or in part) in Iran.

(c) The President shall direct the appropriate agencies of the Federal Government to establish such regulations and procedures as are necessary to implement subsection (a).

SEC. 3. WAIVER OF PROHIBITION ON THE IMPORT INTO THE UNITED STATES OF PRODUCTS OF IRAN.

(a) Should the President determine that it is not in the overall interest of the United States to prohibit the import into the United States of products of Iran, he may delay the implementation of the prohibition for up to one hundred and eighty days following enactment of this section.

(b) Should the President, under the authority of subsection (a), delay implmentation of the prohibition for any period up to the one-hundred-and-eighty-day limit, he shall submit to the Congress a written report, explaining the reasons for that decision, including specifying how the national interest would be jeopardized by implementing the prohibition.

(c) Should the President decide to delay implementation of the prohibition through the procedure outlined in subsection (b) for the full one hundred and eighty days, the prohibition shall go into effect on the one hundred and eighty-first day following enactment of this section, unless the Congress, by joint resolution, extends the one-hundred-and-eighty-day period.

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The PRESIDING OFFICER. The Senate will now resume consideration of the pending business, S. 1394, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 1394) to authorize appropriations for fiscal year 1988 for the Department of State, the United States Information Agency, the Board for International Broadcasting, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

(1) Wallop Amendment No. 842, to express the sense of the Congress regarding the Soviet ICBM tests near the State of Hawaii.

(2) Helms Amendment No. 843 (to Amendment No. 842), of a perfecting nature, to express opposition to obstructing national defense programs in order to comply with treaties or provisions thereof which the President has certified that the Soviet Union is violating, unless such violations cease and assurance is given that they will not again use impact areas adjacent to the State of Hawaii or any other State or territory of the United States for testing ICBMs or any other nuclear weapons delivery system.

Mr. DODD. Mr. President, I ask unanimous consent to speak for 10 minutes as if in morning business.

Mr. BYRD. Mr. President, I will not object to this request. I hope we will not have other requests. We need to go on with this bill. I have no objection to this particular request.

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

The Senator from Connecticut is recognized for 10 minutes.

Mr. DODD. Mr. President, I thank the majority leader and the distinguished chairman of the Foreign Relations Committee and the ranking minority member as well for providing me with this opportunity.

## JUDGE BORK

Mr. DODD. Mr. President, this afternoon the Senate Committee on the Judiciary will vote on the nomination of Judge Robert Bork to be an Associate Justice of the Supreme Court of the United States.

Mr. President, I have not expressed my opinion on this issue publicly in the past because I felt Judge Bork deserved to have a hearing before the Judiciary Committee. I felt that each one of us who are not members of the Judiciary Committee should have an opportunity to review the testimony, both pro and con.

I have reached a conclusion, Mr. President, that this nomination is not in the best interests of the country. For that reason, I will oppose the nomination of Judge Bork. I do not say this with any sense of joy at all. In fact I think it is a sad day for all of us, regardless of whether one is for or against Judge Bork because this nomination has provoked too much dissent and too much hate.

Like all of my colleagues, I approach the question of the confirmation of Judge Bork with enormous seriousness and solemnity. We all bear a tremendous responsibility to fulfill our constitutional duty to provide advice and consent to the President of the United States—and to the American people—on judicial nominations.

The vote on Judge Bork's nomination is clearly one of the most important and far-reaching votes that any Member of this body will ever make.

A Supreme Court Justice has an unparalleled opportunity to influence the most critical issues facing this and future generations of Americans. Moreover, I believe that the Court now may be at a pivotal point in which the future direction of our law is at stake.

Article two of the Constitution vests in the Senate the privilege—and the solemn duty—to give advice and con-

sent to Supreme Court nominations. This active Senate role makes great sense. When a Justice is nominated, the President is not proposing the appointment of someone to a post within the executive branch but to a branch outside his own, for a lifetime appointment that extends beyond his own term.

While the framers unquestionably intended that the Senate take an active role in the confirmation process, the Constitution nowhere delineates those factors by which each Senator should judge the fitness of a judicial nominee to serve his or her lifetime on the Federal bench. Thus, each Senator must determine for himself or herself the acceptable criteria in judging a Supreme Court nominee.

In my view, each Senator must begin and end his or her examination of the nominee with one overriding question: Is confirmation of this nominee in the best interest of the United States?

Answering this question in the affirmative first requires that each Senator satisfy himself or herself that the nominee possesses the excellent technical and legal skills which we must demand of all Federal judges. If the nominee lacks those skills, our examination need proceed no further, and we are duty bound to reject the nominee.

Judge Bork spent much of his legal career as a professor at Yale University School of Law in my home State of Connecticut. I have tremendous respect and admiration for his intellect, scholarship, and legal experience.

Our next task is to ensure that the nominee is of the highest character and free from any conflicts of interest. Judge Bork's personal integrity and character are not in question.

Finally, we must vigorously examine the nominee to see whether he or she is capable of and committed to upholding the Constitution of the United States, and protecting the individual rights and liberties guaranteed therein.

We must ask whether the nominee has the commitment and judicial temperament to give life and real world meaning to our Constitution's guarantees. We may disagree about the meaning of the various provisions in the Constitution, but the nominee's views must be within an appropriate range, and his or her approach must reflect a deep commitment to our Nation's constitutional ideals.

In that regard, it is up to each Senator to decide for himself at what point a nominee's views become so contrary to what the Senator believes is in the best interest of the Nation to warrant opposition to the nominee.

I have never opposed a judicial nominee solely because he or she holds concededly conservative views regarding the Constitution and the Court's role in interpreting and applying it.

In fact, I supported the nominations to the Supreme Court of both Antonin Scalia and Sandra Day O'Connor—both widely perceived as judicial conservatives—and I have supported the vast majority of President Reagan's nominations to the lower Federal courts.

However, after a review of Judge Bork's extensive writing, his decisions as a judge on the Court of Appeals for the District of Columbia Circuit, and his testimony before the Senate Judiciary Committee, I must oppose this nomination because I have concluded that Judge Bork's long-expressed views are totally out of step with many of our fundamental constitutional values and that his confirmation would not be in the best interests of the United States.

For more than a quarter of a century—as a professor, a legal scholar, a writer, and most recently, as a Federal judge—Judge Bork has developed and articulated a comprehensive judicial philosophy which can be expected to provide the framework for his judicial decisionmaking as an Associate Justice on the Supreme Court. That judicial philosophy reflects positions on basic and fundamental constitutional values that are extreme, radical, and reactionary.

My concern about Judge Bork does not arise from his views about any one or two constitutional issues in isolation. 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.

I am fearful of placing on the Supreme Court an individual who has consistently rejected so many fundamental constitutional doctrines.

Judge Bork has called for overruling Supreme Court decisions not based on what he perceives as the correct interpretation of the "original intent" of the Constitution's framers. Even conservative Justices traditionally have 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 the American people. I have serious doubts as to whether Judge Bork would uphold and honor that tradition.

As the New York Times editorialized yesterday:

> Robert Bork's Constitution is smaller and more closed than the living document Americans celebrate in this, its bicentennial year.

His Constitution is so different from the Constitution produced by two centuries of Supreme Court interpretation that I fear should he be confirmed, Judge Bork's radical doctrine would threaten the unique role of the Federal courts in protecting individual rights and liberties.

Most of us, of course, on occasion, disagree with particular Supreme Court decisions. However, we support the Court's basic and indispensible role of safeguarding our individual rights, and we want that role to continue. 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.

It is Robert Bork's long-established pattern of unreceptiveness of fundamental constitutional values that has troubled me from the time this nomination was made, and my uneasiness was not allayed by the hearing that ended last week.

In matters of racial equality, free speech, freedom of religion, personal privacy, family rights, and women's rights, among others, Judge Bork has repudiated a body of law and principles which fortunately is now well-established in America.

For example, for almost a quarter of a century, Judge Bork has expressed strong opposition to laws and Supreme Court decisions prohibiting discrimination on the basis of race and vindicating the rights of all citizens to equal justice. He has aligned himself against remedies in virtually all of the key areas where blacks have been subjected to discrimination—voting, public accommodations, education, and housing.

Bork's opposition to civil rights came at a time when most Americans were awakening to the moral imperative of fulfilling the promises of constitutional guarantees for all Americans, regardless of one's color. For instance, in 1963, the year of Martin Luther King's historic March on Washington, Bork published an article in the New Republic in which he strongly opposed enactment of civil rights legislation and used the expression "unsurpassed ugliness" to describe proposals to outlaw discrimination in public accommodations. The proposals Bork attacked became the law of the land 1 year later, as the Civil Rights Act of 1964.

Judge Bork's public career has spanned the same period during which our society made great strides in extending the promise of equal justice to all its citizens. Unfortunately, Judge Bork has rejected many of the laws and decisions which made this progress possible.

I also am concerned about Judge Bork's extremely narrow view of the first amendment freedom of speech and freedom of the press. He has expressed the view that the "core" of the

first amendment is its protection for speech that is intended to directly influence political decisions, and that it is "unprincipled" to extend protection to other forms of speech, such as literary, artistic, and scientific speech. Although in 1984, in a brief response to an article critical of this view, Bork announced he had changed his mind and that the first amendment could protect moral and scientific speech, his judicial record reflects an apparent attempt to force all speech which is protected into the category of political speech.

For Bork, however, a person's right to free expression is at the mercy of the community, not guaranteed by the Constitution, when speech becomes advocacy of illegal action. The Supreme Court and the mainstream of public opinion long have tolerated strident dissent, reserving punishment for incitement to imminent lawless action. Bork's view that the prevailing moral standards in each community should define the scope of each individual's right to free speech, would drastically limit first amendment protections.

The first amendment is a bulwark of American liberty that was designed to protect fundamental individual rights even though the majority might find them unpopular. Open debate is critical to a healthy democracy. Bork's efforts to limit the breadth of protected speech and to allow Government to restrict debate would limit the right of Americans to free expression and to receive information.

In every era, the Supreme Court has reaffirmed the constitutional principles protecting our religious liberties. Judge Bork's record makes clear that he disagrees with the Supreme Court's protection of first amendment religious liberties and that he holds views on church-state issues outside the mainstream of American constitutional thought. Judge Bork has endorsed the view that the framers of the Constitution intended the first amendment's establishment clause to do no more than prevent the establishment of a national church or preferential treatment of one religion over another.

Most fundamentally, Judge Bork does not regard Government support of religion as a violation of the establishment clause or a threat to religious freedom. It is clear that Judge Bork's views represent a threat to the constitutionally mandated separation between church and state that has allowed religion in America to flourish.

For more than 20 years, the Supreme Court has interpreted the bill of rights and the 14th amendment to protect individuals from unwarranted Government intrusions into their private lives. Judge Bork, in extensive written and oral comments, has stated that the right to privacy was improperly created by an activist judiciary. He asserts that decisions concerning fundamentally private issues such as intimate sexual and family affairs should be left to the prevailing mood of the community and not the courts. I am deeply concerned that as a member of the Court, he might effectively abolish decades of constitutional protection for individual freedom.

On many occasions, Judge Bork has vehemently opposed the Supreme Court decision in Griswold versus Connecticut which is the leading case articulating the principle of the right of privacy. Moreover, despite Supreme Court decisions to the contrary, Judge Bork has stated that a woman's decision to terminate her pregnancy is not a constitutionally protected right.

The Supreme Court has long recognized a zone of privacy in which the individual is protected against unwarranted community intrusion, what Justice Brandeis called the "right to be left alone—the most comprehensive of rights and the most valued by civilized men."

Protecting individual freedoms is one of the greatest responsibilities of the Supreme Court. Unfortunately, Judge Bork does not believe that the Court should protect the right to personal privacy.

One of my greatest fears regarding Judge Bork is that his constricted interpretation of the equal protection guarantees of the Constitution would jeopardize women's right to be free from sex discrimination.

Over the years, Judge Bork has insisted that equal protection applies only to race as originally intended by the framers. As recently as June 10, 1987, just 1 month before his nomination, Judge Bork said that equal protection should have been limited to race and ethnicity. This view of the 14th amendment 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 Stevens' reasonable basis standard. I have serious doubts about Judge Bork's vigorous application of this fundamental legal principle where over the years, he has disagreed with the scope of coverage and has a settled philosophy that constitutional rights do not exist unless specified or are within original intent.

Because of Judge Bork's long-expressed views in these key constitutional areas I have just outlined, I looked to the hearings held over the past several weeks with the hope that they might allay my concerns. But while Judge Bork did modify his positions 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 many years of contrary writings. And in those few other instances where he said he now accepts court decisions that he still believes were wrongly decided—decisions involving the first amendment, for example—it is plausible to think that he would apply those decisions very restrictively in the future.

In addition, Judge Bork's testimony left me with serious concerns about his judicial temperament. Even though Judge Bork is obviously a highly intelligent man, he looks at the Constitution in a rigid and abstract way. As some have suggested, he reads it more like the Tax Code than a basic charter of freedom for Americans. 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. 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. It is for that basic reason that I will vote against the confirmation of Judge Bork.

Mr. President, I again want to express my gratitude to the chairman of the committee and the ranking minority member and the majority leader for providing me these few minutes to express these views.

Mr. President, I yield the floor.

three earthquakes in the morning. The earthquake was a bad sign. It was decided that the demonstration would begin on the 27th."

The monk, his ash-gray hair clipped close to his skull, said he was not afraid. "I spent 21 years in prison," he said. "Nine years in the black. I know what electric shocks are like."

"There is unity in prison," he added, his voice little more than a whisper. "We say, if you kill us, the Dalai Lama is still alive."

Mr. HELMS. Mr. President, if nobody else desires to speak, I suggest that we vote.

The PRESIDING OFFICER. The question is on agreeing to the amendment. The yeas and nays have been ordered and the clerk will call the roll.

The bill clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Tennessee [Mr. GORE] and the Senator from Oklahoma [Mr. BOREN] are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 98, nays 0, as follows:

[Rollcall Vote No. 304 Leg.]

YEAS—98

| | | |
|---|---|---|
| Adams | Glenn | Murkowski |
| Armstrong | Graham | Nickles |
| Baucus | Gramm | Nunn |
| Bentsen | Grassley | Packwood |
| Biden | Harkin | Pell |
| Bingaman | Hatch | Pressler |
| Bond | Hatfield | Proxmire |
| Boschwitz | Hecht | Pryor |
| Bradley | Heflin | Quayle |
| Breaux | Heinz | Reid |
| Bumpers | Helms | Riegle |
| Burdick | Hollings | Rockefeller |
| Byrd | Humphrey | Roth |
| Chafee | Inouye | Rudman |
| Chiles | Johnston | Sanford |
| Cochran | Karnes | Sarbanes |
| Cohen | Kassebaum | Sasser |
| Conrad | Kasten | Shelby |
| Cranston | Kennedy | Simon |
| D'Amato | Kerry | Simpson |
| Danforth | Lautenberg | Specter |
| Daschle | Leahy | Stafford |
| DeConcini | Levin | Stennis |
| Dixon | Lugar | Stevens |
| Dodd | Matsunaga | Symms |
| Dole | McCain | Thurmond |
| Domenici | McClure | Trible |
| Durenberger | McConnell | Wallop |
| Evans | Melcher | Warner |
| Exon | Metzenbaum | Weicker |
| Ford | Mikulski | Wilson |
| Fowler | Mitchell | Wirth |
| Garn | Moynihan | |

NAYS—0

NOT VOTING—2

| | |
|---|---|
| Boren | Gore |

So the amendment (No. 858) was agreed to.

Mr. HELMS. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. PELL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

## RECOGNITION OF SENATOR PRESSLER

The PRESIDING OFFICER. Under the previous order, the Senator from South Dakota is recognized for a period not to exceed 5 minutes, after which time the Senate will stand in recess.

## THE NOMINATION OF JUDGE ROBERT BORK

Mr. PRESSLER. Mr. President, I rise to state once again that I strongly support the nomination of Judge Robert Bork to the Supreme Court. Judge Bork was unanimously approved for the court of appeals by this body only a few years ago, and unanimously approved by the Judiciary Committee.

Judge Bork has never been overruled while he has served on the court of appeals. Indeed, his voting record is 98 percent the same as Judge Scalia's, who is considered very much in the mainstream on the Supreme Court.

Since my days at Harvard Law School I have read Judge Bork's opinions. I read his 1971 piece in the Indiana Law Journal which I think is one of the most thought-provoking and finest articles produced. It is my strongest feeling that the President of the United States deserves his choice if the judge is in the mainstream of our political thinking; if there is not an ethical question, and if he meets the standards of professional competence. Indeed, when President Carter was in office I supported Abner Mikva for the court of appeals based on that philosophy. I believe that Judge Bork is one of the finest judges in our court of appeals system. He has been given the highest ratings by the American Bar Association. His record is excellent.

Mr. President, I support Judge Bork in part because he is tough on crime. Our Supreme Court has given criminals more rights than victims. Nearly every crime-fighting group in the United States has endorsed Judge Bork. For example, the National Association of Chiefs of Police, the National Sheriffs Association, and many, many other crime-fighting groups. The reason they have endorsed Judge Bork is because he is needed on the Supreme Court to bring a balance and to give back some rights to law-abiding citizens. Indeed, our Supreme Court has given criminals more rights than victims, and Judge Bork would bring back some balance.

So, Mr. President, for all of these reasons I support him. It is my strongest feeling that we are facing a political vote here. What is really happening is there is an effort to delay this until a new President is elected in the hope that he or she may be a President of the opposite party. I also believe very strongly that the campaign against Judge Bork has been basically unfair. He has been held to a different standard than other nominees. I support him proudly, and shall vote for him. I hope that this body will confirm him to the Supreme Court.

Mr. President, I yield back the remainder of my time.

## RECESS UNTIL 2 P.M.

The PRESIDING OFFICER. Under the previous order, the Senate will stand in recess until 2 p.m.

Thereupon, at 12:59 p.m., the Senate recessed until 2 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. DODD).

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate continued with the consideration of S. 1394.

AMENDMENT NO. 859

Mr. BENTSEN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Texas (Mr. BENTSEN), for himself, Mr. DOLE, Mr. KENNEDY, Mr. HATCH, Mr. CRANSTON, Mr. GRAHAM, Mr. MCCAIN, Mr. KERRY, Mr. MCCONNELL, and Mr. DURENBERGER, proposes an amendment numbered 859.

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

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

The amendment is as follows:

On page 60, line 14, strike "$17,500,000 for fiscal year 1988 to be available only for a grant to the National Endowment for Democracy for use in carrying out its purposes" and insert "$17,750,000, for fiscal year 1988 to be available only for a grant to the National Endowment for Democracy for carrying out its purposes, of which not less than $250,000 shall be used to support elements of the free press and the democratic civic opposition inside Nicaragua which espouse democratic principles and objectives. As is the case with all programs of the National Endowment for Democracy, no employee of any department, agency, or other component of the United States government may participate directly or indirectly in controlling, directing, or providing these funds to the free press and democratic civic opposition inside Nicaragua".

Mr. BENTSEN. Mr. President, I offer this amendment on behalf of myself and Mr. DOLE, Mr. KENNEDY Mr. HATCH, Mr. CRANSTON, Mr. GRAHAM, Mr. MCCAIN, Mr. KERRY, Mr. MCCONNELL, and Mr. DURENBERGER.

After many years of fighting and many starts and stops in the negotiating process, I think most of us in this body were surprised when we saw the Central American nations get together

200 prominent Baha'i have been executed. In its first year of power, the Khomeini regime attacked and demolished the holiest Baha'i shrine in the country. As a further mindless indignity, graveyards were torn apart. Throughout villages, vicious mobs, led by Shiite clergy, ransacked Baha'i communities. The accounts of life for a Baha'i in Iran over the last 8 years sadly belong in the journals that describe the darkest periods of the history of mankind.

In late 1986, a decline in the number of executions, an increase in the number of Baha'is permitted to leave Iran and a release of 500 prisoners gave some hope that a change might be occurring. Unfortunately, we no longer have that hope. Today the reports of persecution and senseless murders continue to mount. In fact, last week, two leaders of the Baha'i community were executed in Iran.

The Iranian Government offers the Baha'is one option, to recant their religious beliefs. Young children are given the following choices in school: Recant your faith or you cannot take your final exam. Education and employment opportunities are severely limited and the fear of humiliation, torture, and murder are constant. Yet somehow, through it all, the Baha'i persist and remain devout to the principles of their peaceful religion.

There is unfortunately little we can do in the U.S. Congress to save the Baha'is. However, we can protest and publicize their plight and it pleases me greatly that section 511 is included in this bill. Promulgating these horrific human rights violations may lead the Khomeini regime to modify its behavior. Even Iran has concern for its international reputation. Let the world know about these atrocities. To remain silent on this matter would be unconscionable.

Thank you, Mr. President.

Mr. SIMON. I would like to draw attention to section 511 of S. 1394, the Foreign Relations Authorization Act for 1988. This section focuses on and condemns the Government of Iran's systematic discrimination against and presecution of the Baha'i community in Iran. These gross violations of human rights include the denial of freedom of religion, denial of the right to own property, denial of the right to contract, denial of the right to inheritance, denial of the right to employment, denial of the opportunity to be educated, and even the denial of the right to live. Since 1978 the Iranian Government has murdered over 200 members of the Baha'i falth and excluded Baha'is from equal protection under the law. Murderers of 16-year-old Baha'i boy were heralded as patriots for their actions instead of being condemned. The Iranian Government's actions indicate support for the liquidation of Iranian Baha'is. Most recently, on September 28, 1987, two members of the Baha'is National Assembly of Iran, Mr. Ardeshir Akhtari and Mr. Amir Husayn Naderi, were executed. These injustices and outrages must end. I call upon the administration and my colleagues in the Congress to condemn this persecution and disseminate information to our friends and allies around the world concerning the plight of the Baha'is in Iran.

## MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that there now be a period for the transaction of morning business and that Senators may speak therein for up to 10 minutes each.

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

Mr. FORD addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

## THE NOMINATION OF JUDGE ROBERT H. BORK TO THE U.S. SUPREME COURT

Mr. FORD. Mr. President, the nomination of Robert Bork has divided this country as no other nomination that I can recall. It has divided communities and yes, it has divided families.

As all of the Members of this body have done, I have thought about and worried about this question for many days. In my years of public service I have had many decisions to make but few as soul searching as this.

However, I have arrived at a decision and a vote. The essence of this man is not what I want on the highest court. I will vote against Judge Bork's confirmation to the Supreme Court.

Either his earlier statements on basic and vital issues were recklessly stated—and his decisions as a judge were not responsibly made—or what he says now is not what he believes and does not evidence what we could expect if he were on the Supreme Court.

Whichever is true I cannot accept him.

No single issue is really the problem—the problem is that this man either is not now—or was not in the past—responsible and candid in stating his views and making his decisions. I don't want to worry about whether my right to privacy or my freedom of speech or my protection under the law will ebb and flow like the tide.

Judge Bork's assertion in his confirmation hearings that the Constitution does not protect a general right to privacy strikes at an ingrained belief that our Constitution protects the desire of an individual or family to be left alone. While many, including myself, will argue over the extent of the right to privacy, very few will argue that it does not exist at all. I do not want the latter view represented on the Supreme Court. My right to privacy and my individual freedoms mean too much to me, my children and grandchildren.

Mr. President, much has been said about the intent of the framers of the Constitution. One conclusion I reached, years ago, is that the framers intended for our judiciary to be the stabilizing element in our system of checks and balances. Judge Bork will not bring stability to the High Court. I have serious concerns with the commitment he would make to respecting well established precedent of the Supreme Court.

The framers wrote within the context of "all men are created equal" and of "inalienable rights." One document that was burned into their consciences was the Declaration of Independence. The Bill of Rights provides that certain rights are to be specifically retained by the people. To me this is more than a blob on the parchment of the Constitution. It is a very real protection for the individual Kentuckians whose own Bill of Rights was penned by Thomas Jefferson.

Judge Bork's nomination itself has been divisive. His confirmation itself threatens to open old wounds, to revisit old struggles that have been thought settled. He would alter or reverse longstanding antitrust protections for the consumer, small business and the farmer.

I want a Justice who will think of the individuals in this country who are affected by what he decides. I believe the record shows that Judge Bork lacks the necessary humanitarian feel for the true spirit of human rights and human liberties.

Mr. President, I oppose the nomination. I believe that, after full and reasonable debate, the Senate should proceed to an up-or-down vote on the nominee. For this reason, I, for one will not participate in any filibuster of the nomination. And if this nominee is not confirmed, I hope that the President will submit another name for immediate consideration by the Senate.

## TRIBUTE TO ODA CECILIA KEPPLE WILKERSON, ROSWELL, NEW MEXICO'S LEGIONNAIRE OF THE YEAR

Mr. BINGAMAN. Mr. President, I wish to call to the attention of my colleagues the selection of Oda Cecilia Kepple Wilkerson as New Mexico's American Legionnaire of the Year. Mrs. Wilkerson, who will celebrate her 100th birthday on November 5, is being so honored by the Charles M. DeBremond Post No. 28 of Roswell and Legionnaires throughout the State of New Mexico.

Mrs. Wilkerson has lived a life of notable achievement. Several times in her long life, she has served her fellow man in most unusual circumstances—under combat conditions. She first served as a nurse for British Forces in Northern France in 1916-17. Later, when the United States entered World War I, she was assigned as a U.S. Army Nurse ministering first to front line battle casualties. It is believed that she is the oldest living female American Legionnaire who also served in a combat zone.

When asked why she chose to pursue such a perilous calling, she answered simply, "I wanted to help. Everything in war tends to hurt, and medical services is a way to help the hurt."

I commend Mrs. Wilkerson on being named Legionnaire of the Year and wish her a happy 100th birthday—with many more to follow. I'm sure my colleagues join me in saluting this unique Legionnaire.

## THE BORK NOMINATION

Mr. PELL. Mr. President, I have not previously announced my position on the nomination of Judge Robert H. Bork to be a Justice of the U.S. Supreme Court. I waited until this moment because I believed the processes of this Senate and the prerogatives of our Judiciary Committee should be respected. Now that the committee has voted on the nomination, I believe it is now appropriate for me to state my position.

I have decided to oppose the nomination of Judge Bork.

This has been a difficult decision for me. In my view, a decision on a Supreme Court nominee should not be based on the result of a popularity contest or a public opinion poll. Nor should it be based on symbolism or labels. Instead, the decision should be based on a careful consideration of the nominee's abilities, character, and judicial philosophy.

On the one hand, Judge Bork is a man of brilliant intelligence, good moral character and proven ability. He has twice been approved for Presidential appointment by the Senate without a single dissenting vote.

On the other hand we must remember that the Supreme Court is unique in its role and responsibilities. The Court, through its power of interpretation, can have as much to do with making or changing our laws as do we in the Senate.

And because Supreme Court Justices are appointed for life, we know that Judge Bork would continue to influence the direction of our Nation long after the appointing authority, President Reagan, has retired from the national scene. For this reason, the Senate has a greater responsibility to exercise its individual judgment than it does in acting on appointments that expire with the term of the President.

In all likelihood, the person who assumes the vacant seat on the Supreme Court will serve well into the 21st century. That person must have intelligence, legal talent and experience, and good character—all qualities which I know Judge Bork possesses.

But this new Justice must also have another quality: The wisdom to find a constitutional basis for the rights and liberties that I and most Americans believe to be a part of our heritage as Americans.

In viewing Judge Bork's judicial philosophy, his writings and judicial record and his testimony before the Judiciary Committee, I have concluded that his approach to our Constitution lacks this dimension and is, instead, narrowly judicial and extremely conservative. I am particularly concerned about his views on the right to privacy and the rights of women and minorities.

Thus, while I admire Judge Bork's intelligence, experience and character, I find his restricted view of the Constitution unacceptable.

And so, on balance, I find I cannot support the nomination of Judge Bork and will vote accordingly.

## NOMINATION OF JUDGE BORK

Mr. KASTEN. Mr. President, I rise today to announce that I intend to vote in favor of the nomination of Judge Robert Bork to the Supreme Court.

Judge Bork's record as a law professor, as Solicitor General, and as a Federal judge has been exhaustively examined over several weeks of hearings in the Judiciary Committee. It is clear to me that what emerges from that record is a portrait of a brilliant legal mind dedicated to maintaining the integrity of our constitutional system.

Judge Bork has consistently taken the position that laws ought to be made by the legislature and implemented by the executive. Judges, in his view, are needed to interpret laws and to uphold those rights which the Constitution specifically protects.

Disagreement on complex legal issues is to be expected. Judge Bork himself, in the course of his long experience with the law and the Constitution, has sometimes been convinced by the arguments of others.

More frequently, though, his arguments have proven the more convincing—as shown by the fact that in his service as a judge on the D.C. Circuit, he was never once reversed by the Supreme Court.

Mr. President, the people of Wisconsin have sent me a clear message of support for Judge Bork—the mail and phone calls to my offices have been running at least 2 to 1 in favor of this nomination.

But a judicial nomination is not a popularity contest. If I thought Judge Bork were unqualified for the Court, by reason of inadequate experience or unfit character, I would vote against him regardless of the mail count.

President Reagan made a sound choice in nominating Judge Bork to the Supreme Court, and the Senate should not hesitate to confirm him.

## NOMINATION OF JUDGE ROBERT H. BORK

Mr. STAFFORD. Mr. President, I shall vote against the confirmation of Judge Robert H. Bork to be an Associate Justice of the U.S. Supreme Court.

We have made too much progress toward assuring all of our citizens equal opportunity in this great Nation to allow the Court's balance to rest with an individual who views the Constitution primarily as an inteliectual exercise.

While I reject the most strident and sometimes downright untruthful anti-Bork statements, I am acutely aware that many women honestly fear for their rights if Judge Bork were the swing vote on the Supreme Court.

While I regret voting against a Presidential nomination on the floor of the Senate for the first time, I cannot in my heart trust the rights of privacy of all Americans with an individual who cannot in his heart find such rights in our Constitution.

At this time in our remarkable history, women should expect to march step by step forward with men. Minorities no longer should expect to fear government intrusions. Americans should expect their privacy to be protected not semanticized.

At this time in our history, the American people look for a uniting force, not one that stirs fear and apprehension. Judge Bork's nomination comes at the wrong time for the wrong place.

## JUDGE BORK

Mr. JOHNSTON. Mr. President, I ask unanimous consent that a transcript of my remarks of October 1 regarding the nomination of Judge Robert H. Bork as an Associate Justice of the Supreme Court be printed in the RECORD.

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

SENATOR BENNETT JOHNSTON ON THE NOMINATION OF JUDGE ROBERT H. BORK, OCTOBER 1, 1987

The hearings are over. The question in all of our minds as we threaded through, day by day, the written record, was how would Judge Bork explain what is, at best, an erratic philosophical record: going from socialist, to conservative, to libertarian, to strict constructionist. And with, more important, a record on the issues before the

Supreme Court such as: *Shelley v. Kraemer,* where he criticized (a decision against) restrictive covenants based on racial grounds; such as the Harper case where he criticized a (decision striking) state poll tax; such as his criticism of affirmative action; *Griswold v. Connecticut,* dealing with the most basic right of privacy between a man and his wife in the privacy of their own home to use contraceptives; public accommodation, which he referred to as unsurpassed ugliness; *Baker v. Carr,* one man one vote; the Voting Rights bill with its (striking) literacy tests. And many, many others where he has written over a period of decades, and left a record which is always, it seems, on the side of big government and against the individual.

Well, we heard his explanation. I was impressed, I was bedazzled by his brilliance, his mental dexterity, his ability to recall, his scholarship. And yet, as he tried to thread his way through this record, he said either we didn't understand what he meant, or he didn't say what he meant, or he didn't mean what we construed it, or that he was joined by other distinguished judges or other explanations which, frankly, when they were all over sounded very good. I was impressed but not persuaded.

It reminds me of that old story were the wife comes in and catches the husband right with the women in flagrante dilecto and he doesn't know what to say so he says, "who are you going to believe, me or your lying eyes."

Well, Judge Bork has left a record over a period of decades. An unmistakable record which cannot be explained and which he has not put an adequate explanation on. For whatever the reasons are, he's always on the side of government, he's always against the individual. 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 what it shows is a scholarship devoid of moral content. He misses the spirit of human rights in the Constitution.

To Bork the law is a great game, an intellectual exercise, an intellectual smorgasbord, it is not as (Justice Oliver Wendell) Holmes once described it when he said that the life of the law is not logic, it is experience. What Judge Bork misses is the experience, the feeling, the spirit and the moral content of the law, as opposed to its logic. I have no quarrel with the ability of his logic. It is with the latter, that is, his inability to put into the law the life of experience and of moral content.

To millions of people, the Supreme Court—I guess to us all—the Supreme Court is the court of last resort where basic human rights are decided: the right to vote, to have it counted, the right to life, liberty, privacy, and all of those other rights that people die for. We simply, on those basic rights, cannot afford to take the chance that this brilliant Judge, with this erratic record, will heed to his explanations as opposed to his record.

I will oppose Judge Bork's nomination. Now to those who say this is a question of liberal vs. conservative, I would say—as one who has voted for Judge Rehnquist, Judge O'Connor, Judge Scalia, without question on each of those three—I would say to the President: Send us a man or a woman of that caliber and I will approve them. That is the question. If you can send us a man or a woman of that caliber I will approve him and I believe the Senate will. We cannot afford to take a chance on Judge Bork.

One final point, in my state and in many areas around the country this is regarded as a pro or anti right to life vote. Those who say so, I think, misjudge badly the question. First of all, his statement criticizing *Roe v. Wade* was made in the context of testifying against right-to-life legislation. Judge Bork told me, and he has testified, that he probably overstated his opposition to *Roe v. Wade,* indeed, he seems to have gone out of his way to at least, put in doubt, what he would do on *Roe v. Wade.* Senator Wilson, who approaches the question of *Roe v. Wade* from a different direction than I—I have voted consistently for right to life and have criticized *Roe v. Wade*—Senator Wilson comes from the opposite direction. But he has stated that he would support Judge Bork because he is reassured that Judge Bork would re-look at the question of *Roe v. Wade* in light of the precedence, in light of Judge Bork's statement that he would not overturn the decision based in the fabric of American society.

Whatever Judge Bork would do, if given the chance to vote on *Roe v. Wade,* I think it is absolutely a mistake for people to be for or against Judge Bork based upon his position on *Roe v. Wade.* Because I think that is totally unascertainable. The one thing that does seem to be clear, that if he disagrees still with *Roe v. Wade*—and I'm not sure he does or I'm certainly not sure he would overturn it—that that disagreement does not spring from any deeply held moral conviction or religious conviction. And I am not one to bring up any religious test for judges. I simply mention that because there are so many right-to-lifers, people with whom I agree, there are fundamental religious people who look to Judge Bork as if he is some savior on this question. And I say that they should look, in addition to what he has written, at his statements on morals or lack thereof—and I don't mean to suggest he is immoral—but his lack of occupation with morals and with religion.

In my judgment, Judge Bork will not be confirmed.

## MRS. NELL PEEPLES LIGHTSEY, FOUNDING TRUSTEE OF BAPTIST COLLEGE OF CHARLESTON, SC

Mr. THURMOND. Mr. President, on Saturday, August 16, 1987, Mrs. Nell Lightsey, a founding trustee of Baptist College at Charleston, SC, died at the age of 83. Mrs. Lightsey will be fondly remembered as the grandmother of the Baptist College. Mrs. Lightsey and her husband, Dr. William Norris Lightsey, financially supported the construction of the college's L. Mendel Rivers Library and the Lightsey Chapel, which is named for them. The undaunted faith that Mrs. Lightsey had in the many young students who have attended Baptist College over the years encouraged many young people to realize their full potential.

Mrs. Lightsey was extremely involved in the community of Varnville, SC. She was an intelligent and caring woman dedicated to the service of others. Through her participation in civic organizations such as the American Cancer Society and the Heart Fund, and through her various activities within her church, Mrs. Lightsey demonstrated the characteristics of a true Christian servant throughout her life.

Mrs. Lightsey's life will serve as a role for our young people for years to come. We are saddened by the death of Mrs. Nell Lightsey, and Nancy and I join with my colleagues in extending deepest sympathy to Dr. Norris Lightsey, her husband, and their two daughters, Mrs. Moses Tucker Laffitte, Jr., and Mrs. Margaret Lightsey MacMillan during this time of bereavement.

Mr. President, I would like to ask unanimous consent that an editorial on Mrs. Lightsey from the Hampton County Guardian and an obituary from the Charleston News & Courier be printed in the RECORD following my remarks.

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

[From the Hampton County, (SC) Guardian, Sept. 2, 1987]

TO NELL P. LIGHTSEY: 'LADY OF THE CHAPEL'

At Baptist College they called her the "Lady of the Chapel."

Nell Peeples Lightsey was an exemplary representative of two of Hampton County's pioneering families, Peepleses and Lightseys. Her death August 16, at age 83, marked the end of a long and fruitful life for which she will be remembered and appreciated at home and abroad.

Her contributions and those of her husband, W. Norris Lightsey, have extended far beyond Hampton County boundaries. Much of her work was in "the Lord's Vineyards".

First and dearest to her heart was her role as dedicated and devoted wife and mother of two fine daughters, Nell Lightsey Laffitte, of Columbia, and Margaret Lightsey MacMillan, of Hampton, grandmother of six and great grandmother of eight.

A 1926 Winthrop College graduate, she was a life-long leader and teacher in her church, First Baptist Varnville, the church for which her late father, the Rev. E.W. Peeples, was first pastor.

In addition to being a Sunday School teacher and church pianist she was a past president of the Woman's Missionary Union. She also was a participant in numerous civic and garden club activities and did volunteer work with the American Cancer Society and Heart Association in the community.

Baptist College counted her and her husband as generous, faithful "grandmother and grandfather" of the college, sustaining supporters through its 20 year history. She was a founding trustee also.

The Lightseys were honored with doctorate of humanities degrees at Baptist College in 1979. The $3.8 million Lightsey Chapel and Nell P. Lightsey Music Building were dedicated in her honor in 1984. Together they contributed to the Mendel Rivers Library there.

Nell Lightsey has gone to her reward but she left a legacy of good works not to be soon forgotten. She also left behind a large circle of loved ones, family and friends and fellow church members, who share her family's sense of grief and loss.

To her husband, Norris Lightsey, to her daughters, Nell Laffitte and Margaret Mac-

Millan and their families The Guardian extends heartfelt sympathy.

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[From the Charleston (SC) News & Courier, Aug. 18, 1987]

NELL LIGHTSEY, FOUNDING TRUSTEE OF BAPTIST COLLEGE, DIES AT 83

VARNVILLE.—The funeral for Nell Peeples Lightsey, 83, a founding trustee of Baptist College at Charleston and wife of William Norris Lightsey, will be at 11 a.m. Wednesday in Varnville Baptist Church. Burial, directed by Peeples-Rhoden Funeral Home of Hampton, will be in Crocketville Cemetery.

A memorial service will also be conducted at 11 a.m. Wednesday in Baptist College's Lightsey Chapel.

Mrs. Lightsey died Sunday in a Columbia hospital.

She was born in Varnville, a daughter of the Rev. Edwin Wiley Peeples and Harriet Johns Peeples. She was a 1926 graduate of Winthrop College, where she majored in public school music. She had taught school in Norway.

She received an honorary doctor of humanities degree from Baptist College in 1979.

Mrs. Lightsey and her husband were longtime supporters of Baptist College. She was a member of the college's first board of trustees and her husband was chairman of the Baptist College Foundation.

Together, the Lightseys made donations toward construction of the college's L. Mendel Rivers Library and the Lightsey Chapel, which is named for them.

"Mr. Nell Lightsey and her husband, Dr. Norris Lightsey, are known as the grandmother and grandfather of the Baptist College at Charleston," says a statement issued Monday by the college. "In the spirit of all grandmothers, Mrs. Lightsey nurtured the college and maintained her faith in this young institution as it matured during its first 20 years. In recognition of the support of the Lightsey family, the college dedicated its chapel-auditorium as Lightsey Chapel. The faithfulness to Christian witness exemplified by Mrs. Lightsey will remain as an example to future generations of Baptist College students."

The Lightseys and their family attended the dedication of the $3.8 million chapel-auditorium in December 1984. More than 1,000 faculty, alumni, students and other guests saw the chapel dedicated to "academic excellence in a Christian environment."

At the time, Margaret MacMillan, the Lightseys' daughter, said the chapel was a dream come true for her parents. Also dedicated in 1984 was the Nell P. Lightsey Music Building.

Mrs. Lightsey was a member of Varnville First Baptist Church, where she served as a Sunday school teacher and the Sunday school and church pianist. She was also president of the Women's Missionary Union. Her father was the first minister of that church.

She also was active in many civic organizations. She was a charter member of Hampton-Varnville Music Study Club, a member and past president of the Azalea Garden Club and a member of the county board of the American Cancer Society. Mrs. Lightsey also was a Heart Fund volunteer and was a past president of the Varnville Parent-Teachers' Association.

Surviving are her husband; two daughters, Mrs. Moses Tucker Laffitte Jr. of Columbia and Margaret Lightsey MacMillan of Hampton; a sister, Mrs. Foster Miller Routh of Columbia; six granchildren; and eight great-grandchildren.

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## NOMINATION OF JUDGE ROBERT BORK

Mr. HELMS. Mr. President, inasmuch as other Senators have stated their opinions about the Bork nomination, I think it is appropriate that I do so, since I have the floor.

Let me say at the outset that I have known Judge Bork since I came to this town in 1973. I find myself resentful of the transparent display of demagoguery, histrionics, hypocrisy, distortion, and misinformation surrounding the confirmation question involving Mr. Bork. Before the merits of the nomination were even considered, before one witness was heard in the hearings, there came a cacophony of protest, the usual groups across the country threatening Senators that if they vote for Robert Bork, they will pay for it in the next election.

If I were of a mind to be critical of the administration, I would say that perhaps the administration ought to have taken the advice some of us gave at the time which was to launch a positive campaign across this country to offset the Norman Lears and the labor unions and various other pressure groups. But that was not done. So the deluge of unfair, inaccurate, false information circulated about Judge Bork had its effect.

I do not know how the Senate will vote. At best, it is going to be close now. But 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, and even his most severe critics have said that his integrity is beyond question, that his credentials are unsurpassed.

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.

I had to laugh when I kept hearing on the radio, oh, the Bork nomination is in trouble. Look, Senator so and so has come out against him. Senator so and so has come out against him, and they usually came in threes—three one day, three the next day—and you could just see the scoutmaster saying, "You three go today and you three go tomorrow, and we will give you all this publicity."

And they got it.

And I found myself thinking, "Well, where is the surprise that any of these fellows is coming out against Bork?" It was no surprise.

But the point, Mr. President, is that there is really no question in any reasonable man's mind but that Judge Bork is eminently well qualified to serve on the Supreme Court.

Now there are far left elements who recognize that Judge Bork will carry out his duties to uphold the Constitution and the laws of the land as they were intended.

Of course, he will not deprive them of any constitutional rights. But he will deprive them of one thing should he yet be confirmed. He will deprive them of a Justice who will attempt to implement the liberal agenda through judicial activism. That Robert Bork would never do on the Supreme Court.

An example of what I am trying to say: In the September issue of Ms. magazine, the following statement appears, and I quote:

> * * * 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 jumps slam out of the bag. That is what they are up to. That is what they have been up to all along.

The strategy behind the liberal special interest groups opposing this nomination is clear: 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.

Others can have their own opinion and express them, but I hope that neither Robert Bork nor President Reagan will even consider withdrawing this nomination. Let us vote on it in the Senate. And let us vote on it quickly.

Mr. President, a very fine North Carolinian, who served admirably on the North Carolina Supreme Court, Dr. I. Beverly Lake, has voiced his support to the Bork nomination. In a recent article written for the Durham Morning Herald, I think Dr. Lake captured the essence of the opposition to Judge Bork's nomination, and I ask unanimous consent that the article by

Judge Lake be printed in the RECORD at the conclusion of my remarks.

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

[See exhibit 1.]

Mr. HELMS. I thank the Chair.

I further ask unanimous consent that a column by Giles Lambertson, who is a highly respected columnist for the Greensboro Daily News and Record in Greensboro, NC, in connection with the battle over the Bork nomination be printed in the RECORD at the conclusion of my remarks.

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

[See exhibit 2.]

Mr. HELMS. Mr. President, I thank you so much, and I yield the floor.

EXHIBIT 1

SHOULD ROBERT BORK BE CONFIRMED?—YES

(By I. Beverly Lake)

I have never had the privilege of knowing Judge Bork personally, nor have I attempted to make a thorough study of his judicial opinions or other legal writings. I do, however, have a very real admiration for him because of the enemies he has made, especially those who have come to the surface recently.

When a man has devoted many years to the service of the public, in political and judicial office and also in academic fields, sometimes the comments of his would-be detractors speak more persuasively in his behalf than do the appraisals of his friends. So I find it in the case of Judge Bork.

For weeks, those opposing his becoming a member of our highest court have cross-examined him and sifted through his writings, both official and academic, in an effort to find some action or statement which, in their opinion, indicates lack of qualification to sit on the court formerly graced by such profound legal scholars as John Marshall, Oliver Wendell Holmes, Louis Brandeis, Harlan F. Stone and Charles E. Hughes.

The net result of their delving into Judge Bork's record seems to be this: They have found no defect of character or personality. They concede that he is, indeed, possessed of a superior intellect, he is a diligent student, well acquainted with established legal principles and with the political, economic and social history of our country.

They do not question his familiarity with and understanding of the nature and scope of either the more recent or the earlier decisions of the Supreme Court, nor do they question his appreciation of the importance of judicial precedents in a sound and stable jurisprudence for the government of free people in a secure and orderly society.

If we ignore envy and professional jealousy, which are by no means unheard of in the world of law school faculties and writers of law review articles, and also ignore political hypocrisy of senators and would-be presidents seeking to curry favor with activist minority groups, the real basis for opposition to Judge Bork seems to be that he knows the Constitution of the United States and, if he becomes a member of the court, he will abide by his oath to support it.

It must be remember that if Judge Bork is confirmed, before he takes his seat on the court he must take a solemn oath that he will support the Constitution of the United States.

Not one of his detractors has suggested that Judge Bork will take the oath lightly or regard it as a perfunctory ceremony to be forgotten or disregarded. He will, I believe, carry it out to the best of his ability, so help him God. What more can we ask of an appointee to that office than that he be a man of character, studious industry, superior intellect, knowledge of legal principles and committed by oath to support the Constitution of our country? His opponents say Judge Bork has all those qualities.

But, they say, he will use the power of office to overturn decisions made by the court in the last 50 years because he is a conservative in his philosophy of government! Judge Bork's oath will be to support the Constitution—not to support the decisions of Chief Justice Warren, Justices Douglas, Brennan, Felix Frankfurter or Thurgood Marshall. The Constitution, which he will be required by his oath to support, declares that it, and the laws enacted by Congress pursuant to it, are the supreme law of the land. A decision heretofore made by those crusading liberal justices is not, and, in a case coming before the court in the future, any justice who has taken that solemn oath is morally and legally under a duty to refuse to vote in accord with any previous decision of the Supreme Court which he, himself, sincerely believes is a departure from or conflicts with the Constitution.

Because Judge Bork appears to accept that as his duty, if confirmed, and because he has the other qualifications I have mentioned, this country's future tranquility, security and prosperity and the liberties of our people will not be endangered by confirmation.

To be sure, Judge Bork's philosophy of government is conservative. So what! A conservative, by his very nature, is not a crusader for widespread, instantaneous change in established institutions and practices. It is the activist liberals, such as Justices Brennan, Marshall, Douglas and Warren, who preach and practice disregard of the Constitution in order to make America into what they, themselves, believe to be a land of greater opportunity and freedom.

For the last 50 years, that has been the philosophy and motivation of the majority of the justices who have served on the Supreme Court. It is in the best interests of all our people, regardless of race, sex, national origin or financial status, that, in the future years, we have a conservative majority on the court, committed to interpreting and applying our Constitution in accordance with the intent of the great Americans who gave it to us, just as were those great justices Holmes and Brandeis—liberals in economic philosophy but faithful to their oath to support the Constitution and to follow it in deciding cases coming before them.

But suppose Judge Bork believes a previous decision of the Supreme Court, such as that concerning abortion, is an improper distortion of the Constitution. That decision cannot be overturned by Judge Bork without the concurring vote of at least four other justices.

The Miranda Rule, which has proved to be such a shield for those accused of vicious crime, and thus has made our city streets, including those of our national capital, unsafe after dark for women or men, cannot be overturned by Judge Bork without the agreement of at least four other justices.

*Brown v. Board of Education*, which I believed then, and now believe, was an unwarranted and totally unlawful violation of the Constitution by the Supreme Court, may or may not be a correct application of the Constitution in the opinion of Judge Bork, but even if *Brown v. Board of Education* were overruled, which is extremely unlikely regardless of Judge Bork's opinion of it, that would not cause a single public school in North Carolina to be segregated according to race, nor would it cause any pupil or teacher to be reassigned.

Whatever the merits or demerits of integrated public schools may be, the present assignment of public school pupils and teachers in North Carolina is in accord with the present statutes enacted by the North Carolina Legislature, and no one has ever questioned the present authority of the state of North Carolina to operate integrated schools if the Legislature of this state so directs.

Thus, the suggestion that if Judge Bork is confirmed our North Carolina public schools will again be segregated by race is simply hog-wash designed to mislead and frighten our black voters and cause them to vote in our local and state elections for candidates who are opposed to Judge Bork's taking the seat on the Supreme Court to which President Reagan has nominated him.

Finally, it must be remembered that as justice of the Supreme Court, Judge Bork will, along with eight other justices, he called upon to decide many, many cases that do not involve what are usually referred to by the press and television commentators as "civil rights."

These involve acts of Congress, such as those dealing with income taxes, wage and hour laws, labor relations, food stamps, welfare, the rights of retired persons and sick people under the Social Security Act and Medicare, and congressional appropriations and administrative regulation of funds for our national defense, highway construction and many, many other federal statutes and administrative regulations.

Those acts of Congress and administrative regulations must be interpreted by the court. Judge Bork's record as judge indicates that he will, when acting as justice of the Supreme Court, interpret them so as to carry out the intent of the Congress which enacted those laws. Not one of his opponents, so far as I have noted in the press or on television newscasts, has suggested Judge Bork is not capable of interpreting these federal laws correctly and with an even-handed justice.

I have recently read somewhere in the press that in the years that Judge Bork has served as judge of the United States Court of Appeals for the District of Columbia a large number of the court's decisions written by Judge Bork have been appealed to the Supreme Court of the United States and not a single one has been reversed by the court, dominated as it has been by liberal and "middle-of-the-road" justices. Few trial and intermediate appellate judges have such a record as that. It speaks convincingly of his knowledge of legal principles, his sound judgment and his understanding of and fidelity to the highest judicial standards.

I find nothing in Judge Bork's record as revealed in these recent weeks of hearings to cause doubt as to his ability and intent, if confirmed, to interpret and apply correctly and fairly the Constitution and laws of the United States regardless of race, sex, occupation, financial status or political views of the litigants whose cases are brought before the court.

I. Beverly Lake of Wake Forest is a retired law school professor, former candidate for

governor of North Carolina and former member of the North Carolina Supreme Court. He represented North Carolina before the U.S. Supreme Court in *Brown* v. *Board of Education*.

EXHIBIT 2

BORK BATTLE EXPOSES POLITICAL HYPOCRITES

(By Giles Lambertson)

The confirmation battle over Supreme Court nominee Robert Bork is flushing out hypocrites. Some people are probably surprised by the sight.

The struggle for confirmation is being conducted at the level of irrelevancy sought from the beginning by Bork's most critical opponents, who are proving adept at tinny denunciation and verbal groin kicks.

The thrust of the anti-Bork hysteria is that the nominee is an utter misfit in 1980's America. If so, it is a wonder he was unanimously confirmed by the Senate to a federal appeals court earlier this decade. The flip-flop suggests some senators have experienced a confirmation conversion of their own.

More to the point, if Bork's harshest critics are serious about the nominee's potential to miscarry justice on the high court, they should sue to have the judge unseated from the lower court. Why visit such grave injustices upon any courtroom?

The difference is, of course, that the Supreme Court is adjudicator of last resort, which is to say not even Congress is outside the purview of the nine justices. Congress has few natural enemies to be concerned about but a Supreme Court considered hostile surely qualifies as one. This accounts for the intensity of the conflict and this is where the hypocrisy comes in.

Our national legislature has in it people who wear compassion on their shirt sleeves. Among these are Senators Joe Biden and Ted Kennedy, the arch-anti-Borkists with whom we are all familiar. There are others.

You know these people by their rhetoric. They clothe themselves in gaudy sentiments about pluralism, diversity and tolerance. Alas, the Bork debate has left them naked. They are exposed as moralists of stunning expediency.

Because Bork is decried as an inflexible ideologue, for example, these fair-weather lovers of liberty deem it reasonable to oppose him stridently and for purely ideological reasons. Because the nominee is characterized as majoritarian, his critics see nothing wrong with opposing him by manipulating special interest groups into a frenzy. Because the nominee is considered to have the heartbeat of a fascist, they feel justified demagoguing the nomination until it is withdrawn.

Bork is none of these things. What Bork's most fervent critics are is plain to see. It is a good feeling not to be numbered among them.

Arrayed against the nomination are the likes of Atlanta's Andrew Young, NOW's Molly Yard, Georgia's Jimmy Carter, and Harvard's Laurence Tribe, not to mention the ACLU, AFL-CIO, NEA and Norman Lear's People for the American Way. These are all good people and respectable organizations but one is hardly struck by the group's philosophical diversity.

Supporting the nomination are people such as moderate Republican and Saturday Night Massacre victim Elliot Richardson, former Carter aide and self-described liberal Democrat Lloyd Cutler, former Chief Justice Warren Burger, current Justice John Paul Stevens and broadcast executive Ronald Davenport, who is former dean of the Duquesne University Law School and a long-time black friend and former Yale student of Bork's.

Institutions in Bork's corner include the American Bar Association—whose committee gave the nominee its highest recommendation on a split vote—the Southern Baptist Convention's Public Affairs Committee and Concerned Women for America. All in all, the mix is greater in the Bork camp.

Thus it is special interests—and the party of special interests—against a guy whose only special interest is the Constitution. Bork has taken an abiding interest in it for a quarter of a century, as a matter of fact, an investigation that has led him to view society through a constitutional prism rather than vice versa.

This puts him in conflict with his critics who, in the clinch, prefer good intentions to constitutional fidelity. They clearly distrust the Constitution they claim to be safeguarding from people like Bork.

What hypocrites.

## BICENTENNIAL MINUTE

OCTOBER 6, 1862: ALBERT J. BEVERIDGE BORN

Mr. DOLE. Mr. President, 125 years ago today, on October 6, 1862, Albert J. Beveridge was born on a small midwestern farm. His was one of those Horatio Alger stories that we Americans treasure so much. As his farming family struggled to get by, the teenage Beveridge worked as a plowboy, railroad hand, logger, and teamster. All the time he was saving money for his education, and in 1881 he was able to attend what is now DePauw University, from which he graduated with honors. After a career as a lawyer in Indiana, he was elected as a Republican Member of the U.S. Senate in 1899. At 36, he was the youngest Senator at the turn of the century.

Beveridge wasn't just any Senator. He was by far the most powerful and popular orator in the Senate of his time. He also became a leader in the progressive wing of the Republican Party, during the period we call the progressive era. Beveridge was a strong supporter of President Theodore Roosevelt's "Square Deal" politics. In reaction to revelations about unsanitary conditions in the meat packing industry, Beveridge drafted the Meat Inspection Act. He was also a leader in the movement to outlaw child labor and he fought against the rise of corporate monopolies.

In foreign affairs, Beveridge was equally outspoken. He endorsed American overseas expansion, and even traveled to the Philippines to get a firsthand look at the territory that the United States acquired as a result of the Spanish-American War. In the days before jet travel, such a journey meant a considerable commitment of time and energy.

Beveridge lost his bid for reelection to a third term. He retired to become an outstanding historian. Today, the American Historical Association names one of its most prestigious annual awards after Albert J. Beveridge.

## EMPLOY THE HANDICAPPED WEEK

Mr. HARKIN. Mr. President, this is Employ the Handicapped Week. It is a time when we can look back with pride on the tremendous forward movement that this country has witnessed in the last decade and one-half. We can celebrate the enactment of sections 501, 502, 503, and 504 of the Rehabilitation Act of 1973, prohibiting discrimination based on disability and committing the Federal Government and its grantees and contractors to be models in employing people with disabilities. We can point to last year's amendments to the Rehabilitation Act, Public Law 99-506, which establishes a new initiative—called supported employment—on behalf of people with severe disabilities and recognizes the important role that rehabilitation engineering can play in enhancing employment opportunities for persons with disabilities. And we can point to a host of other laws and appropriations that create rights and fund programs to implement them.

Hire the Handicapped Week also is a time when we can look hard into the mirror of reallty and find that, despite our policies and tax dollars, people with disabilities still face formidable obstacles in getting jobs, advancing in jobs, and retaining jobs. A recent Lou Harris, Inc., poll for the International Center for the Disabled revealed that two-thirds of all working-aged disabled people are not working, even though a large majority of them want work. Disabled people, therefore, are much less likely to be working than any other demographic group in America, including black teenagers. The poll also showed that employers' experiences with disabled workers have been very good, that employers believe costs of accommodations for disabled workers are not barriers and indeed approximate the costs for employing people without disabilities, and that about half of the employers surveyed typically make special accommodations as a regular matter. But the fact remains that people with disabilities are more unemployed and underemployed than anyone else in America.

What are some of the solutions? We need to pass the Civil Rights Restoration Act to restore protections against employment discrimination by recipients of Federal financial assistance undercut by the Grove City and Darrone decisions. We need to extend protections against discrimination of persons with disabilities to cover the private sector. We need to continue the process of educating employers about the capabilities of persons with disabilities. We need to increase training op-

from New Hampshire wishes to speak for a while.

Mr. HUMPHREY. Ten minutes.

Mr. BYRD. Mr. President, I ask unanimous consent that the period for morning business be extended for 15 minutes and that the distinguished Senator from New Hampshire and any other Senator may speak therein.

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

The Senator from New Hampshire.

## NOMINATION OF JUDGE ROBERT BORK

Mr. HUMPHREY. Mr. President, in connection with the Bork nomination, there has been a great deal of activity on the part of special interest groups directed at influencing Senators. Whatever else one might say about special interest groups, they can hardly be said to take a balanced approach to their agenda. They are subjective, as we would expect them to be. We do not expect them to be wholly objective. They put their agenda first. We do not expect special interest groups to put the general interest first on their agenda.

I suggest to my colleagues that these campaigns by special interest groups against Judge Bork have obscured the impressive quallfications of the nominee and the extraordinary endorsements of the nominee by many eminent and highly respected authorities.

In a calmer and more rational environment, this Senator believes confirmation would be a foregone conclusion.

The point is easily demonstrated. Last year, we confirmed Justice Antonin Scalia for the Supreme Court by a vote of 98–0. When Judge Bork and Judge Scalia were together for several years on the D.C. Circuit Court of Appeals, they voted alike in 98 percent of the cases in which they both participated. Their judicial philosophies are very similar, with Scalia regarded by many as slightly more conservative than Robert Bork. How, then, can the greatly disparate treatment of these two nominees be explained?

The answer is obvious at least to this Senator. Special interest politics have turned the Bork confirmation into a political and ideological contest.

I hope Senators will look at the testimony of some eminent Americans whose judgment we can trust. Americans who have no political or special interest axes to grind. Retired Supreme Court Chief Justice Warren Burger, testified or stated to this effect in any event. "I don't 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." Responding to charges that Judge Bork is outside the legal mainstream of American juris prudence, Chief Justice Burger said, "Senator, if Judge Bork is not in the mainstream, neither am I and neither have I been." (Committee Hearing Transcript, September 23, p. 22.)

To this Senator at least, that kind of accolade coming from a retired Supreme Court Justice speaks far louder than do the criticisms of those who clearly have a special interest agenda to pursue.

Does a retired Supreme Court Chief Justice lightly dispense accolades about nominees to the bench? Certainly not. It is almost unprecedented. Justice Burger has reached the pinnacle of his career in the law. He has gathered all the laurels one can as a lawyer and judge. Are we to dismiss his endorsement? This Senator would sooner dismiss the ravings of all the special interest groups which have been howling for Judge Bork's scalp. Justice Burger says no one has been better qualified than Judge Bork in the last 50 years to serve on the Supreme Court.

I hope Senators will think about that. That is truly an extraordinary endorsement. What a mouthful—that a retired Chief Justice would even involve himself in the proceedings is striking, that he would say no nominee to the Supreme Court in the last 50 years has been better qualified than this nominee, Robert Bork, is an extraordinary endorsement.

Justice Burger says Bork is in the mainstream. Think about that. Measure that statement of a respected jurist who possesses the wisdom of some 50 years in the law profession. Measure his judgment against the politically charged accusations of the special interest spokesmen.

Justice John Paul Stevens, a sitting member of the Court, has also strongly endorsed Judge Bork. Justice Stevens stated that Judge Bork—

Is a very well-qualified candidate and one who will be a very welcome addition to the court (hearing tr., Sept. 15, p. 6).

Are we to subordinate the opinion of this distinguished jurist to the snivelings and scribblings of the wretched special interest spokesmen? I hope not.

President Gerald Ford said:

Judge Bork is uniquely qualified to sit on the United States Supreme Court (hearing tr., Sept. 15, p. 8).

The promiment figures who have strongly endorsed Judge Bork's confirmation are politically diverse and varied. Two eminent and respected Democrats, Griffin Bell and Lloyd Cutler, Attorney General and White House counsel during the Carter administration, the two highest Carter administration officials in the area of the law, testified strongly in support of Judge Bork's confirmation.

Lloyd Cutler said to the committee:

I believe that if Judge Bork is confirmed, the journalists and academics of 1992 will rank his opinions as nearer to the center than the extreme right, and fairly close to those of the very distinguished Justice whose seat he would fill (written statement of Lloyd Cutler, Sept. 22, p. 4).

No less than seven distinguished former Attorneys General of the United States came before the Judiciary Committee to testify in support of Judge Bork's confirmation: Edward Levi, William Rogers, Elliot Richardson, Griffin Bell, Herb Brownell, William French Smith, and William Saxbe.

Seven Attorneys General of both parties, men whose credibility is beyond assail, testified in support of Judge Bork's confirmation.

Consider, for instance, the statement of Edward Levi, certainly one of the most progressive Attorneys General of modern times. He said of Judge Bork:

In my experience with him, I would say that Judge Bork is an able person of honor, kindness, and fairness, and I would say 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 (hearing tr., Sept. 21, p. 218).

The statement of Edward Levi, one of the most progressive Attorneys General of modern times.

William P. Rogers, who has been in the forefront of the modern civil rights movement since its beginnings in the 1950's, had this to say about Robert Bork:

[B]y all the standards I know, he would be a natural selection. I cannot think of any Court of Appeals judge during the time I was in the Justice Department who had as outstanding a record as he has (hearing tr., Sept. 21, p. 308).

Elliot Richardson, no rightwinger, surely, strongly recommended Judge Bork's confirmation, saying:

My uncertainty has now been dispelled by the carefully considered testimony that Judge Bork has given to this committee. Though he may not assign the same weight to these considerations that I would give them, I regard his valuation of them as eminently reasonable. I am also satisfied that to portray him as bent on enshrining his every past utterance in some future majority opinion is worse than caricature—it is distortion (written statement of Elliot Richardson, Sept. 29, p. 4).

Elliot Richardson characterizing as distortion the efforts of some to portray Bork as bent on enshrining his every past utterances in some future majority opinion.

Present and former Governors also came forward to attest to Judge Bork's excellence and urge his confirmation. Gov. Jim Thompson of Illinois, one of the Nation's leading moderate Governors, stated:

I believe Robert Bork would be a fine Justice on the Supreme Court; and more, I believe he would do equal justice under the law, the words carved on the Court, which I passed today to come here to testify (hearing tr., Sept. 23, p. 194).

Richard Thornburgh, former Governor of Pennsylvania, based his strong endorsement of Judge Bork on his personal experience working with him in the Justice Department. As Governor Thornburgh testified:

I observed him to be a strong advocate of fair and effective law enforcement, committed to ensuring high standards in Government as well as the protection of what I regard as the first civil right of all Americans, the right to be free from fear of violent crime in their homes, in their streets, and in their communities (hearing tr., Sept. 28, p. 156).

Strong support for Judge Bork has come from prominent women legal authorities as well. For example, Carla Hills, former Secretary of Housing and Urban Development, testified forcefully in support of Judge Bork's confirmation. In particular, Secretary Hills refuted the false claims that Judge Bork would be insensitive to the particular legal concerns of women, stating:

Judge Bork's view of gender equality under the equal protection clause advances, not retards, women's rights" (written testimony of Carla Hills, Sept. 22, 1987, p. 4).

A large number of the Nation's top legal scholars and law school deans forcefully attested to Judge Bork's qualifications and refuted the criticisms of their liberal colleagues. Prof. Daniel Meador of the University of Virginia Law School, one of the country's finest surely, summed it up when he testified:

Indeed, the nominee's commitment to law and rational legal process, his intellect, and his rich legal experience provide ample evidence from which one can objectively conclude that in many respects he is unusually well-fitted for a Supreme Court Seat (written testimony of Daniel J. Meador, Sept. 25, 1987, p. 16).

There was a whole parade of respected officials, scholars, lawyers, and judges who testified to the extraordinary excellence and integrity of this nominee. But Senators might not have known it from some biased news coverage. For example, news reports critical of Judge Bork were frequently frontpage stuff in the Washington Post. Guess where the Post printed the story on the appearance of Chief Justice Warren Burger on behalf of Judge Bork. Page 3. That tells you how the game is being played.

Witnesses ranging from the learned deans of eminent law schools to the leaders of the Nation's foremost law enforcement and police officers' organizations all stressed the critical importance of confirming Judge Bork.

Surely, the most striking aspect of the testimonials for Judge Bork was that so many of them came from witnesses who had absolutely nothing to gain, and in some cases much to lose, for making those testimonials.

Lloyd Cutler, for instance, a self-professed liberal Democrat who is no supporter of the Reagan administration, put his reputation and integrity on the line in supporting Judge Bork.

Distinguished black Americans such as Dr. Thomas Sowell, and former Deputy Solicitor General Jewell LaFontant, as well as Roy Innis, the Congress of Racial Equality, strongly endorsed Judge Bork. Roy Innis had this to say about the Bork nomination:

As chairman of the Congress on Racial Equality, I strongly support the nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court because I believe that he will apply the law in a fair and even-handed way. His record as Solicitor General and as a Federal appellate judge amply attests that Judge Bork will vigorously enforce the civil rights laws on our statute books and in the Constitution. I also believe that 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 Americans today—urban crime. The testimony of Roy Innis, Chairman of the Congress on Racial Equality, Sept. 30, P. 1).

And surely Justice Stevens and former Chief Justice Burger have no ax to grind in their endorsements of Judge Bork. The statements of these impartial Justices should carry far more weight with us than the hostile assaults on Judge Bork made by the partisan special interest groups.

I regret to say that the unconscionable distortion of Judge Bork's impeccable record has seriously compromised the integrity of this confirmation debate. The unparallelled record of excellence that Bork has achieved as a court of appeals judge and as Solicitor General of the United States has been nearly obliterated by the mudballs thrown by special interest critics.

No one has to take my word on this point. Instead let me quote the testimony of former Chief Justice Burger, who stated as follows concerning the level of distortion.

The PRESIDING OFFICER. The 15 minutes allotted the Senator has expired.

Mr. HUMPHREY. Mr. President, I ask unanimous consent that I might continue for another 5 minutes at the most.

The PRESIDING OFFICER. Is there an objection?

Without objection, it is so ordered.

Mr. HUMPHREY. I thank my colleagues and the majority leader.

Justice Burger had this to say about the distortion which has been resorted to by many of the opponents, not all but many:

He was speaking of this confirmation effort and the efforts of those to deny confirmation.

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." (Hearing tr. Sept. 23, P. 3).

That is a mouthful. The worst one he has seen apparently.

Former Attorney General William French Smith was asked whether he had ever seen a confirmation proceeding with more distortion of the nominees' record. General Smith's response was so heartfelt and compelling that it is worth quoting at some length, and I wish all Senators could have seen General Smith in this response because he is ordinarily a very patrician man of serene attitude and composure but the indigration that have been instructed if Senators could have seen it. He said:

I do not think I can think of a close second. And it reached the point where one wonders whether anyone is willing to subject himself to this kind of a process in order to get even that high a position.

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.

He said, as he looked the Senator straight in the eye—

I mean, there are people in very important positions in this Government who are lying to the American public. Now, that is hard to take.

And the problem is, I say "lying" because they know what they say is not true—and not just people in this Government, but people on law school campuses and elsewhere who presumably are supposedly responsible people.

I have never seen anything like it. I hope I never see anything like it again, and I find it really—well, "inexcusable" is a very soft term to use for it. (Hearing tr. Sept. 21, P. 262).

Attorney General William French Smith accusing opponents of lying about Robert Bork.

Similarly, Prof. Richard Stewart of Harvard Law School testified to the outright distortion of Judge Bork's positions in the various special interest group reports attacking his record. As Professor Stewart testified:

So there have been some serious charges made here. My memorandum, and others in the briefing book, I think show, that a semblance of these claims is made out by a highly selected culling, unrepresentative sample of cases, and an outright distortion or highly misleading account of those cases when they are discussed in the reports. (Hearing tr., Sept. 22, p. 142).

These are not the kind of men who would make such charges lightly. The fact is that Judge Bork's principled and conscientious judicial philosophy has been shamelessly distorted and defamed in these proceedings. So I urge my colleagues to consider these realities as they reach their decisions on the Bork nomination. I urge them to look beyond the hostile propaganda and focus on the man, his record as a Solicitor General active in pushing outward the coverage of civil rights statute, and his impeccable record as a U.S. Court of Appeals judge. And I urge Senators to reflect on whether the man we unanimously confirmed

for those two extremely important posts could possibly be the same man portrayed by Bork's extremist critics. Indeed not.

Mr. President, a grave injustice will be committed if the Senate decides the fate of the Bork nomination on the basis of smears resorted to by some of the more visible Bork opponents. And the Nation will lose someone who would surely be one of the greatest Supreme Court Justices of all times.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

## ORDERS FOR WEDNESDAY

### REDUCTION OF LEADERSHIP TIME

Mr. BYRD. Mr. President, I believe we have some items that can be taken care of by unanimous consent.

Mr. President, while we are waiting, I ask unanimous consent that the time of the two leaders tomorrow be reduced to 5 minutes each.

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

### RECOGNITION OF SENATOR BREAUX AND MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that following the time allotted for the two leaders on tomorrow, Mr. BREAUX be recognized for not to exceed 15 minutes, after which there be morning business between that point and 9 a.m. and that Senators may be permitted to speak for 1 minute each during that period for morning business.

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

### AUTOMATIC QUORUM AT 9 A.M.

Mr. BYRD. Mr. President, I believe the order has been entered for a vote to occur at 9 a.m. tomorrow.

The PRESIDING OFFICER. The Chair advises the majority leader that there is no order to that effect.

Mr. BYRD. I ask unanimous consent that there be an automatic quorum to begin at 9 a.m. tomorrow.

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

### IMPLEMENTATION OF REGULAR ORDER

Mr. BYRD. Mr. President, there will be a motion to instruct the Sergeant at Arms to request the attendance of absent Senators. As I have already indicated today, that will be a rollcall. It will go for 30 minutes, at the end of which I ask unanimous consent that the regular order be implemented.

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

### PROGRAM

Mr. BYRD. Mr. President, on tomorrow the Senate will resume consideration, following that rollcall vote on establishing a quorum, of the pending Department of State authorization bill. Several amendments have been disposed of today. There are several amendments remaining, most of which I believe we will find are on the other side of the aisle.

The whips on this side of the aisle have contacted several of the Senators who have amendments remaining over here, and we are ready to propose time limitations on their amendments. If we cannot get time limitations, the amendments in all likelihood will not take a great deal of time for the most part.

I hope Senators will be able to complete work on the State Department authorization bill tomorrow, so that the Senate then can proceed to other business. There are other matters that are awaiting action. The following appropriations bills are on the calendar: Energy and Water Development; Commerce, State, Justice, Judiciary; Labor, HHS, Education. In addition thereto, under the order that has been entered, the Senate will be taking up the catastrophic illness bill in all likelihood by Thursday. The Verity nomination could come up at any time. So I expect rollcall votes on any and all of these matters to occur early and they can occur late.

## UNANIMOUS-CONSENT AGREEMENT—S. 328

Mr. BYRD. Mr. President, this request has been cleared by the distinguished Republican leader. I ask unanimous consent that the majority leader, after consultation with the distinguished Republican leader, may call up S. 328 at any time to require the Federal Government to pay interest on overdue payments, and that that measure be considered under the following time limitation:

Thirty minutes on the bill, equally divided between Mr. SASSER and Mr. TRIBLE.

Ten minutes on an amendment to be offered by Senators LEVIN and QUAYLE on behalf of the committee, dealing with section 7.

Five minutes on an amendment to be offered by Senator DIXON, requiring payment for dairy products no later than 10 days after invoice receipts.

Five minutes on an amendment to be offered by Senator SASSER, making technical corrections.

Five minutes on an amendment to be offered by Senators ARMSTRONG and GRASSLEY to establish a commission to study the Government's debt collection practices and make recommendations.

Forty minutes on an amendment to be offered by Senators DANFORTH, BUMPERS, and PRYOR dealing with interest owed farming entities on overdue CCC payments.

Provided, further, that no other amendments be in order with the exception of the committee-reported substitute.

Provided, that there be 15 minutes on any debatable motion, appeal, or point of order if such point of order is submitted by the Chair for debate.

Provided, that no motions to recommit, without or without instructions, be in order.

Provided, additionally, that the agreement be in the usual form.

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

The text of the agreement follows:

Ordered, That the majority leader, after consultation with the minority leader, may call up S. 328, to require the Federal Government to pay interest on overdue payments, and that the following amendments be the only amendments in order, except the committee reported substitute:

Levin/Quayle amendment, offered on behalf of the committee, dealing with section 7, 10 minutes

Dixon amendment, requiring payment for dairy products no later than ten days after invoice receipt, 5 minutes

Sasser amendment, making technical corrections, 5 minutes

Armstrong/Grassley amendment, to establish a commission to study the Government's debt collection practices and make recommendations, 5 minutes

Danforth/Bumpers/Pryor amendment, dealing with interest owed farming entities on overdue C.C.C. payments, 40 minutes

Ordered further, That there be 30 minutes on the bill, to be equally divided and controlled by the Senator from Tennessee (Mr. Sasser) and the Senator from Virginia (Mr. Trible), and that there be 15 minutes on any debatable motion, appeal, or point of order, if it is submitted by the Chair for debate.

Ordered further, That no motions to recommit, with or without instructions, be in order.

Ordered further, That the agreement be in the usual form.

Mr. BYRD. Mr. President, I want to thank the floor staffs on both sides for the hard work they have put into getting this agreement. It took a lot of work, and I thank them.

## PROGRAM

Mr. BYRD. Mr. President, the Senate will convene at 8:30 tomorrow morning. After the two leaders have been recognized not to exceed 5 minutes each under the order, Mr. BREAUX will be recognized for not to exceed 15 minutes; after which, if there is any remaining time before 9 a.m., there will be a period for morning business for Senators to be permitted to speak therein for not to exceed 1 minute each.

At the hour of 9 a.m., the automatic quorum call will begin. At 9:30 a.m., the automatic call for the regular order will be implemented. I would

in the 1980 "Baucus amendment" to the Social Security Act (P.L. 96-265). This provision defines minimum standards that must be met before companies can market Medicare supplement policies.

Medicare supplement policies generally cover those costs not covered by Medicare, primarily deductibles, coinsurance and some policies cover costs in excess of Medicare-approved amounts. One provision of the "Baucus amendment" establishes Federal sanctions, consisting of fines, imprisonment, or both for knowingly selling policies that duplicate coverage in individual already has under Medicare. This provision was enacted, in part, in response to reported marketing and advertising abuses in the sale of private Medicare supplement insurance to the elderly.

The bill S. 1127 would increase Medicare coverage primarily by eliminating certain deductibles and coinsurance. As a result, benefits now being provided by private Medicare supplement insurance policies under the standards required by State laws pursuant to the 1980 "Baucus amendment" model standards will duplicate Medicare-covered benefits.

It is anticipated that changes to current NAIC "Medicare supplement" model standards and subsequent State law changes may not occur for one to three years. Thus, until State laws are conformed, Medicare supplement insurers will be in the untenable position of either providing the minimum coverage required by State law and thus be subject to Federal sanctions of a $25,000 fine, 5 years imprisonment, or both; or violating State law standards by eliminating their Medicare supplement policy coverage which would duplicate Medicare.

In addition, a significant number of private Medicare supplement-policies are required by State law or private contract to be "guaranteed renewable," and the insurer must renew the policy upon the timely receipt of a renewal premium. While permiums under such guaranteed renewable contracts may be adjusted for all policies on a class basis, renewal is considered to be a continuation or extension of the original contract. Thus, Medicare supplement insurers may not unilaterally alter the coverage of such a policy. Insurers may be subject to numerous legal actions if coverage is unilaterally restructured to reflect the changes precipitated by this legislation.

At best, Mr. President, in enacting this legislation this year with its effective date on January 1, 1988, we will be giving States three months to change their laws. We will be giving insurers three months of alter policy coverages, recalculate premiums, and inform elderly consumers.

Perhaps all Medicare benefit increases under the bill should be made effective at least one year from the date of enactment to give States time to amend State laws, to give insurers time to adjust coverages and premiums, and to educate elderly consumers on the new Medicare coverages and private options. A January 1, 1989, effective date would provide a minimal transition period for these changes.

PRIVATE INSURANCE ROLE

Mr. President, Medicare has come a long way since its enactment in 1966. Following the system's creation most commercial insurance companies began to write what we called "Medi-Gap" policies. Typically, these policies would pay a specific benefit addressed as either a Medicare copayment amount or a deductible amount or both. These policies looked like they worked with Medicare, but didn't actually. This was not a satisfactory situation.

As I mentioned earlier, the "Baucus amendment" directed the States to set specific standards for what would then be termed "Medicare supplement insurance." Only policies meeting these standards could employ this term and no other policy could address Medicare in its benefits. Further, any other type of health insurance policy delivered to a person eligible for Medicare because of age must be accompanied with an outline of coverage including the statement, "this policy is not a Medicare supplement policy."

This action not only eliminated the confusion of what was and what was not Medicare supplement insurance, but also allowed companies a standard base upon which they could build Medicare supplement insurance coverage. This has worked very well and as pointed out in the Bowen report of last November has provided private industry prepayment of normal expenses and insurance for extraordinary expenses while acting as a simplifying mechanism for dealing with the complexities of the Medicare program. Industry statistics indicate that 70 percent of the Medicare beneficiaries have insurance of this nature.

Private Medicare supplemental insurance has been criticized because many of these policies are said to have low loss ratios. Loss ratios must be kept in perspective as only one element in measuring the value of a health insurance product. According to GAO's own observations, loss ratios must be interpreted with care. Various factors can affect loss ratios such as health of the policyholder (healthy people file few claims), the number of policyholders under group plans, or whether premiums can be adjusted annually.

Medicare itself could be said to have a 75-percent loss ratio rather than the 98 percent often touted by some. Based upon the detailed figures included in the "Appendix" for the "Budget for Fiscal Year 1988," the Federal hospital insurance trust fund had income of about $67 billion, and outgo of $49.6 billion. A loss ratio is essentially premium income compared to benefits paid. Thus, the trust fund's loss ratio is about 75 percent, the minimum "target" under the "Baucus amendment" for group policies.

Legislation establishing Medicare catastrophic coverage must maintain a significant role for private insurance.

CONCLUSION

Mr. President, Medicare's 1986 $40 hospital deductible has now grown to $540, the hospital daily coinsurance amounts have risen from $10 to $135 and $270 with a skilled nursing facility daily copayment amount of $67.50. The part B premium is rising to nearly $25 per month. Expenses for care which exceed Medicare approved costs and other noncovered costs are increasing.

These amounts are significant out-of-pocket costs for the elderly and it's obvious changes are needed. I would support such changes, but the legislation before us, does far more than adjust the deductible and coinsurance amounts, and will add more costs for retirees participating in the program. Costs of expanded benefits will rise in later years, further burdening both retirees and the Federal Treasury.

We will consider an amendment to this bill to establish a Medicare provided outpatient prescription drug benefit. Recognizing prescription drugs are a large expense for seniors, I also note there is nearly an $8 billion difference in estimates between CBO and HHS on the cost of establishing such a benefit. Absent certainly, how do we ensure a self-funding program? What if costs escalate above the added income from the new surtax?

Do we really want to impose a new tax on the elderly? The financing mechanism, a mandatory tax on senior citizens, also poses uncertainties as these mandatory supplemental premiums rise even higher in later years to as much as $1,000 or more per person. What if costs rise to such amounts that beneficiaries do opt out of part B? With the Medicare trust fund's financial picture already appearing somewhat precarious in future years, will this further exacerbate the problem?

This legislation will challenge the solvency of the Medicare trust fund. Without this legislation, the trust fund is expected to experience financial difficulties, falling some $20 billion short by the year 2005. Just as the original Medicare Program's costs were underestimated, it is likely that, due to our increasingly aging population, costs will outpace the "self-financing" mechanism of this legislation.

Mr. President, perhaps we need to further study and reflect on this plan and its implications before hastily expanding benefits for reasons that appear to be politically motivated. Are we making the wisest choice to invest scarce Federal dollars in this program, or should these dollars be used to support our seniors' true catastrophic need—long-term care?

I thank my colleagues for considering these remarks and urge a careful review of this legislation.

## RECOGNITION OF SENATOR BREAUX

The PRESIDING OFFICER (Mr. PROXMIRE). Under the previous order, the Senator from Louisiana is recognized for not to exceed 15 minutes.

## NOMINATION OF JUDGE ROBERT BORK

Mr. BREAUX. Mr. President, my colleagues and I have been asked by the President of the United States to confirm his nomination of Robert Bork to be an Associate Justice of the U.S. Supreme Court. My duty as a U.S. Senator, under article 2, section 2 of our Constitution, is to confirm that nomination or to reject it. This is not an easy task, but it is one that carries

with it enormous responsibility which I and my 99 colleagues accept.

Who is this man that President Reagan asks me to confirm? Some of my constituents tell me, in good faith, he is a legal scholar, extremely intelligent, a former law professor, and court of appeals judge who would protect our Constitution from all legal attacks and I ought to vote to confirm him.

Others, with equal good faith, tell me that he has a dedicated political agenda, is committed to reversing decades of Supreme Court precedents and wiping out constitutionally protected privacy, free speech, and equal rights for all classes of people and I should vote to reject his nomination.

All my constituents' views are important. I have received, as other Senators, numerous calls and letters, and I commend my constituents for participating in the public debate by following the Senate hearings and expressing their opinions.

However, this decision, Mr. President, cannot be a political decision. It cannot be a popularity contest. It cannot be decided by adding up the numbers in a poll or merely counting the mail we received. My decision must be based on whether this nominee in and of himself is the right person for the job.

I feel, Mr. President, that a nominee to our Highest Court must be predictable as to what kind of Justice he will be. By predictable, I mean not how he will vote on each and every case, but predictable as to the philosophy upon which he will rely throughout his Court tenure. Robert Bork lacks this predictability.

He was, at one time, a socialist campaigning for socialist candidates. He has been a New Deal liberal. At another time he was a libertarian. Then he changed, again, to become a strong conservative. During the confirmation hearings he tried aggressively to portray himself as a moderate. One can only wear so many hats before it becomes impossible to tell what role he is playing.

A lifetime of political writings and speeches by Judge Bork, followed now by his public testimony discounting these former views, clearly suggests a lack of predictability.

Lack of predictability for a person who will be appointed for life is a serious concern that we cannot dismiss.

Our Constitution, which we celebrate this year for protecting our democratic form of government for 200 years, is protected itself principally by our Supreme Court. That document guarantees the rights of the majority and it also protects the rights of the minority. Judge Bork views the Constitution differently, it seems, depending on the issue.

When the issue is individual rights, Judge Bork says he is a strict constructionist and he has consistently exercised judicial restraint when individuals have asked the court to prohibit Government interference with their activities.

However, when the case is big business complaining about Government intrusion, Judge Bork has been much more willing to find new constitutional protection for big business. Judge Bork has, for instance, voted against individuals and workers and in favor of the Government in 26 of 28 administrative law and constitutional split decisions. He also voted in favor of business and against the executive branch in eight out of eight administrative law split decisons. In cases where individuals sought the right to have their day in court, Judge Bork voted against the individuals in 14 out of 14 split cases.

The hearings themselves have produced in Judge Bork's testimony a man who has written and decided cases one way, versus candidate Bork who reversed himself on the protection of the first amendment, who reversed himself on the protection of women and who reversed himself on civil rights. But the facts of history cannot be reversed and his record is what we must use to judge him.

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. In fact there are many areas addressed in his writings with which I agree. I agree, for instance, with Judge Bork's critique of the judicial excesses that led the Court to decide the Roe versus Wade decision allowing for abortion. But we cannot support a person for a lifetime appointment based on one issue, any more than we can oppose him for that reason—the total picture must be evaluated.

Finally, as Southern Senator, let me say that I feel strongly that geographical representation on our Nation's Highest Court is important. Is there not a single person from the South competent to replace our retired southern justice from Virginia, Justice Powell? Why not search again and send us our brightest and most intelligent?

So I say to our President:

"Your duty, Mr. President, is to nominate the best you can find. Our duty is to make sure that the person is, in fact, the best.

"Send us a conservative, Mr. President, if that is your wish. That is your right. But Mr. President, send us the very best you can find. I want to help you in that search. Let us go back and look again, ask for new recommendations and then come back and let us work together so that history will record that Ronald Reagan found the very best."

My vote, Mr. President, will be not to confirm this nominee.

Mr. President, I yield the floor.

## MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will not be a period for the transaction of morning business, not to extend beyond the hour of 9 a.m., with Senators permitted to speak therein for not to exceed 1 minute.

## PROHIBITION OF IMPORTS OF PRODUCTS FROM IRAN—S. 1748

Mr. DOLE. Mr. President, I would like to offer one point of clarification with respect to S. 1748 and to offer guidance thereon to the appropriate agencies of the Federal Government in establishing regulations and procedures of implementation.

In fairness to United States businesses, it was not the Senate's intent to affect Iranian products under loading, in storage to or in transit to the United States on the date of enactment. While we want to halt the importation of Iranian products, we do not want to cause financial harm to United States companies presently involved in legitimate business transactions with Iran. The Senate intends for the appropriate Federal agencies to reflect these concerns when promulgating regulations.

## THE BORK NOMINATION

Mr. GORE. Mr. President, when the nomination of Judge Robert Bork to the Supreme Court was first announced in July, I pledged to keep an open mind and give the matter serious consideration. I have kept that pledge. The issue has raised strong emotions on both sides, and there was pressure to make hasty judgments. I believed that Judge Bork deserved a fair hearing.

This is not a partisan matter. I do not believe that Judge Bork or any other Supreme Court nominee should be subjected to an ideological litmus test. Ideology should never be the sole criterion used either for nomination or confirmation. I wouldn't vote against Judge Bork solely because he is a conservative.

I have listened carefully to what Judge Bork has said, and given his views careful scrutiny. I reviewed the committee hearings and Judge Bork's testimony. I met with Judge Bork in my office on Friday and asked him to address some of my concerns. I respect Judge Bork as a man of integrity and intellect. He is neither a racist nor a bigot. But I have come to the view that Judge Robert Bork does not belong on the Highest Court of our Nation. In all good conscience, I cannot support his nomination, and I will vote against that nomination when it reaches the floor.

Judge Bork does not understand the Constitution as most Americans do. He says he would interpret the Constitution exactly as the framers would have, 200 years ago. But 200 years ago black people were property and women couldn't vote. Two hundred years ago, due process was a restriction on the Federal Government alone. Not only have we added amendments to our Constitution, we have changed the context in which it should be read.

We have grown as a people. Our country has made great strides toward eliminating injustice. Our society now stands as an example of the greatness that can be achieved if everyone is given an opportunity.

The Constitution is not a mere list of 200-year-old rules. It is an instrument of dynamic principles and the blueprint of a broad, democratic and pluralistic society. Americans are not ready to let the Supreme Court take us back to the days when our Constitution was given a narrow and restrictive interpretation.

The Supreme Court is the guardian of our liberties, all of our liberties. We need Justices with the courage and compassion to ensure that our country truly has liberty and justice for all. To quote Congresswoman Barbara Jordan, "I like the idea that the Supreme Court of the United States is the last bulwark of protection for our freedoms." That is essential to our system of government and our tradition of liberty.

Judge Bork has opposed every major civil rights initiative of the last 30 years. He now admits that many of these initiatives have worked—and I agree. Judge Bork has great faith in the legislative process and sees it as the last resort for those who have been treated unfairly by the State. However, he has criticized many cases which have expanded voting rights so that we have a truly representative democracy. How can a judge say: "The legislature will protect your rights" when he opposes decisions to strike down poll taxes, literacy tests, and malapportioned districts that deny minority voting rights?

It is not solely Judge Bork's narrow views of the Constitution and the protections it provides minorities. it is also his unwillingness to find protection for fundamental rights in the due process clause, his failure to find a right to privacy or first amendment protections for creative expression and civil disobedience, that disturb me. In addition, he finds no legal basis for Members of Congress to sue the executive for unconstitutional behavior. Not only are these matters disturbing, Judge Bork's positions on these issues are at odds with generally accepted constitutional law and Supreme Court precedent.

The due process guarantees of the 5th and 14th amendments, along with the 9th amendment's assurance that "(T)he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," demonstrate that the framers intended to protect fundamental values from Government intrusion. The most scholarly and conservative Justices of this century have recognized this. Why is Judge Bork seemingly blind to this aspect of original intent?

The right to privacy provides us all with a safeguard against unreasonable governmental intrusion into our private lives. And just as Judge Bork does not like his adversaries investigating which movies he views in the privacy of his own home, the American public does not want the Government interfering with the privacy of the marital relationship. There are certain activities and areas which should remain unassailable by the Government I do not wish to see a Justice on the Supreme Court who does not recognize that fundamental principle.

The first amendment's right to freedom of speech is the cornerstone of the American system of government. We cannot afford to limit it in any way, save that of protecting our people from imminent lawless action. We cannot afford to distinguish between Thomas Paine's eloquence regarding the harshness of British rule and Paul Cohen's jacket demanding—in crude terms—an end to the Vietnam war draft. Both are expressions of dissatisfaction with the Government, and both deserve the protection of the Constitution.

Last, I believe that Judge Bork's view that Members of Congress do not have standing to sue the executive branch provides the executive with too much power, thereby undermining the balance of power which the framers of the Constitution originally intended. We cannot let the executive authority run rampant. The "Iran-Contra affair" should have taught us at least this. If the Supreme Court won't hear the claims of Members of Congress that the executive has gone beyond the limits of its power, who will? If the Legislature is the last resort for those whose rights have been trampled on—as Judge Bork contends—what are we to do when an imperial executive ignores that law and tramples on the Legislature. We cannot allow a judge on the Court who would eschew that responsbility.

For all these reasons, I will vote against Judge Bork's nomination. I do not mean to say that he lacks intelligence or experience. However, there are other characteristics which are equally important for a Supreme Court Justice. While I do not believe in judges making law—that is a congressional responsibility—I do believe that they must take care to see that the spirit as well as the words of the Constitution and the laws of the United States are fairly and equally applied. And the Supreme Court must not only ensure that the laws are fairly applied, but that the laws themselves are fair. Fair means not only that they do not unduly burden our right to privacy, but that they do not deprive us of a fundamental right, and that they do not distinguish on the basis of race, sex, religion, or other invidious and largely irrelevant factors.

I oppose Judge Bork's nomination.

## BICENTENNIAL MINUTE

### OCTOBER 7, 1929: BRITISH PRIME MINISTER RAMSAY MAC DONALD ADDRESSES SENATE

Mr. DOLE. Mr. President, on October 7, 1929, British Labor Party Prime Minister Ramsay MacDonald delivered a major address before the Senate. He spoke warmly of British-American friendship, and advocated making the Kellogg-Briand peace pact, ratified earlier that year, a living principle. While MacDonald's was one of the more substantive addresses by a visiting dignitary to be given before the Senate, it was not the first. Ever since 1852, when Gov. Louis Kossuth of Hungary addressed the Senate, foreign leaders occasionally have sought the Senate Chamber as the site of major speeches. Prior to MacDonald, the only Englishman to address the Senate had been Prime Minister Arthur James Balfour, whose grim mission in May 1917 was to brief the Senators on the terrible war in Europe that the United States had just voted to enter.

The purpose of MacDonald's 1929 visit to America was to invite the United States to join England, France, Italy, and Japan for a naval conference in London, designed to avert future wars. The Prime Minister arrived at the Senate trailing clouds of good will and hope for a safer world, and made his way into the Capitol through the cheering crowds of well-wishers lining the stairs. Nearly every Senator was present and the galleries were packed with notables eager to hear more about the conference he proposed. The Labor Party leader was roundly applauded when he declared that—

> There can be no war—nay, it is absolutely impossible, if you and we do our duty in making the peace pact effective, that any section of our arms, whether land, or sea, or air, can ever again come into hostile conflict.

The conference MacDonald espoused did take place and in April 1930 the London Naval Treaty was signed by the United States, Great Britain, and Japan. The next Englishman to address the Senate was King George VI in June 1942. Like Balfour before him, the King came in the

ess of dismantling the operation while not making the enemies I did.

Well, that is one attitude, and I do not deny people their own perceptions, even members of our Foreign Service. But I would argue with them on those perceptions. I am sure that many of our body have been in refugee camps. I do not think anybody in this body would say they are a pleasant place. I cannot imagine that anybody who has been in any refugee camps would feel there is anything but a call to all of us to try to eliminate the problem.

In 1968, on the floor of the Senate, I made a speech about refugees in the Middle East. I stated then and I would restate now, that there will never be peace in the Middle East until the Palestinian refugee problem is addressed. That brings down the ire of some people, too. But that is still a human problem.

Now, Mr. President, I feel very strongly; we are not asking the Senate to do anything but assert itself through a sense-of-Senate resolution to send a signal—and that is about all you can call this, a signal because it is a sense-of-the-Senate resolution—to our friends in the world that we are going to carry through with this commitment for a 3-year period, and let me emphasize again why the 3 years. This is the period of time that prayerfully—and hopefully we can all agree on this point—through a new initiative, through new efforts we can resolve the MIA/POW problem and the other humanitarian issues unresolved with Vietnam, which would be the triggering mechanism to resolve the problem of Cambodia which has been the major source for many of the Indochinese refugees today.

I am going to yield to the Senator from Minnesota, who wants to be heard, on the issue relating to the H'mong situation which has been specified in this same letter that the Senator has quoted and has signed along with other colleagues.

I know of no other ethnic group in the whole world where we have specified some kind of a special treatment, as the Judiciary letter stipulates, that intimates a threat to our country than how the letter singles out the H'mongs. I interpret this as not really something protecting ourselves so much as it is a demeaning affront to an ethnic group.

Let me just say briefly the H'mongs were some of the most loyal fighters that the United States had in the war in Vietnam. If any one group went out on a limb, so to speak, and stood with the United States cause, how ill defined it may have been in Vietnam, it was the H'mongs. The H'mongs are now refugees because they had taken that political stance so clearly, risking their lives and giving their lives. They came to this country as part of the resettled refugees, and one of the first things we discovered was the H'mongs did not have a written language. I am proud to say that Portland State University and others joined together in a coalition to develop a written language out of the phonetics of the H'mongs language. And I can also say that as one State with one of the highest refugee populations per capita of any State certainly, there were some problems initially with not only the H'mongs but with many other groups as well. I see no reason for singling the H'mongs out at this time as it has been done in this letter because I think again the Senator from Minnesota will testify to the fact that Minnesota, with one of the largest H'mong populations, has seen a tremendous improvement within the H'mong group, as well as I can testify from the H'mong experience in Oregon.

Mr. President, I will not go into the Sureck case. I have alluded to it, and the Senator from Wyoming has outlined a procedure that, somehow, a letter from the appropriations chairman that I confess to having written to the Presdient of the United States and to the Secretary of State, outlining the case as I saw the problems of the refugees in Southeast Asia, somehow defeated Mr. Sureck and brought a change in assignment.

I would say regarding the President of the United States I have recommended many things to him, and he has taken very few of my recommendations. And I used to even write some of those recommendations on the Appropriations Committee stationery and sign my name as chairman of the Appropriations Committee.

It is merely because I and 13 other Senators wrote a letter, which did not necessarily mean the President of the United States and the Secretary of State are going to immediately respond in the affirmative or support my proposition in the letter, that they looked into the situation. They took action on that situation based upon the facts of the case that they obtained and that they also reviewed. And that was the basis of their decision, not because I wrote a letter as chairman of the Appropriations Committee. If anyone wants to test that further, I will give them the win and loss record of my recommendations to the White House. It almost got to the point where I did not bother to send recommendations down there any more. But again, the implication of somehow that the President's action was taken on the basis of my stationery, I would refute that.

Mr. President, I hope we can move to a vote shortly on this. I do know the Senator from Minnesota as well as the Senators on the floor here may wish to speak to this amendment.

I again thank the chairman of the Senate Foreign Relations Committee.

Mr. DIXON addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DIXON. Mr. President, the distinguished manager has been gracious enough to say that I can proceed for a few minutes to make a statement. I thank the President for recognition.

## THE NOMINATION OF ROBERT BORK

Mr. DIXON. Mr. President, when I last stood on the Senate floor to discuss a Supreme Court nomination—the nomination of Justice Rehnquist to be Chief Justice—I laid out three tests that I would use to guide my consideration of such an appointment: First, great intellectual capacity; second, the kind of background and training that appropriately prepares the nominee for the post to which he or she is recommended; and third, personal integrity and a good reputation. I also stated that opposing the political or judicial philosophy of a President's nominee is not generally a basis for a vote against that nominee.

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. Therefore, when the President sent the nomination of Judge Bork to the Senate, my initial inclination was to favor the appointment.

However, the Supreme Court is unlike any other court in the land. Its rulings on constitutional issues cannot be appealed, and can only be overturned by another ruling of the court, or through the extremely difficult and time-consuming process of constitutional amendment. My responsibility as a Senator therefore demanded that I review Judge Bork's qualifications and suitability for the Supreme Court with great care.

I have thought about this nomination a lot since it was first sent to the Senate on July 1 of this year. I have read a number of Judge Bork's writings and judicial decisions. I have listened to the hearings in the Judiciary Committee when possible, and I have reviewed the transcript of those hearings. I hoped that review would definitively answer all the questions that have been raised about this nomination. Unfortunately, it did not.

Despite Judge Bork's undeniable brilliance, I have to say that I do not believe he has put a number of the major issues involving this nomination to rest.

I want to take a moment to briefly discuss the areas where I have real concerns, but before I do, I want to comment on one general matter concerning whether the Senate would

advise and consent to the nomination of any philosophical conservative.

I do not object to the nomination of a judicial conservative to the Supreme Court bench. I think the President is entitled to nominees that share his philosophy. I have voted for the nominations of judicial conservatives to the bench in the past, and I expect to support the nomination of judicial conservatives to judicial posts in the future. I have supported the nomination of Justice Rehnquist to be Chief Justice, and the nominations of Sandra O'Connor and Antonin Scalia to be Justices. If the Senate rejects the nomination of Judge Bork, I fully expect President Reagan to send the Senate a conservative nominee, and I fully expect that the Senate will confirm a conservative nominee.

The questions the Bork nomination raises for me, though, do not go to the question of conservative or liberal philosophy. Rather, they go to the fundamental question of how he views our Constitution, how he sees the powers of government and individual liberties, and the role he sees for the Court in protecting individual rights guaranteed by our Constitution.

Our Constitution replaced the Articles of Confederation. The Articles of Confederation were abandoned because they were not strong enough to manage the country. Our Nation's founders knew they needed to strengthen the fundamental law on which our country is based. At the same time, however, they wanted a limited government, one that preserved individual liberties. The Government of the United States, therefore, is a government of limited powers. Even that was not enough to satisfy the Founders that individual liberties would be sufficiently protected. They felt compelled to add the Bill of Rights—the first 10 amendments to the Constitution—in order to ensure ratification.

The Bill of Rights is every American's guarantee that their liberties will be preserved. It specifically guarantees such fundamental rights as freedom of speech and religion, and the right to trial by jury. It is much more, however, than a list of specific rights, and even more importantly, it is not an exclusive list.

The ninth amendment states:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

What that means is that the Constitution explicitly recognizes that those rights explicitly listed in the Bill of Rights or elsewhere in the Constitution do not represent all the rights of Americans that are constitutionally protected. Simply because a right is not spelled out, like the right to marry, for example, does not mean that it does not exist.

The Constitution, at least in my view, thus takes an expansive view of the individual liberties it guarantees. Judge Bork's writings, opinions, and testimony before the Judiciary Committee leaves real questions, however, as to whether he sees the Constitution in that light. A strong case can be made that his view of the Constitution leads to a much more cramped and narrow view of individual rights and liberties in such important areas as civil rights and the right to privacy.

Let me say at the outset that I do not believe that Judge Bork is a prejudiced man. In the area of civil rights, however, I think there is a real question as to whether his views on a number of vitally important issues are in the mainstream of American opinion.

He has criticized, for example, Supreme Court opinions holding racially restrictive real estate covenants—preventing the sale of real estate to blacks or other minorities—as unconstitutional, and overturning State poll taxes. He argues that many civil rights issues should be brought to the Congress for resolution, rather than being left to the courts. However, he has also criticized congressional action in the civil rights area as exceeding its powers.

These criticisms of Judge Bork's record come, not from some narrowly based interest group. Rather, they come from a broad spectrum of America and must be taken seriously. They come from such people as William Coleman, a Republican member of President Ford's cabinet, and a distinguished lawyer who started his career as an appellate court and then a Supreme Court clerk.

What troubles me most is that the civil rights questions Judge Bork takes issue with are basically settled law, well accepted throughout the legal community. It creates a real question in my mind about how he would approach future civil rights cases.

Judge Bork has also criticized the well-accepted line of cases affirming every American's right to be let alone—to be free from intrusive governmental invasion of their personal liberty and privacy. He has objected to Supreme Court opinions affirming the fundamental right to marry, to travel, and to privacy. Again, however, that is a view that seems to be well outside of the judicial mainstream.

I could go on at some length on this subject, because I am deeply troubled by the picture of Judge Bork's views on individual liberties that has emerged since the nomination was sent up. I am also greatly concerned, for example, about his approach to first amendment and sexual discrimination issues, where he again takes a very narrow view of individual rights.

Instead, however, I would like to make one other point before I conclude. I have had a long career in politics, Mr. President, and I have had the privilege of serving in all three branches of government. I started my career as a police magistrate in Belleville, IL, just about as far as one can get from the Supreme Court.

I learned something important in that job, though, something that has stayed with me through my entire life, and that is that justice is about people. Decisions have a real impact on real people's lives and liberties. Justice was a very personal business in the magistrate's court. You come to know the parties that came before you in a way that is impossible at the Supreme Court level.

Even though that same personal touch cannot be there at the Supreme Court level, however, that same truth still applies. In fact, Supreme Court decisions are perhaps even more about people because many more people are affected by a Supreme Court decision than by any decision of the Belleville Police Magistrate Court. What that means is that a Supreme Court Justice, no less than a police magistrate, must be sensitive to the fact that the cases before the Court are more than legal questions, that real people's interests and freedoms are at stake.

I acknowledge that Judge Bork is a superbly qualified lawyer. Yet as I read his writings and judicial opinions, as I listened to him before the Judiciary Committee, as I read the transcript, I could not eliminate my doubts about his sensitivity to the fundamental people issues that are at stake in the cases he argues so well.

A Supreme Court Justice must have that sensitivity because the Court is not a simple mechanical, analytical institution. It is a political institution, in the best sense of that word, designed to protect American liberties by checking the excesses of the legislative or executive branches. It is a dynamic institution, and like the other parts of government, must respond to changing circumstances by viewing the Constitution as the living, breathing, document that it is. Our Government was created to protect the life and liberty of every American, and the Supreme Court functions as a key part of that protection.

I want to conclude by stating that the more I reviewed Judge Bork's record, the more questions I had. I want the President to be able to get his choice confirmed, but my own responsibilities under the Constitution demand that I carefully examine every prospective nominees views on fundamental constitutional issues.

In many areas, I like to give the President the benefit of the doubt. I have voted for many Cabinet appointments that I personally would not have made. I voted for Justice Rehn-

quist, though I disagreed with some of his philosophy.

The issues raised by this nomination, though, are not really about whether the nominee is a conservative. If it were that simple, I would be supporting the nomination. Rather, the issues relate to Judge Bork's fundamental approach to the Constitution, and to what is the Constitution's first priority—to preserve the liberty of all who live in the United States. This is an area where the President cannot have the benefit of the doubt. Questions in this area must be satisfactorily resolved before the Senate can advise and consent to the nomination. Unfortunately, in the case of Judge Bork, these questions still remain. I must therefore oppose his nomination.

## NOMINATION OF JUDGE BORK TO THE SUPREME COURT

Mr. EXON. Mr. President, the controversy over the Bork nomination is tearing America apart, dividing friends and families, and spewing acrimony between special interest groups. Enough is enough of this hysteria in this Senator's view.

This is by far the most divisive issue I have seen since coming to the Senate. Reason has given way to harshness.

The question at this juncture is no longer whether one agrees or disagrees with the nomination. The issue now is what can be done promptly to stop the blood-letting and start weaving together a sense of national fabric and understanding of others' points of view that is basic to America's greatness. This Supreme Court seat does not belong to President Reagan or Robert Bork. It belongs to all the people.

Last Friday, I tried to encourage the President to withdraw the nomination, since I was convinced the President and the Court could only be harmed, and thus the country, by further needless conflict. This might not have been fair to Judge Bork or the process, but that was the way it was. Mankind sitting in judgment of its fellow man is difficult and at times imperfect, as history and our religions have taught us. To say that Judge Bork was somewhat controversial is a clear understatement, complicating the situation, although I had thought that I might eventually vote for him. I am troubled by many of his seemingly shifting views, highlighted by the National Catholic Register editorial in opposition to his confirmation because of his unclear stand on the abortion issue.

Mr. President, I ask unanimous consent that the editorial be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. EXON. Mr. President, in my view, Judge Bork was not nearly as bad as his detractors state nor as irreplaceable as his supporters contend. But that is not the question now. The 9-to-5 negative vote in committee sealed what had been all but a lost cause. The rush to judgment day accelerated as pressures and demands from special interest groups mounted to record proportions.

As a genuinely undecided Senator, I have been forced to the conclusion that, regardless of other considerations, Judge Bork has not exhibited due judicial temperament by his adamant position to fight to the end a certain defeat. This is hardly in keeping with the "prudent man" principle. He appears incapable of grasping that there is a time to aspire and a time to concede.

I respectively urge Judge Bork and the President to come down from their defiant mountain top and end the confrontation. They cannot win, but they do not have to lose, and there need be no "dead bodies." All the king's horses and all the king's men can't put Judge Bork's nomination back together again.

When this is accomplished, the President could then promptly send up a new nominee for confirmation. The Senate could then hopefully put all of this behind us and get on with the many important and controversial issues confronting the Congress and the executive branch. These matters are far more important to the Nation and the free world than one of nine members of the Supreme Court, as important as that body and its membership is. I would have no trouble voting for a conservative judge for the Supreme Court, but this appointment is divisive, and it is tearing the country apart.

To the end of moving forward and to eliminate any uncertainty as to this Senator's position, as dictated by events, which might prolong the meaningless controversy, I announce that when and if the nomination comes to a vote, I shall oppose the nomination of Judge Bork.

EXHIBIT 1

BORK AND PERSONHOOD

The evening before I was to begin my first job at a neighborhood supermarket, my father gave me some advice: "Son, remember, the boss isn't always right. But he's always the boss." There were many occasions to resent those words, like on icy winter nights when the truck arrived late and we bagboys were stuck until the wee hours unloading it. Why it couldn't wait for morning was beyond us, but the manager said it couldn't. His job was to make these decisions. The boss was the boss.

Then, as now, I recognized that there are times when one must buck authority—or better put, the misapplication of authority. Nuremberg demonstated that you can hang for "just following orders." And, yet, while a father who counsels his daughter to get an abortion violates his God-given responsibility as a parent, his misdeed cannot negate the very concept of parental authority. There is a critical difference between resisting illegitimate acts by those in authority and denying authority as it validly subsists within an individual or institution.

In the holy-war atmosphere surrounding the confirmation hearings for Supreme Court nominee Robert Bork, some pro-Bork factions, among them pro-lifers eager to end America's abortion holocaust, are failing to observe this distinction. In their enthusiasm to score a political victory, pro-lifers have tied their cause to an agenda whose result could be to strip the court of its authority to interpret the Constitution and define civil rights—including the unborn's right to life.

One conservative coalition admits that its gripe with the judiciary is more "procedural" than "substantive," a claim which, if only a pretense, isn't likely to persuade anay diehard pro-abortionists in the Senate. "Free the Courts" avowed mission is to save the court from itself, or as they insist, "from over 30 years of institutional enslavement to activist jurisprudence." Not only is this goal different from the pro-life movement's primary legal objective; the two may actually conflict.

A categorical rejection of "Judicial activism" would disallow all federal interest in abortion pending enactment of a human life amendment. That could "free the court" of its obligation to stralghten out the mess it made in *Roe vs. Wade*—not by inanely "returning the issue to the states," but by ruling in favor of the unborn. For as William F. Buckley Jr. writes, "To withdraw the license of *Roe vs. Wade* is not to illegalize abortion." It does not adjudicate in favor of the unborn's right to life.

Rather than seeking to emasculate the court, pro-lifers should invoke a little "activist jurisprudence" on behalf of their silent constituents. This is what the Constitution, not to mention the urgency of the situation, requires.

The question: Would Bork's confirmation signal the demise of legal abortion? Despite all the hysteria and euphoria, there's room for doubt. Whereas Bork's disdain for the court's performance in *Roe vs. Wade* is evident, his commitment to a positive, federally guaranteed right to life isn't.

Bork has decried the Roe decision as a "usurpation of state legislative authority." Nowhere does that statement suggest that what Roe more critically denied is a constitutional right embedded in the Fifth and 14th Amendments. In fact, Bork once expressed skepticism of the idea that rights inhere in humans. Although he vehemently rejects a right to abortion, he could prove just as biased against a constitutional interpretation mandating civil rights protection in the form of personhood for the unborn.

Roe vs. Wade is characterized by three determinations:

First, that abortion is subject to federal review and jurisdiction;

Second, the denial of personhood to the human fetus:

Third, the creation of a right to abortion.

In deferring to the states' prerogative, Bork opposes the first and third determinations, but refuses to cite fetal personhood as a point of dissent. Most pro-lifers, on the other hand, would concur with the first determination, agreeing with Roe's majority that abortion is not amenable to local resolution. Moreover, they would affirm fetal personhood as the reason, thereby also overriding any right to abortion.

There is simply no way to ignore fetal personhood and truly reverse Roe vs. Wade. The court will either support personhood for the unborn or, by turning a blind eye to the issue, reaffirm its denial through default. Incidentally, Bork testified against the Helms Human Life Bill, charging it unconstitutionally infringed upon the court's role to enunicate personhood. Pardon me, but that puts the ball back in the judiciary's court.

The question facing pro-lifers as well as the Senate Judiciary Committee is this: Given an opportunity to declare the fetus a person deserving a civil right to life, would Bork advance this argument? Or would he dismiss it as "judicial imperialism"? Might Bork succumb to a neanderthal hostility toward civil rights doctrine as "utopian?"

He in fact argued against the Civil Rights Act of 1964, predicting "a loss in a vital area of personal liberty." Bork says he regrets that rhetoric. But it would be a tragic irony if pro-lifers were to find their ultimate goal of securing personhood for the unborn sabotaged by the very tenets of judicial conservatism in which they have placed their hope.

Justice Bork could turn out to be far more dedicated to limiting the rights of unions, minorities and those accused of crimes than he is to promoting an unborn baby's rights to enter this world alive.

Meanwhile, despite its horrendous errors, the court is still the institution with a responsibility to defend civil rights. There is but one compelling reason for it to renounce abortion on demand, and that's a firm conviction that the unborn are persons with a right to life. Any other rationale may culminate in a faint attempt to shun its duty, while more than 4,000 unborn children continue to be executed each day.

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate continued with the consideration of S. 1394.

AMENDMENT NO. 886

The PRESIDING OFFICER. Who yields time?

Mr. PELL. Are we on limited time, Mr. President? I do not think so.

The PRESIDING OFFICER. Time is not limited.

Who seeks permission to speak?

Mr. BOSCHWITZ. Mr. President, how much time remains?

The PRESIDING OFFICER. There is no time limit.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BOSCHWITZ. 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. BOSCHWITZ. Mr. President, I see that my distinguished colleague from Wyoming is back and I want to respond to some of the remarks he made. I did not hear his entire talk, but I heard some of it and I will respond to those remarks.

While I find myself most often in agreement with my good friend from Wyoming, in this case I do not find myself in agreement at all.

My friend from Wyoming said that in the event you transfer this to the State Department hard decisions on refugees will not be made.

Mr. President, that is not the experience of my life. The hard decisions that were made by the State Department, the hard decision that I see being made by the State Department, the hard decisions that were made in the early part of my life with respect to refugees by the State Department, certainly would suggest that the statement by my friend from Wyoming really is not based on fact.

During the thirties and forties the attitude of the State Department, with the notable exception of the father of the distinguished chairman of the Foreign Relations Committee, with the exception of very few people other than Senator PELL's father, was that they made decisions that were not hard but were harsh, that were unfeeling, and, as you see the State Department making the hard decisions that indeed have to be made in the field of foreign relations, the idea that, if you transfer to the State Department these decisions, that hard decisions are not going to be made certainly has no precedent in history and certainly I do not think is rooted in fact.

The fact that they do know what is going on in those border camps, the fact that they have a larger and broader viewpoint of who is a refugee and who is indeed under stress in the world than perhaps does the INS is to its credit and is the reason that they should be included in this process.

So, first, in response to my good friend from Wyoming, and indeed he is my good friend, I say that the transfer of some of this authority and some of the decisionmaking to the State Department is indeed called for and he should not fear that the State Department is going to take an attitude that is not hardminded as he wants those decisions to be.

Then my friend from Wyoming said that we get two or three members of the family now in addition to the refugee. I am not quite sure why he finds that to be such a disadvantage. Indeed we should bring over the members of the family.

I agree with him that some of the organizations should be forced to expend the funds and not bank them, and those kind of things, but the family is indeed welcome in this country. I was a member of one of those families at an earlier period of my life and the idea that close members of the family should somehow be excluded is I think not becoming to this entire argument.

You only have to live in a camp to be a refugee for a few years says the Senator from Wyoming. Well, I do not understand that these folks are there in those camps by choice, and I would say to him they are not Taj Mahal's there as he used the expression. Those camps are indeed dangerous. Those camps are often out of control. Those camps are not desirable places to live and to bring up your family as some people must, but those camps are indeed often the scum of where one would not want to be there and people are not there most often by choice but because indeed if they return to their original country or if they return to the place from where they come they would be severely deprived, their lives indeed would be in danger.

Then the processing will only draw more people to the camps, the processing of long stayers, people who somehow are not refugees, according to my friend from Wyoming, but have been there for years in these camps and in the event that they are processed, they will only draw more people to the camp. Regrettably that appears that it may be true, that the condition of many of these people in that part of the world is so bad that in the event that refugees are allowed to be processed often this attracts more people to these camps, more people who have a hope for freedom, more people who have a hope that their lives may be fulfilled and they should not live in fear an deprivation.

So I respectfully disagree with my friend and colleague from Wyoming. I feel that the coming of these refugees not only enobles our country and enobles our people, but it strengthens our country whether it is economically or morally or any other way and indeed it rejuvenates our coutnry, as I see the young people go through high school and college with my children, outstanding students, students that have excelled because they, as other refugees before them who have built this country, really rejuvenate and strengthen and bring new energy to this country, and it really is in the interest of our country that that continue.

I say to my friend from Wyoming that these people are not from Taj Mahal, that these people are in those camps because they mostly cannot go back to the country from where they come.

So I rise today, Mr. President, in support of Senator HATFIELD's Indochinese Refugee Resettlement Act of 1987 as an amendment to this State Department authorization bill. I am proud to say that I am an original cosponsor of this important and very necessary legislation.

We in Minnesota, Mr. President, despite the fact that perhaps some would think it is a little out of the way, have a large population of Indochinese refugees, particularly of the H'mong and I believe in comments

Export values are also understated—GAO reports that OMC's export data "is not verified, current, or compatible" with other foreign military sales data.

ENFORCEMENT

OMC "does not verify the accuracy of information provided by registrants." (One is supposed to register before licensing.)

OMC does not systematically check applicants, freight forwarders, or consignees against "lists of questionable exporters, exporters convicted of past export violations, or those denied export privileges of the Department of Commerce."

GAO found that OMC issued 322 licenses worth $15 million in FY 86 to a company denied export privileges by the Department of Commerce.

A 1987 study found "negative information" on 26% of a random sample of OMC registrants and 27% of foreign consignees.

OMC does not formally develop "watch lists" of questionable exporters out of concern for FOIA and the Privacy Act. (Commerce, DOD and Customs do so and consider it legal and important.)

OMC told GAO it is aware of less than 30 questionable firms and individuals (DOD said there were hundreds).

OMC can revoke license privileges. However, it has done so only four times since 1976, the last time in 1983.

END USE

OMC asked US embassies to verify the end use of only 50 exports in FY 86 (on 49,000 license applications).

OMC's stated reason: resource limitations and inability to identify suspicious exports.

POLITICAL CONTRIBUTIONS AND AGENT FEES

Most licenses worth over $250,000 require letter stating whether political or agent fees were paid. GAO found that 43% of a license sample did not contain any such statement.

OMC'S BUDGET AND ADMINISTRATIVE TROUBLES

OMC officials maintain that an increased work load and static resources have restricted their efforts.

The volume of munitions cases has increased from about 26,000 in 1977 to over 49,000 in 1986. Over the same period, OMC's staff has remained at around 30 persons, with about 10 staff members authorized to approve licenses.

OMC's computer system is essentially an "automated filing system" of limited capacity. "Even with planned software improvements, the system will remain an automated filing system."

Requests for additional staff have been deleted from the State Department's budget request by OMB.

OMC plans meet short term problems but do not address long term needs.

GAO'S CONCLUSIONS AND RECOMMENDATIONS

OMC has worked to process license applications quickly, at the expense of careful license review and administrative and reporting requirements.

OMC must make better use of information available from other federal agencies regarding exporters to identify applications requiring closer scrutiny.

OMC must develop criteria and procedures for getting more end-use verifications from U.S. embassies abroad.

OMC should require exporter compliance with administrative and reporting requirements.

OMC needs to greatly improve its computer system.

Mr. HELMS. Mr. President, I certainly find the amendment acceptable and I commend the Senator on it. It is cleared on this side.

Mr. PELL. It has been cleared on this side, too. It is a good amendment. I trust it will pass.

The PRESIDING OFFICER. Is there further debate?

Mr. PRYOR. I thank both of the distinguished managers of this bill. I think this will be a constructive move, and I ask for its adoption.

The PRESIDING OFFICER. Is there further debate? If not, the question is on agreeing to the amendment.

The amendment (No. 891) was agreed to.

Mr. PRYOR. I move to reconsider the vote by which the amendment was agreed to.

Mr. HELMS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

## THE BORK NOMINATION

Mr. FOWLER. Mr. President, I have not held my peace this long on the question of confirming Judge Robert Bork to the Supreme Court only to confound my friends and adversaries and confuse the media. Until yesterday, I was genuinely undecided about my vote. I view this as one of the greatest responsibilities I have undertaken as a new Member of the U.S. Senate. I promised the people of Georgia from the start 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 plebiscite. 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 do believe Judge Bork has confused the issues to some extent himself—by promoting the doctrine of "original intent," which supposedly keeps the values of judges out of their deliberations. Judge Bork opposes some rulings as contrary to the intent of the framers, but says he would uphold other rulings if they had a "reasonable basis." The latter method—I cannot escape this conclusion—is another way of referring to a value judgment by the jurist himself.

I agree with Justice Harlan, who said in his concurring opinion to Griswold versus Connecticut:

> While I could not more heartily agree that judicial "self-restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula for achieving it is more hollow than real.

I find no reason to oppose Judge Bork for failing to adhere strictly to a theory that I consider ab initio unworkable. Nor will I oppose him on the basis of his opinion on any single issue, however controversial.

I do reject the Judge's particular form of strict construction. Because it has prevented hard facts—the actual injustices, hardships, discrimination, miseries and oppression experienced by real people in an imperfect society—from penetrating the world of pure theory.

Reality does have to enter the ethereal world inhabited by the courts and the Constitution, to bring that world into contact with the society we are struggling to govern and to shape. The way reality enters this world is through the facts and the issues that come before the Supreme Court in living controversies, as set forth in the Constitution.

A Justice on the United States Supreme Court should demonstrate the capacity to confront the difficult decisions he or she must make—and excel not only in intellect, but in fortitude, in determination to uphold justice, and finally in wisdom to apply the broad guidelines of our Constitution to the narrow and particular sets of facts that arise as unresolved cases of law.

I cannot agree with Judge Bork's application of these guidelines, because it is not informed by values set forth in the preamble to the Constitution, and readily discoverable in the history of the founding of our republic. Our forefathers were profoundly influenced by the conflicts of their times, yes, yes, but also by their belief in the gifts of a supreme being. Hear Thomas Jefferson when he proclaimed for his constitutional colleagues: "We hold these truths to be self-evident * * * that we are endowed by our creator with certain inalienable rights."

I think Judge Bork keeps out of his reading of the Constitution those intangibles that are most central to its intent. In the process, his attempt to prescribe 18th century values, stands as one of the greatest works of 20th century relativism.

Judge Bork, for all the brilliant qualities he does possess, does not in-

corporate the attributes we need most at this time in our history. I do not believe he embraces the spirit that can unite our people today, the same spirit that certainly united the authors of our Constitution.

If the court is to succeed, it must aim for consensus among its own members and among the people of our country. I worry about the deep divisions in the Court as reflected by the growing number of 5 to 4 decisions on important cases in recent years. We now need a conciliator, not a swing vote. That was the great contribution of Justice Powell, one of conciliation in a divided court.

Mr. President, if you subscribe to the view that there is a moral order to this world, then you will recognize the deep-seated feeling that comes upon you so strongly at times, that there is a reason for everything that happens—just as you will feel that there is a reason, a moral basis for every word of our Constitution.

In this instance, as painful as it has been for our country, the debate over Judge Bork's confirmation has brought the law of these United States to life. It has exposed many phony issues. It has illuminated the relationship between our law and the things we hold dearest.

How many Americans had heard of Griswold versus Connecticut before? The whole issue of the right to privacy? Arcane legal cases have come down from their musty shelves. Their meaning has come alive in the minds of Americans who never attended a day of law school, who never argued before a jury or deliberated on the bench. In this respect, Judge Bork has succeeded in what I believe he set out to accomplish in his career.

What we have been through cannot help but renew the understanding and commitment necessary for the operation of our Republic. It is for that reason that I decline to criticize President Reagan for advancing this divisive nomination. I cannot support it, but I believe it has opened the discussion necessary to discover the road to consensus.

I want to add one last thought if I may. We will have a conservative Justice on the Court. I welcome that. It is clearly time to sort out the gains we have made, and to heal the wounds we know we have suffered along the way. We require steadiness and careful deliberation. It is not time for careening off in any extreme direction.

It is in that spirit that I ask now, after this wide-open and exhausting controversy, that we now move on to a nominee that our citizens in the great middle ground of America, majorities and minorities, men and women, Democrats and Republicans can rally around. I pledge to President Reagan everything in my capacity to assure that the Court vacancy will be filled by year's end. Our country—and our countrymen—deserve no less.

I yield the floor.

The PRESIDING OFFICER (Mr. DASCHLE). The Senator from Florida.

## JUDGE BORK

Mr. CHILES. Mr. President, few issues have been as troubling for me as considering the nomination of Judge Robert Bork as Associate Justice of the Supreme Court. I approach this decision with the sure knowledge that a position on the supreme court carries with it the potential to have immense impact on the future of all Americans. For the Senate it is an irrevocable judgment. The men and women we confirm can serve for life.

In my three terms in the Senate I have supported every nomination made to the Supreme Court.

I certainly have not agreed with every position these individuals espoused but I was confident in their ability, their integrity and their adherence to fundamental principles of constitutional law. I see my role as a Senator not to second guess the President in his choice but to make a judgment that a person has the intelligence, temperament and principles to serve on our highest Court.

I do not share the view that somehow the Senate must insure some sort of balance on the Court. That is not our role and in view of the historical unpredictability of justices after ascending to the Court it is to me a pointless exercise.

Rather I have tried to satisfy myself that Judge Bork is a jurist who has the capacity to serve on the Court and that he will adhere to the principles and rulings that have developed under our Constitution and are the bedrock of our free society. In doing so I have closely studied the proceedings of the Senate Judiciary Committee and read Judge Bork's writings and decisions.

Frankly, in areas such as law enforcement and the prerogatives of the legislature I find much that I can agree with.

I am 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.

It is Judge Bork's overall philosophy with respect to the Constitution that I find radical and greatly at odds with our 200-year experience under the Constitution. Our Founding Fathers intended to preserve and guarantee individual rights and liberties and to limit the powers and intrusions of Government. The great progress this country has made in assuring these rights to all segments of society—to minorities, to women, to the traditionally underrepresented—has in effect been progress toward a fuller realization of what the Constitution promises to all Americans.

I am not convinced that is Judge Bork's view. His is a much narrower view of individual rights guaranteed by the Constitution. His view of the Constitution is to limit the rights of individuals, to reserve to government those rights not literally spelled out in the Constitution. To my mind this is a view at odds with the intent of our Founding Fathers.

My study of the adoption of the Constitution indicates that the Founding Fathers were concerned about excesses of government. They wanted in effect to limit the power of the state. They were not trying to confer additional powers on the government. They were establishing a charter as to what the powers of government would be, and those not given to the government were reserved to the people.

Mr. President, I feel that they are inherent rights guaranteed by the Constitution and that was intended by the Founding Fathers.

This narrow stance of Judge Bork represents a threat to the difficult and continuing effort to assure the civil rights of all Americans. It is a threat to the rights of privacy that Americans believe are guaranteed by their Constitution. And 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.

Mr. President, I began my consideration of the Bork nomination with the hope that I would be able to vote to confirm.

I have always felt that the President is entitled to have the benefit of the doubt on his nominee. I had no problem in confirming Justice Scalia or Justice O'Connor, nor in confirming Justice Rhenquist to be Chief Justice of the Court. I, too, believe that the President is entitled to nominate, a conservative to the Court.

I think there are many, and certainly many Southerners, who are qualified in this regard. I know of several on the appellate bench from my State.

I regret that I can not vote to confirm Judge Bork as a Justice of the Supreme Court.

## FOREIGN RELATIONS AUTHORIZATION ACT FISCAL YEAR 1988

The Senate continued with the consideration of the bill.

The PRESIDING OFFICER. The majority leader.

Mr. BYRD. Mr. President, I ask unanimous consent on an amendment by Mr. CHAFEE that there be a time limitation of 1 hour, to be equally divided in accordance with the usual form; that on an amendment by Mr. COHEN there be a 10-minute limitation,

SERVICES

Issues of the CAU average twelve articles in ten single-spaced pages; issues of the LADC average ten articles in nine single-spaced pages. Both newsletters are available in the United States via NewsNet, via the Compuserve gateway to NewsNet, via Peacenet, via Bitnet (an international academic network), and via Technet (covering the Rio Grande Research Corridor in New Mexico). All back issues are available on 5¼-inch personal computer disks. A weekly print version of both newsletters will be available beginning in October 1987.

COMMENTS

The LADC and the CAU have been well received by diverse user groups, including scholars, human rights activists, radio and newspaper journalists, congressional research staffs, economic development specialists, and United States-based transnational companies. Among these user groups are the North American Congress on Latin America (NACLA), Beyond War Foundation, Hoover Institution, Pacifica News Service, US Agency for International Development (USAID), and Shell Oil Company. The LADB has been cited in such diverse publications as the Tower Commission chronology of events concerning Central America which accompanied its report on the Iran-contragate affair, and in the Journal of Current History.

Finally, the LADB has just gone online through a mainframe computer at the UNM Computer and Information Resources and Technology Center. With this development, powerful search and retrieval software give those using the LADB rapid and wide-ranging access to the entire database. Anyone making economic, financial, or political risk decisions related to Latin America now has a comprehensive, current and accurate source.

The PRESIDING OFFICER. Is there further debate?

The Senator from North Carolina.

Mr. HELMS. Mr. President, I have studied the amendment of the distinguished Senator.

As I understand it, he is authorizing the State Department to contract with institutions to maintain the data base at the institutions. Is that correct?

Mr. BINGAMAN. That is correct.

Mr. HELMS. This is strictly authorizing. We have worked with the Senator on the amendment. I appreciate his working with us. I find it entirely acceptable, Mr. President.

Mr. PELL. Mr. President, I have no objection to the amendment.

The PRESIDING OFFICER. Do Senators yield back their time?

Mr. BINGAMAN. I yield back my remaining time.

Mr. HELMS. I yield back my remaining time.

The PRESIDING OFFICER. All time has been yielded back. The question is on agreeing to the amendment.

The amendment (No. 892) was agreed to.

Mr. HELMS. I move to reconsider the vote by which the amendment was agreed to.

Mr. PELL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from Florida.

Mr. ROTH addressed the Chair.

Mr. HELMS. Mr. President, if the Senator will withhold for just one moment.

The PRESIDING OFFICER. The Senator from Florida has been recognized

Mr. GRAHAM. Mr. President, our responsibility to the public——

Mr. BYRD. Mr. President, will the distinguished Senator yield for a question? The managers are trying to alert other Senators when they may proceed with their amendments. Could the distinguished Senator indicate how long he will be speaking?

Mr. GRAHAM. Approximately 10 minutes.

Mr. BYRD. Very well. There is no time agreement on the bill and there is no way you can limit any Senator. So the Senator would be speaking about 10 minutes. I would hope we could get some time agreements so we could move on with the amendments and in this way if we yield to Senators, if they want to speak, yield 5 minutes to them or whatever.

Mr. President, I yield the floor so the Senator may proceed.

Mr. GRAHAM. I thank the Senator.

Mr. PELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Florida has the floor.

Mr. PELL. Mr. President, yesterday many Senators wanted to speak on this subject, and we tried to limit it to 5 minutes. I know Senator PRESSLER yesterday waited quite a while.

Mr. PRESSLER. I would say——

The PRESIDING OFFICER. The Senator from Florida controls the floor. One would have to ask him to yield in order to speak.

## NOMINATION OF JUDGE BORK

Mr. GRAHAM. Mr. President, our responsibility to the public we serve embraces few tasks graver and more consequential than the confirmation of the nomination of a Supreme Court Justice.

Clearly both our President and Judge Robert Bork have approached the matter of Judge Bork's nomination with the utmost respect for and reflection upon the role of a Supreme Court Justice in our society.

Judge Bork has dedicated a lifetime to scholarly pursuit and judicial application. He has repeatedly defined a set of deeply-held convictions which inform his decisions. His intellect is formidable. His articulation of his views is forceful.

We in the Senate have no lesser responsibility. Ours is to evaluate the candidate proposed and to measure and reflect the will of the people not only in choosing a justice, but maintaining the historic confidence of the American people in American justice.

Such a decision must probe deeply held beliefs and can be, as we have seen, contentious, even anguished.

Each of us has had to pause in the inevitable clamor of pressing daily events—to consult the people of our State;

The words and decisions of the candidate;

The history of U.S. law and judicial interpretation which hold the pattern and direction for our future;

And we have had to pause to search our own souls for a sense of what will best serve the people of this Nation.

As a Floridian, as someone whose life has been dramatically affected by a Supreme Court decision, I have a unique perspective on this particular choice. I might never have been elected to public office were it not for the Supreme Court decision on reapportionment.

Another former Governor of Florida, Leroy Collins—a man whose record is distinguished by courageous battles to bring Florida into the 20th century of civil rights and equal opportunity—tells a story which illustrates the intimate and ultimate power of the Supreme Court to influence and be influenced by our efforts to sustain a workable democracy.

Governor Collins found himself next to Justice Hugo Black after a Georgetown dinner party in 1963. Justice Black asked Collins what his biggest disappointment had been as Governor.

Collins replied without hesitation that he had been unable to convince the Florida Legislature to reapportion the voting districts of the State—in effect, to reform itself to reflect the dynamic growth of Florida and the diversity of ethnic backgrounds and political positions.

Justice Black told Governor Collins that the Florida experience was discussed by the Court during deliberations on the case of Baker versus Carr, which dealt with Tennessee's reapportionment. Florida's inability to resolve the issue through the State legislative process convinced the Court that it had the final role in ensuring equal weight to each voice—one man/one vote.

We heard eloquent testimony from former Congresswoman, Barbara Jordan who ran for office twice, garnered an impressive turnout twice—and lost twice before reapportionment allowed her to win a seat in the Texas House of Representatives.

She told the Judiciary Committee:

My opposition to this nomination is really a result of living 51 years as a black American born in the South and determined to be heard by the majority community.

When you experience the frustration of being in a minority position and watching the foreclosure of your last appeal and then suddenly you are rescued by the Supreme

Court of the United States—that is tantamount to being born again.

It is this hope—confidence in the essential fairness and justice of our Government which has served as strong sinew in binding our Nation together.

The expectation of full membership in the family of America has kept those waiting for admission within the democratic system.

Our Constitution is the wellspring which inspirits the Nation. The Supreme Court is the channel for the great river of democracy that flows from it. Time and again throughout our history, the Court's decisions have changed the direction of our individual lives.

The Court struck down the poll tax. It said we can teach foreign languages in our schools. It supported affirmative action. It affirmed that individual privacy is a right. It opened our schools to all of our children. It affirmed that the law must equally protect every American. And that no American may be deprived of liberty without due process of law.

His inattention to the human consequence of adjudication is seen as a threat by many who have only recently won—hardwon—progress toward equity for all Americans.

In the course of these hearings, Judge Bork has amended some of his views, altered others. But in the course of his judicial and academic work, the judge has chosen consistently to be provocative, to be divisive.

We are an expansive people; we cannot be constricted by a narrow view. Scholastic brilliance, when it is bloodless and abstract, is nothing more than a brilliance with blinders.

Thomas Jefferson wrote of the Constitution:

Some men look at constitutions with sanctimonious reverence and deem them like the ark of the convenant, too scared to be touched.

Laws and institutions must go hand in hand with the progress of the human mind.

The greatest lessons in our common history are the lessons of the heart:

All men are created equal. We are each entitled to a share of the abundance of this Earth. We have rights to express our opinions, to seek knowledge and gainful employment, to live in adequate shelter, to shield our privacy, to be heard equally, to be judged equally, to find our own happiness, to dream our own dreams.

If the Constitution is the framework of our Government—if the Declaration of Independence is the soul and spirit of our Nation—then the Supreme Court has the responsibility to infuse the one with the other. The Supreme Court is the living instrument of the will and yearnings of the American people.

A justice of that Supreme Court must be a part of that humanity, not apart from that humanity. Judiciousness is reached through streets teeming with the noise and struggles and fears and joys of life. One who is untouched by his passage through those streets is unprepared to wield the power of decision which will so intimately touch other lives.

I have decided I cannot support the nomination of Robert Bork as an associate justice of the Supreme Court. His own words mark him as an inappropriate candidate. In response to Senator SIMPSON's question:

Why do you want to be an associate justice of the U.S. Supreme Court?

Judge Bork replied:

I think it would be an intellectual feast just to be there and to read the briefs and discuss things with my colleagues. That is the first answer.

We need not go on. That is the wrong answer.

The dedication of a life to the shaping of so many lives is the highest honor—and the highest austerity. The preparation for such a rule must be rigorous. The character of such an aspirant must fully exhibit intellectual discipline informed by real passion.

The pursuit and definition of justice is passionate work.

It is all-consuming.

It is a trust we can call sacred.

It is my life and your lives and the lives of our children and the foundation of the democracy we safeguard for all Americans—the enlightened hope we hold up as a beacon to the rest of the world.

Mr. President, thank you.

Mr. BYRD addressed the Chair.

The PRESIDING OFFICER. The majority leader.

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate continued with the consideration of the bill.

Mr. BYRD. Mr. President, I ask unanimous consent that there be the following time limitations on amendments: 20 minutes on an amendment by Mr. ROTH; 10 minutes on an amendment by Mr. ROTH, and these amendments are identified by both managers; 90 minutes on an amendment by Mr. CHAFEE and Mr. SIMPSON, to be equally divided; and all in accordance with the usual form, that no amendments be in order to either of the amendments.

The PRESIDING OFFICER. Is there objection?

Mr. BYRD. Mr. President, I am glad someone is at least listening on the squawk boxes. Ten minutes on an amendment by Mr. ROTH to be equally divided; 90 minutes on an amendment by Mr. CHAFEE to be equally divided; both in accordance with the usual form, no amendments to be offered to either; and I withdraw my request for the time on the amendment dealing with the Bahamas by Mr. ROTH.

Mr. CONRAD addressed the Chair.

The PRESIDING OFFICER. Is there objection?

Mr. ROTH. Reserving the right to object; I will not object.

Mr. CONRAD. May I have recognition?

Mr. BYRD. No. I have recognition.

The PRESIDING OFFICER. The Senator reserves the right to object.

Mr. ROTH. Yes. I want 20 minutes on the second amendment.

Mr. BYRD. That is not the one that deals with the Bahamas?

Mr. ROTH. Yes. Twenty minutes; that is correct.

Mr. BYRD. That is not the one that deals with the Bahamas. I have an objection to that. Yes. But the other one, I put the request for 10 minutes to be equally divided. Is that agreeable?

Mr. ROTH. That is fine.

Mr. CONRAD. Might I inquire, if this unanimous-consent request is agreed to, would that preclude any intervening statements on the Bork nomination.

Mr. BYRD. Senators could ask for the managers to yield time. It is the only way that the managers have of controlling the floor at this time and getting on with this bill. They can still yield time to Senators who may wish to speak.

Mr. CONRAD. If the floor managers would be willing to grant me 10 minutes—I think it could be done in less than that—I would certainly not object.

Mr. ROTH. Reserving the right to object, I have been waiting for nearly an hour, and I do not want to prevent any Senator who desires to speak the time to do so, but I would like to proceed with my amendments.

Mr. CHAFEE. Might I direct an inquiry to the majority leader? Regarding these unanimous-consent requests, will they then proceed in that order? In other words, the Senator from Delaware for 10 minutes, then we will go to my amendment?

Mr. BYRD. That would be fine. I could include that in the request. Yes I do include that in the request.

The PRESIDING OFFICER. Is there objection?

Mr. CONRAD. Again, Mr. President, reserving the right to object, and I certainly prefer not to object, but I am in a difficult situation in that I have pledged to announce my vote today. I would like to be able to explain it. I am just inquiring of the floor managers of this bill if there would be a chance to get some time as we proceed. If there is a chance, I will certainly not object. If there is no chance to get time, I will be left with no alternative but to object.

Mr. BYRD. Mr. President, I hope the Senator will not object. Senators have been waiting patiently. The Sen-

DEPARTMENT OF STATE.—LEASE COSTS OF OFFICIAL RESIDENCES

INTER-AMERICAN

| | Ambassador | Deputy Chief of mission residence | Principal officer residence |
|---|---|---|---|
| St. John's, Antigua (E) [2] Charge' | 32,400 | | |
| Nassau, Bahamas (E) | | $37,800 | |
| Bridgetown, Barbados (E) | | | |
| Belize City, Belize (E) | $27,000 | 21,600 | |
| Belo Horizonte, Brazil (CG) | | | $13,000 |
| Porte Alegre, Brazil (C) | | | 5,600 |
| Recife, Brazil (C) | | | 19,000 |
| Salvador de Bahia, Brazil (C) | | | 8,500 |
| Sao Paulo, Brazil (CG) | | | [1] 33,600 |
| Barranquilla, Columbia (C) | | | 22,800 |
| Santo Domingo, Dominican Republic (E) | | 16,170 | |
| San Salvador, El Salvador (E) | | 36,000 | |
| Martinique, French Caribbean Dept. (CG) | | | 12,857 |
| St. George's, Grenada (E) [2] | 36,000 | 24,000 | |
| Guatemala City, Guatemala (E) | | 18,600 | |
| Ciudad Juarez, Mexico (CG) [2] | | | 31,200 |
| Guadalajara, Mexico (CG) [2] | | | 36,000 |
| Hermosillo, Mexico (C) [2] | | | 36,000 |
| Matamoros, Mexico (C) [2] | | | 22,800 |
| Mazatlae, Mexico (C) [2] | | | 24,000 |
| Merida, Mexico (C) [2] | | | 30,000 |
| Monterrey, Mexico (CG) [2] | | | 24,000 |
| Nuevo Laredo, Mexico (C) [2] | | | 14,400 |
| Tijuana, Mexico (CG) [2] | | | 27,000 |
| Curacao, Netherlands Antilles (CG) | | | 13,483 |
| Managua, Nicaragua (E) | 32,000 | 18,000 | |
| Panama, Panama (E) [2] | | 48,788 | |
| Asuncion, Paraguay (E) | | 30,000 | |
| Port of Spain, Trinidad and Tobago (E) | | 45,000 | |
| Maracaibo, Venezuela (C) [2] | | | 14,018 |

EUROPE

| | | | |
|---|---|---|---|
| Salzburg, Austria (CG) | | 94,700 | 25,710 |
| Brussels, Belgium (USEC) | 25,823 | | |
| Nicosia, Cyprus (E) | | 14,400 | |
| East Berlin, German Dem. Rep. (E) [2] | 106,155 | 35,196 | |
| Vatican City, Holy See (E) [2] | 65,000 | 80,000 | |
| Reykjavik, Iceland (E) | | 16,300 | |
| Genoa, Italy (CG) | | | 39,000 |
| Milan, Italy (CG) | | | 59,985 |
| Palermo, Italy (CG) | | | 30,000 |
| Turin, Italy (C) | | | 45,600 |
| Luxembourg, Luxembourg (E) | | 18,300 | |
| Valletta, Malta (E) | | 8,000 | |
| Krakow, Poland (C) [2] | | | 23,569 |
| Oporto, Portugal (C) | | | 16,800 |
| Ponta Delgada, Azores, Portugal (C) | | | 27,600 |
| Bucharest, Romania (E) [2] | 96,100 | 32,170 | |
| Stockholm, Sweden (E) | | 11,600 | |
| Goteborg, Sweden (CG) | | | 12,345 |
| Bern, Switzerland (E) [2] | | 43,200 | |
| Geneva, Switzerland (80) [2] | 70,400 | | |
| American Branch Office | | | |
| US Mission to U.N. | | | |
| Zurich, Switzerland (CG) [2] | | | 53,300 |
| Adana, Turkey (C) | | | 10,400 |
| Moscow, U.S.S.R. (E) [2] | 189,000 | | |
| Leningrad, U.S.S.R. (CG) [2] | | | 23,857 |

EAST ASIA/PACIFIC

| | | | |
|---|---|---|---|
| Bandar Seri Begawan, Brunei (E) [2] | 68,500 | | |
| Beijing, China (E) [2] | 58,666 | | |
| Shenyang, China (CG) [2] | | | 26,001 |
| Suva, Fiji (E) | | 13,565 | |
| Surabaya, Indonesia (C) | | | 10,000 |
| Naha, Japan (CG) [2] | | | 31,418 |
| Manila, Philippines (E) | | 54,000 | |
| Cebu, Philippines (C) | | | 15,000 |
| Bangkok, Thailand (E) | 1,832 | | |
| Chiang Mai, Thailand (CG) | | | 6,780 |
| Songkhla, Thailand (C) | | | 12,825 |
| Udorn, Thailand (C) [2] | | | 7,328 |

NEAR EAST/SOUTH ASIA

| | | | |
|---|---|---|---|
| Oran, Algeria (C) [2] | | | 9,500 |
| Manama, Bahrain (E) [2] | 42,240 | 36,800 | |
| Dhaka, Bangladesh (E) [2] | 31,746 | 17,857 | |
| Baghdad, Iraq (E) [2] | 91,613 | 58,065 | |
| Kuwait, Kuwait (E) [2 3] | 8,434 | 12,335 | |
| Beirut, Lebanon (E) [2] | | 35,000 | |
| Rabat, Morocco (E) [2] | | 27,523 | |
| Kathmandu, Nepal (E) | | 9,186 | |
| Muscat, Oman (E) | 102,884 | | |
| Doha, Qatar (E) [2] | 99,173 | | |
| Riyadh, Saudi Arabia (E) [2] | 160,000 | 64,000 | |
| Damascus, Syria (E) | | 27,500 | |
| Abu Dhabi, United Arab Emirates (E) [2] | | 64,258 | |
| Sanaa, Yemen Arab Rep. (E) [2] | 166,000 | 43,836 | |

AFRICA

| | | | |
|---|---|---|---|
| Cotonou, Benin (E) | $27,000 | | |
| Gaborone, Botswana (E) | | $16,400 | |
| Ouagadougou, Burkina-Faso (E) | 15,800 | 13,400 | |
| Yaounde, Cameroon (E) | 25,714 | 20,649 | |
| Douala, Cameroon (CG) | | | $35,064 |
| Praia, Cape Verde (E) | 9,000 | | |
| N'Djamena, Chad (E) | 101,600 | 29,500 | |

DEPARTMENT OF STATE.—LEASE COSTS OF OFFICIAL RESIDENCES—Continued

INTER-AMERICAN

| | Ambassador | Deputy Chief of mission residence | Principal officer residence |
|---|---|---|---|
| Brazzaville, Congo (E) | 34,000 | | |
| Moroni, Cosmorcs (E) | 24,000 | | |
| Djibouti, Djibouti (E) [3] | | 54,286 | |
| Malabo, Equatorial Guinea (E) [2] | 14,000 | | |
| Accra, Ghana (E) [2] | | 18,000 | |
| Conakry, Guinea (E) | | 42,000 | |
| Monrovia, Liberia (E) [2] | | 17,500 | |
| Antananarivo, Madagascar (E) | | 14,800 | |
| Maputo, Mozambique (E) [2] | | 28,000 | |
| Niamey, Niger (E) | | 12,700 | |
| Kaduna, Nigeria (CG) | | 66,000 | |
| Kigali, Rwanda (E) | | 17,700 | |
| Dakar, Senegal (E) | 27,100 | 22,000 | |
| Victoria, Seychelles (E) | 19,600 | | |
| Freetown, Sierra Lione (E) | 35,000 | 21,000 | |
| Mogadishu, Somalia (E) | 18,000 | 24,000 | |
| Khartoum, Sudan (E) | 48,000 | 69,200 | |
| Mbabane, Swaziland (E) | 19,200 | | |
| Banjul, The Gambia (E) | 2,100 | | |
| Lome, Togo (E) [1] | 6,900 | 10,400 | |
| Kampala, Uganda (E) | | 36,000 | |

[1] Option to purchase.
[2] Posts where U.S. Government can no longer purchase properties.
[3] Construction of new official residence authorized.

Mr. PRESSLER. Finally, Mr. President, the amendment calls for reciprocal treatment of those countries which prohibit the United States from purchasing additional residential properties. Approximately 26 percent of all U.S. overseas diplomatic missions are in countries which prohibit us from buying residences for our diplomats. Those countries should receive the same treatment here, and my amendment moves in that direction.

Mr. President, I urge that the amendment be adopted.

The ACTING PRESIDENT pro tempore. The Senator yields the floor. Is there additional debate? The Senator from Rhode Island.

Mr. PELL. We have examined this amendment, find it acceptable, and urge its passage.

The ACTING PRESIDENT pro tempore. Is there further debate?

Mr. HELMS. Mr. President, it is a good amendment. We find it acceptable on this side.

The ACTING PRESIDENT pro tempore. The question occurs on the adoption of the amendment of the Senator from South Dakota.

The amendment (No. 896) was agreed to.

Mr. HELMS. I move to reconsider the vote by which the amendment was agreed to, Mr. President.

Mr. PELL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The ACTING PRESIDENT pro tempore. The Senator from North Dakota, Senator CONRAD.

## THE NOMINATION OF JUDGE ROBERT BORK

Mr. CONRAD. Mr. President, I rise to speak on the nomination of Judge Robert Bork to the Supreme Court of the United States.

When the President announced Judge Bork's nomination, I indicated that I would not make a final decision on my vote until the hearings process had been completed. That process was completed yesterday with a vote in the Judiciary Committee. I am now ready to announce my vote and give the reasons for it.

Throughout the confirmation process, I have followed the committee's proceedings with great interest and with an open mind. I have read books on the constitutional debates of our Founding Fathers; reviewed transcripts of the hearings; and read countless articles on the confirmation fight. I have heard from thousands of people in my home State of North Dakota who care deeply about whether of not Judge Bork will be confirmed. Over the past 2 months, I actively sought the viewpoints of my constituents at town meetings in 22 communities; at a debate I sponsored at the University of North Dakota Law School; and by writing to all members of the State bar association. And I was fortunate to have the opportunity to meet privately with Judge Bork last week for more than an hour in my office.

The debate over Judge Bork's nomination has provoked deep divisions in my State as it has in the Nation. This controversy is not just the work of partisan politics, nor is it a simple clash between liberal and conservative ideologies. President Reagan has won Senate confirmation of three conservative Supreme Court Justices; two of them with unanimous support from the Senate.

No, Mr. President, it is not politics which placed this nomination in jeopardy but the record of the man himself. Nor should this nomination be viewed as a simple test of whether the Supreme Court decision allowing abortion should be reconsidered. No judicial nomination can be decided on the basis of a single issue because a judge of the U.S. Supreme Court must rule on hundreds of critical matters in the course of a lifetime appointment to the court. Any nominee must be judged on that broader basis.

Mr. President, I am troubled by a nominee who has argued that the constitutional guarantees of freedom of speech provided for in the first amendment, only applied to political speech. That was his position. Now he has changed.

I am troubled by a nominee who argued that the equal protection provisions of the 14 amendment only applied to race and ethnicity. That was his position. And now he has changed.

I am troubled by a nominee who can find no constitutional justification for the one-man one-vote principle—so

fundamental to our system of representative government. But that is his position.

I am troubled by a nominee who had not met all of his tax obligations until he was nominated for a position on the Supreme Court. Perhaps that is especially sensitive with me as a former State tax commissioner. If he does not show personal respect for the basic tax laws of his jurisdiction, how can he be respected as an interpreter of law on our highest court?

I am troubled by a nominee whose actions as Solicitor General at the height of a constitutional crisis deferred to the wishes of the executive branch and the firing of a special prosecutor.

From the outset I expressed deep reservations about Judge Bork's role in one of our country's most serious chapters: the Watergate Saturday Night Massacre. At the time, our system of government was gravely tested. In my view, Robert Bork did not rise to the challenge of restoring public confidence in the rule of law.

I have found Judge Bork's explanation of his Watergate role inadequate in both his testimony to the Judiciary Committee and in the private meeting he held with me. His decision as Solicitor General to fire Watergate Special Prosecutor Archibald Cox demonstrates to me a serious flaw in judgment.

As a top law enforcement officer, he acted in a way that could have allowed massive abuse of Presidential power to go unchecked.

Instead of providing a satisfactory answer, the confirmation process has raised more questions about this episode than it has answered. Discrepancies exist in Judge Bork's recounting of those events following the firing of Mr. Cox and his testimony was seriously challenged by others involved in the Watergate investigation.

Beyond the implications of his own actions, Judge Bork denounced the law providing for independent special prosecutors as probably unconstitutional. That position would leave the Congress powerless to deal with future questions of illegality in the highest reaches of the executive branch of Government.

But it is not conflicting statements or past deeds alone which give me concern about the pending nomination of Judge Bork to the Supreme Court. It is Judge Bork's narrow vision of the document itself. I am not a constitutional scholar, but I have a vision of the Constitution and its underlying values—values which I have taken an oath to preserve, protect, and defend.

I am deeply troubled by Judge Bork's limited view of the Constitution which has inspired anxiety rather than confidence about whether basic individual rights and freedoms will be protected by him. Judge Bork believes that unless these rights are strictly specified in the Constitution, they do not exist.

Judge Bork, for example, argues that the Constitution does not protect an individual's right to privacy. He states that because privacy is not specifically identified in the Constitution or the Bill or Rights, such a right does not exist.

He calls the ninth amendment, which preserves for the people rights not enumerated elsewhere in the Constitution, "nothing more than a water blot on the document." I disagree. My reading of the debates of the framers of our Constitution and the Bill of Rights indicates that they feared someone would read the rights of the people so narrowly that unless they were specifically listed, they did not exist.

That is precisely why they included the ninth amendment in the Bill of Rights. It was meant to signal to all of us that just because a right is not specifically set out in the Constitution, it is not to be denied to the people. Judge Bork's view would confine the constitutional search for justice to an 18th century world where women could not vote and where slaves were property.

I believe the framers of our Constitution created a more visionary document. Our forefathers could not anticipate all the changes that would shape this country, or all of the issues society would face in the centuries ahead. But their framework endures because it encompasses flexibility, building in a system of interpretation by the court, allowing for the possibility of future amendment, and providing a Government of checks and balances.

I also believe that legal outcomes matter—not just the process of legal reasoning by which decisions are reached. Judge Bork's record and writing show too little concern for their human consequences. His assertion that there is no right to privacy leads him to conclude that the Government could have the right to dictate whether a married couple uses birth control devices in the privacy of their bedroom. I believe that is a profound misreading of the constitutional guarantees of liberty and freedom provided by our forefathers.

Without question, Judge Bork is one of the Nation's foremost legal scholars. Yet the picture that emerged from the hearings process and from the thorough examination of the rulings, writings, and public statements of Judge Bork is disturbingly inconsistent. I am left with an impression of unpredictability. While I do not fault him for revisiting issues and changing his mind, it is hard to believe he's willing to abandon some of his long-held views.

The task of a Justice of the Supreme Court demands not mere strength of intellect but a sensitivity to the core values and aspirations of the Constitution. Because I do not find in the works of Judge Bork these qualities and sensitivities, I cannot consent to his nomination. The Bork nomination is clearly now in jeopardy and I believe that it should be withdrawn. If the nomination proceeds to a vote of the full Senate, I will oppose Judge Bork's appointment to the Supreme Court.

This nomination has deeply divided our State and the Nation. I fervently hope if Judge Bork's nomination is defeated, that the President will send the Senate a nominee who provides this country a spirit of unification and not division.

Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Chair now recognizes the Senator from Oregon, Senator HATFIELD, for 10 minutes.

## THE BORK NOMINATION

Mr. HATFIELD. Mr. President, David Broder grasped the political dynamic of the current dilemma over the Bork nomination far better than I when he said:

> 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.

Mr. President, I will not impugn the motive of any Senator, who, after having weighed the evidence, decides to vote for or against Judge Bork. Far be it for me to do that. And I will not suggest here today that any Senator's decision was produced under duress from the runaway politico-technological hate machines that operate as I speak. Nor Mr. President do I believe, as appalled as I may be, that the atmospheric rancor which has descended upon this body can be justly cited by anyone as a basis for a decision on this matter. But I will say this: though our revulsion should not determine the manner in which we should proceed, it most certainly should sound an alarm that this democracy is in poorer health today than it was the day before all this happened.

Yes, we have been here before with Brandeis. We have been here before with Parker. We have been here before with Black. And due to the magnificent resilience of our constitutional democracy we have recovered. And I am sure we will now.

But never before have we seen the type of political viciousness which is unique to the television age threaten the independence and the integrity of the judiciary. It has transformed a good man into an evil symbol. We have watched the political extremes—the fear warriors and the hate war-

riors of the left and the right—each side reinforcing the extremism of the other in a hate concerto.

Mr. President, anyone who observed the Judiciary Committee's vote yesterday knows that Judge Bork's intelligence is not in question; knows that his honor is not in question; knows that his character is not in question; knows that his experience is not in question. And while each of these factors is as pertinent to his fitness to serve as any other, I will lay those matters aside and ask simply: By what standard do we determine whether the ideological portrait of this man lies within reasonable bounds?

The first consideration must be the framework within which we judge him. The viciousness of which I just spoke is something we have come to expect if not condone in the arena of elected office. But its presence in this skirmish is proof of something more profound. We have lost touch with a vital democratic premise: the distinction between legislation and adjudication.

The former demands that the overriding consideration is the ultimate policy which emerges from the thinking and the actions of the legislator. The latter must be dominated by the ultimate quality of the reasoning brought to bear on the interpretation of the law. To suggest otherwise would endorse the view that adjudication is "merely a continuation of legislation by other means"—which it most definitely is not. This does not mean that the result is unimportant, because it is—does not mean that the element of understanding and compassion brought to bear on the decision is not important—because it is. It simply means that there is a different order of priorities which we must apply to the selection of a judge as distinguished from the election of a legislator.

Having established a framework for consideration of this problem, I want to turn to the fundamental accusation around which this matter revolves: is this man an ideologue? We Senators have before us an individual with a long and distinguished career. As that career progressed, a number of transformations in his political orientation occurred. Now we have an obligation to choose the points of reference we will apply. We cannot simply add everything up and honestly say that the whole equals Judge Robert Bork of 1987. Is Judge Bork "the libertarian" the most telling point of reference? Judge Bork the Socialist? Judge Bork the professor? Though they are all relevant, I do not think so. I will say, however, that this very fact of an individual who has undergone such profound changes in political outlook over the ccurse of a lifetime defies the definition of ideologue.

Nevertheless, he has produced during those periods, opinions on the great issues of our day, most particularly in the area of civil rights, which I find profoundly disturbing. But it is my obligation, as one who stands in judgment, to place it in context. Of all the criteria which we have at our disposal to determine the likely quality of his performance on the Supreme Court, the fairest, most complete and I believe the most accurate measurement is provided by Judge Bork's record on the U.S. Court of Appeals, the most recent position he has held.

During this 5-year period, with over 400 decisions and 125 opinions which he authored, spanning a wide range of constitutional and statutory questions. Judge Bork voted with the so-called "liberals" on that court in 75 percent of the cases. Of the 10 race, sex and age discrimination cases involving substantive legal issues as to the scope of the protection of those rights, Judge Bork voted with the plaintiff 7 times. Of the three remaining cases in which Judge Bork voted against the plaintiff, the Supreme Court upheld Judge Bork's position in two of them.

But the most important conclusion is simply this: At no time has the Supreme Court reversed Judge Bork during his tenure as a judge on the U.S. Court of Appeals. At no time. That is not the record of an ideologue.

As Lloyd Cutler, a liberal Democrat, has described it, this is a record of an individual closer to the center than to the right, more in the mainstream than on any fringe, and more in keeping with the status quo of Supreme Court decisions than a disruption of any balance which now exists.

Let me remind the Senate: in 1982 we unanimously confirmed Judge Bork. If anything we have a far more moderate record today upon which to judge him than we did in 1982. At worst, there is absolutely nothing in his record over that 5-year period to indicate that he has suddenly become a danger to the Republic. 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 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, very wrong. The case against this man is flawed.

I would say this to my fellow liberals: We above all others have a solemn obligation to stand firm against unfounded charges of extremism. We above everyone had better err on the side of tolerance lest we be deemed intolerable ourselves.

If I were to judge this man exclusively on the degree of common political ground we share, then I also forfeit my right to urge tolerance upon my colleagues when a liberal whose views are more fully compatible with my own is nominated by a future President to the Supreme Court. I have said many times that the President, Democratic and Republican alike, deserves to choose his own team unless serious questions of character exist. The Supreme Court, however, is not the President's team any more than we are part of his team. That is precisely what separates us from dictatorship.

But in some ways I do not view this decision in a radically different context from the one I faced regarding the nomination of Kenneth Adelman to the directorship of the Arms Control and Disarmament Agency. There is no cause to which I have been more fervently committed throughout my life than the end of the nuclear arms race. There was probably not one issue with which I found myself in agreement with Mr. Adelman, yet I voted for him. I voted for him because my eye was on Mr. Adelman—but it was also on the future. I voted for him because I had not given up the dream of a future President who would come to the White House unabashedly determined to end this madness and appoint a negotiator who would do just that. If I were to oppose a qualified individual who was not an extremist, I would abandon my right and my credibility to fight for the next individual to come along whose views are more in keeping with my own.

Who will the President send us next if this nomination is defeated or withdrawn? This President is not going to send a liberal up here. In fact, it is my guess that when all is said and done, once the smoke clears; it will be the ideologues on the right who will have the last laugh.

This man has flaws. He has taken positions which concern me deeply. I cannot vote for him without doubts. But I also cannot in good conscience oppose him on the ground that he is an extremist because the record flies in the face of that charge. This nomination debate has been described as a lynching. That imagery should serve as a reminder to all of us. For it is moments such as this when we should remember that the independence and the 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.

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.

I hope my colleagues also remember those periods in our history when the

ruling majority in Congress held the same party label as the man who sat in the White House—those periods when the Congress played "rubber stamp" to the President. The independence of the Supreme Court and only the independence of the Supreme Court stood between us and what could be described as a voluntary totalitarianism. 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 the legitimate concerns one may have—and there have been many voices of reason opposing Judge Bork struggling to be heard above the shrill catcalls—there is no question in my mind that we will live to regret the course which this body seems intent on pursuing.

The ACTING PRESIDENT pro tempore. The Senator from Tennessee is recognized for 10 minutes.

## THE NOMINATION OF ROBERT BORK TO THE SUPREME COURT

Mr. SASSER. Mr. President, I rise today to offer my views on the nomination of Judge Robert Bork to be an Associate Justice of the Supreme Court.

I think I can forgo any further discussion on the importance of this nomination. It has controlled the attention of the American people in recent weeks.

We are all aware that the seat to which Judge Bork aspires is pivotal. The person who takes it may well make decisions that will determine the direction of the body of law in this country for decades to come.

When President Reagan nominated Judge Bork to the Nation's highest court, I stated that I would not make a decision on the nomination until the hearings were completed. The hearing process is now over and the record of Judge Bork has been laid before the Senate and the country in detail.

For good or ill, we have had one of the most intense scrutinies of a Supreme Court nomination in recent history, perhaps in the history of the Republic.

While before the Judiciary Committee, Judge Bork revealed himself to be a complex and brilliant scholar. He has a searching intellect that has resulted in some truly profound inquiries into this Nation's judicial heritage.

After a thorough examination of his academic writings and after scrutiny of the Judiciary hearing record, there can be no doubt, and I have no doubt that Judge Bork is a man of the highest intellectual and moral integrity. I am convinced that this intellectual and political odessey has been absolutely sincere.

But having said that, I am concerned about some of Mr. Bork's personal characteristics—characteristics that may well work to produce excellence in a scholar but which in a Supreme Court Justice may produce deep doubt, distrust, and divisiveness.

Mr. President, the Supreme Court is, as it was called repeatedly by our distinguished colleagues on the Judiciary Committee, a peoples' court. For many of our citizens, who may well have exhausted all other means of redress, it is indeed the court of last resort.

My fears about Judge Bork arise largely from my foreboding that approval of his nomination to the Court will persuade millions of American citizens that the ultimate bar of justice has been closed to them, that the final arbiter in conflicts between personal rights and government rights has been rendered deaf to the voice of the individual.

Frankly, I must confess that I am deeply troubled by the erratic nature of Judge Bork's views. I am troubled by his journey from a youthful Socialist who believes that Government supplies all the answers to a libertarian who believes that government has little or no place in regulating the conduct of human affairs.

I am equally troubled by his more recent journey from a radically conservative judicial belief that majority views are paramount and predominate to the exclusion of minority views, a journey that continues to what we are told now is a quiet, moderate niche in the judicial mainstream.

For anyone who has followed the confirmation process and seen the radical activist Bork, the originalist Bork, then heard about the libertarian Bork and the moderate Bork, 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?

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 if that scholarship is to be our true guide, there is far too much in it that is extreme, inflammatory, and, to quote my distinguished friend from Alabama, Judge HEFLIN, "Bordering on the strange."

I believe these radical views derive from a constricted view of the individual rights upon which this country was founded, a view that we should bind our civil and individual liberties in a straitjacket called original intent.

Mr. President, I practiced law in the courts of this land for 15 years before being elevated to this body by the people of Tennessee and in that time I think I developed some view as to what our Constitution should be, and my view is that the Constitution is a living document whose basic genius is that it lays down a broad mandate for the individual rights and liberties that must evolve in response to changing social and technological circumstances as our country travels through the centuries.

In my judgment, the Constitution is a solid, brilliantly constructed foundation upon which we have built, for 200 years, a superstructure of deeply considered judicial belief.

I submit it would be the opposite of conservatism to tear the roof off that superstructure, rip down the walls and pillars of this carefully crafted hall of justice, in order to declare that we are preserving the pure foundation of original intent that undergirds it all.

Quite frankly, Mr. President, that is the very definition of a "foolish consistency," and it results in precisely the kind of judicial thinking that is represented in a careful reading of Judge Bork's Indiana Law Review article of 1971.

It results in a denial of any right to privacy, a view that privacy is not implicit in our Constitution or a right to privacy is not implicit. It results in the view that there are no real rights outside of those that are explicitly enumerated in the language of the Constitution itself.

It results in challenges to the Public Accommodations Act—title II of the Civil Rights Act of 1964. It results in the most narrow and miserly possible interpretation of the 14th amendment "equal justice under the law" clause.

Finally, it results in statements like these from Judge Bork's 1971 "neutral principles" piece.

And I quote from that piece, Mr. President. Judge Bork wrote that:

> 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 or literary.

That is too narrow a reading of what American citizens have come to construe now for almost 200 years as freedom of speech.

What about the principle of one man, one vote? Here is what Judge Bork wrote about it.

> The principle of one man, one vote was not neutrally derived: It runs counter to the text of the Fourteenth Amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the court invented the new formula.
>
> That is one man, one vote.

And the new formula that he says the Court invented out of thin air was one man, one vote.

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, he would not shred the very

fabric of our culture in order to preserve the purity of the theories that he so carefully crafted over the past 20 years.

But I submit, Mr. President, the Bork nomination was sent to this body basically on the strength of the judge's ideological purity. The Robert Bork who has been proposed for the High Court was proposed precisely because of his strictly held originalist beliefs and because of the promise implicit in them that he would roll back the clock on issues like civil rights, privacy, and equal justice under the law.

So the question occurs once again, Mr. President, Who is the real Judge Bork? And can we afford to send him to the Highest Court in the land, the pivotal seat, before we know for sure?

My answer, like the answer of so many of my colleagues from the southeastern region of the United States, must be no.

Mr. President, the Southland that I love has been down a long and difficult road in pursuit of equal rights for people of all races and all sexes. We have fought a bloody war over this issue that pitted brother against brother.

I know that the citizens of my State, and the citizens of the South in general, do not want to retraverse that painful journey.

I believe we want rigorous jurisprudence in accordance with the guidelines established by the Constitution, but consistent with the 200 years of constitutional experience that have enshrined in our canon of ethics the simple principle of "equal justice under the law."

In conclusion, Mr. President, I would urge the President to send to this body the name of one of the many highly qualified candidates for the Court from the Southern States.

I called upon the President to select a southerner when Justice Powell announced his resignation from the Court.

I would remind my distinguished colleagues that Justice Powell of Virginia succeeded Justice Hugo Black, of Alabama, who was also a Southerner. We have always had a Southerner on the Supreme Court.

I would urge that the principle of regional balance is well worth preserving. There are numerous Southern judges who exemplify the qualities we need on the Court—scrupulous adherence to the values inherent in the Constitution—tempered by a broad understanding of the struggle for individual liberty that has been our heritage for 200 years.

So, Mr. President, in conclusion, I urge the President of the United States to send to the Senate another nominee for the Supreme Court.

The PRESIDING OFFICER (Mr. REID). The Senator's time has expired.

Mr. MOYNIHAN. Mr. President, before proceeding with the amendment which has been scheduled, may I take a moment to express my great appreciation and admiration for the statements of the Senator from Tennessee which were so cogent, thoughtful, and modulated. May this Yankee express his agreement with the thought that, of course, there ought to be a Southern member of the Supreme Court. There has always been. I hope that he is heard carefully in the executive branch.

Mr. SASSER. Mr. President, I wish to thank my distinguished friend from New York for his remarks.

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate resumed consideration of the bill.

AMENDMENT NO. 898

Mr. MOYNIHAN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from New York [Mr. MOYNIHAN] proposes an amendment numbered 898.

At the appropriate place, insert:

It is the sense of the Senate that the Department of State, in arranging visits of foreign dignitaries to the Capitol, shall have in mind that ours is a republican institution which by long established practice, and as a matter of principle, conducts its affairs with a minimum of display. Individual Senators do not have official cars, do not have motorcycle escorts, do not have praetorian guards. The recurrent spectacle of screeching, self-important, heavily armed caravans of limousiness, some "decoys," bearing foreign visitors is discordant, disruptive, and scarcely a service to the visitors themselves. The Department of State is urged to consider that two unadorned automobiles and no motorcycles would ensure foreign visitors a warm welcome, and make clear to them that they are visiting the representative body of a democratic state, and not some besieged citadel of a fearful tyranny.

Mr. MOYNIHAN. Mr. President, I will be brief.

I make two observations. It has long been the observation of historians that organizations in conflict become like one another. And anyone who has been in and out of of our Nation's Capital for some near three decades, as is the case with the Senator from New York, will have observed the ever-rising degree of spectacle with which we encounter executive branch performances; the heightened security, the outriders, the decoy limousines, the stationwagons filled with armed men and women, which are scarcely appropriate to a republic.

We here in this Capitol are representatives of a free people. We are freely elected. If anything befalls us, misfortune of any kind, we will be replaced by other equally free representatives.

I do not like, and I cannot think others do, the impression that we are somehow emulating the manner of other nations where rulers roar down the streets, traffic is cleared, and passers-by are scrutinized for whatever unhappy intent they might well indeed have.

We are not that kind of a nation, but much more the kind of a nation, may I say, where the previous President walked down Pennsylvania Avenue in his inaugural parade.

I just hope that the State Department would understand that they are likely giving a very wrong impression to others when they bring them to us in this manner.

Yesterday afternoon, the President of Mozambique arrived here in a manner which Mr. Duvalier would have found excessive as he roared through Port-au-Prince. Indeed, that President enjoyed such treatment as any dozens of tyrants or dictators in the world are accustomed to. That is not our practice. This is not their place.

I would hope that the State Department would hear us saying: Bring them up, but have them arrive the way we arrive.

Mr. President, the distinguished Senator from North Carolina has asked that he might be a cosponsor of this measure and I am very happy that he should be.

Mr. PELL. I would like to be added, as well.

Mr. MOYNIHAN. Mr. President, my day is now fully filled with joy that our beloved and distinguished chairman of the Committee on Foreign Relations joins in this matter.

Mr. BYRD. Mr. President, I would like to be added as a cosponsor.

Mr. MOYNIHAN. I think I will mark this day as one of permanent happiness. The distinguished majority leader as a cosponsor: A man who represents everything we are talking about, a plain Democratic representative in a Republican institution.

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

Mr. MOYNIHAN. Mr. President, if there are no further comments, I move the adoption of the amendments, encouraging the Secretary of State to pay heed.

The PRESIDING OFFICER. Who yields time?

Mr. PELL. With full support for this amendment on this side of the aisle, I trust the amendment will pass.

Mr. HELMS. And the unbridled and enthusiastic support on this side.

The PRESIDING OFFICER. Senators have yielded back their time?

Mr. MOYNIHAN. Yes.

Mr. PELL. Yes.

place, thus strengthening the competitive potential of our Nation's enterprises;

Whereas employee ownership is a viable tool for creating and retaining jobs in our Nation's communities;

Whereas the growing number of firms with employee owners deserve special praise for their participation in the positive economic trend of employee ownership; and

Whereas the United States Congress, as a matter of sound economic policy, supports the further adoption and expansion of employee ownership in American business: Now, therefore, be it

*Resolved*, that it is the sense of the Senate that the period commencing October 5, 1987, and ending October 11, 1987, should be recognized as "Employee Ownership Week".

Mr. BYRD. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. PELL. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Without objection, the preamble is also agreed to.

## ORDERS FOR THURSDAY

### RECESS UNTIL 8:45 A.M.

Mr. BYRD. Mr. President, I ask unanimous consent when the Senate complete its business today it stand in recess until the hour of 8:45 a.m. tomorrow.

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

The foregoing order was changed later to provide for a recess until 8:30 a.m.

### LEADERSHIP TIME WAIVED

Mr. BYRD. Mr. President, I ask unanimous consent that time for the two leaders be waived on tomorrow.

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

### RECOGNITION OF CERTAIN SENATORS

Mr. BYRD. Mr. President, I ask unanimous consent immediately following the prayer Mr. PROXMIRE be recognized for not to exceed 5 minutes; and immediately following Mr. REID a quorum call begin.

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

Mr. BYRD. Mr. President, that will be a live quorum. It will be a 30-minute quorum call.

### CALL FOR THE REGULAR ORDER TOMORROW

Mr. BYRD. Mr. President, I ask unanimous consent that the call for the regular order be automatic after the conclusion of 30 minutes on that rollcall.

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

## PROGRAM

Mr. BYRD. Immediately following that rollcall the two managers are prepared to proceed with the business that we have been on for the last 2 days. Amendments hopefully will be ready for action. I urge all Senators who have amendments to be prepared to call up their amendments tomorrow. It is hoped that action can be completed on this measure by 2 o'clock tomorrow afternoon. Obviously there will be some rollcall votes in connection therewith.

I compliment the two managers on their handling of this bill. They have disposed of a good many amendments today and yesterday and on Friday last. They have been at their posts of duty, ready to take on all amendments. I wish them well on the morrow.

I hope that we can finish this measure, as I say, by 2 o'clock tomorrow. It would be my expectation then to go to the nomination of Mr. Verity. It is also possible that tomorrow afternoon we could do the prompt payment act. The order, of course, is for going to catastrophic illness, but I am thinking of changing this order for good reasons.

It would be my plan, then, on Friday, to take up catastrophic illness, in the event that matters work out as I hope they will and as I have tentatively set them forward here.

## PROPOSED UNANIMOUS-CONSENT AGREEMENT—NOMINATION OF MR. VERITY

Mr. BYRD. Mr. President, I will put this in the form of a consent. I ask unanimous consent that upon the disposition of the State Department authorization bill on tomorrow, the Senate go into executive session and proceed to the consideration of Mr. Verity. I am sure there will be a vote on that nomination. I ask unanimous consent that the vote on the nomination of Mr. Verity occur on Friday at the hour of 9 a.m. and that upon the disposition of that nomination, the Senate then proceed to the consideration of the catastrophic illness legislation, if the State Department authorization bill has been completed prior thereto.

Mr. DOLE. Mr. President, reserving the right to object, I needed to make one phone call on this. I had someone indicate they could not give consent to move to the Verity nomination. I know you could get it——

Mr. BYRD. Mr. President, at the moment I withdraw the unanimous consent and thank the Senator from Nebraska for his courtesy for yielding.

## THE NOMINATION OF JUDGE ROBERT BORK

Mr. KARNES. Mr. President, I rise at this time to speak on the nomination of Judge Robert H. Bork to serve as Associate Justice of the Highest Court in our country—a nomination which surely will go down in history for the unprecedented level of attention and degree of scrutiny it has received.

I believe this particular issue is the most significant of my short Senate career. Indeed, it is one of the most important of our constitutional responsibilities as U.S. Senators, thus, I have given great care, attention and study to my decision to support the President's nomination of Judge Bork.

Of greatest importance in making a decision of this nature is the recognition of qualities which must be present for the confirmation of a nominee to the Supreme Court. Drawing upon the collective wisdom and experience of colleagues like Senator THURMOND, and my personal beliefs as to the measure of responsibility demanded of an individual sitting in judgment of the will of the people as expressed through their elected representatives and found through the acts of citizens, I note the following as important factors:

First, unquestioned integrity as evidenced through courage to render decisions in accordance with the Constitution and the will of the people as expressed in the laws of Congress;

Next, knowledge and understanding of the law, in other words, professional competency;

Next, understanding to recognize both the rights of the individual and the rights of society in the quest for equal justice under law;

Next, appropriate judicial temperament; the ability to prevent the pressures of the moment from overpowering the composure and self-discipline of a well-ordered mind;

Lastly, an appreciation for the greatness of our system of government—in its separation of powers between the branches of our Federal Government and its division of powers between the Federal and State Governments.

Certainly no one look at the career of Judge Bork and not be singularly impressed with his extraordinary credentials, nor doubt that Judge Bork meets these qualifications. At this point, I think it serves to reiterate what many have already emphasized about Judge Bork's record.

A graduate of the University of Chicago Law School, a Phi Beta Kappa and managing editor of that institution's Law Review, Robert Bork has twice served on the faculty of Yale Law School and was a professor at that prestigious institution for 15 years. In his private practice of law, Mr. Bork earned a national reputation as an outstanding litigator. In his 4 years as Solicitor General of the United States, Robert Bork fulfilled his role in a job that is universally recognized as one requiring the talents of a "lawyer's lawyer".

Robert Bork has, in my opinion, since 1982, accumulated a remarkable record as judge on the Circuit Court of

Appeals for the District of Columbia. This record should be most relevant to this Senate's consideration. Of the 426 cases, in which he has participated, Judge Bork has been the author of the majority opinion in 106 instances. With respect to those 106 majority opinions, it is deserving of emphasis that he never has been reversed by the Supreme Court. Furthermore, of the 401 cases in which Judge Bork joined with the majority, none have been reversed by the U.S. Supreme Court.

In addition, Judge Bork authored dissenting opinions in 25 remaining cases, and the Supreme Court adopted the viewpoint expressed by Judge Bork in those dissents on six different occasions. Many have offered the observation that Judge Bork may well have the most remarkable record on appeal of any currently sitting U.S. Federal judge. I, too, think that it is a fair conclusion from these statistics that Judge Bork's judicial rulings during these 5 years have not been at variance with the prevailing views of the current Supreme Court.

I also must add that twice before, Judge Bork has passed confirmation of this U.S. Senate for positions on the Federal Bench, each time unanimously.

Mr. President, a great deal has been said during these hearings concerning judicial philosophy and/or ideology. As the Senate looks at a nominee's record in its duty to advise and consent, it is reasonable to look at other aspects of the person and his record. Broadly put, the "ideology" of the nominee is a factor among numerous factors that I previously cited which are within the discretion of Senators to consider. However, I believe that many of my colleagues are making the grave mistake of declaring ideology the dispositive factor—a first among equals as a criterion for confirmation. Of course, reality is that the ideology question is rarely based on an objective weighing of the lofty ideals of freedom and democracy, but rather a subjective examination of the nominee's views and how his views square with the prevailing ideological beliefs of the questioner—in other words, "does the nominee think the same way I do?" As one witness noted, "the critics bless their own views as the mainstream and damn everyone else as outside of it."

Mr. President, I feel that the overly great importance on matters related to individual ideology found in the Bork nomination works a disservice to the people and to the system of Government that serves them. There are many levels on which Supreme Court nominees are examined, investigated, questioned and judged; in this case, the life of Robert Bork has been completed dissected. I believe so much so, that the Bork confirmation process itself is legitimately subject to criticism.

In this regard, I feel obligated to publicly state my tremendous frustration and disgust with the scope of any apparent disinformation campaign created by opponents of Judge Bork. I have read a number of his opinions and find the distortions of his record in the media, in advertisements, and in the hearings designed to create the public image of a man very different from the one I met with on Monday of this week, and very different from the one that emerges from a fair reading of his record.

I have previously cited Judge Bork's outstanding judicial record. In my mind, judicial experience and one's judicial record, if available, should provide the principal basis for one's determination and conclusions on judicial philosophy. Clearly, the law school writings of 15-20 years past should be considered but not predominate. The selected culling and frequent unrepresentative sampling of cases cited by the opponents of Judge Bork created in my view a highly misleading account of his judicial philosophy or ideology, if you will. Unfortunately, I believe this orchestrated effort at disinformation apparently will achieve nonconfirmation. As well, it establishes an extremely threatening scenario for the future politicizing of Presidential nominees to the Court. If such media hype and public hysteria continues, it will inevitably discourage vigorous advocates of the Constitution and the rule of law, such as Judge Bork, from seeking high judicial positions in this country. Again, I have no objection to full, fair and comprehensive hearings and inquiries into the nominee. However, the pattern of unrelenting disinformation is unsuitable and unjustified.

Mr. President, in reaching my decision to support the nomination of Judge Bork, I have reviewed carefully the confirmation hearing record on his views concerning criminal law, civil rights, the right of privacy, equal protection, the first amendment, the Watergate circumstances, his view of judicial precedent/stare decisis, the separation of powers, and judicial restraint and judicial standing issues. In certain instances, I must admit that the outcome or the final decisions in these areas may not have been to my complete liking or agreement, but the fact is Judge Bork has consistently applied a reasoned and principled standard of judicial restraint in deciding cases that underscore his oft-stated, long-held belief that people—we the people—make the laws—not judges.

It seems to this Senator that the fundamental focus of Judge Bork's detractors in his criticism of judicial activism, and his strong objection to the role of courts on occasion creating "judge-made" law equal to the system of laws passed by legislatures.

As Judge Bork put it 3 weeks ago: "the judge must be every bit as governed by law as is the Congress, the President, the State Governor and legislatures, and the American people. No one, including a judge, can be above the law".

To say that judges must follow the law rather than their personal bias is not to say that individual liberty or freedoms are not without full scope or vitality in the mind of Judge Bork. To the contrary, when deciding constitutional cases in the "grey area", Judge Bork testified that the judge's responsibility is to discover the framers' values, defined in the world they knew, and apply them to the world we know. I don't suggest that this formula always yields an easy result—or even a result I always agree with—but it is a reasoned and principled approach to cases and disputes. Simply stated, his view is that the Court's role is to interpret the Constitution, interpret the laws passed by Congress, and rule on the administration of those laws when appropriately presented to the Court. He objects to the concept of the super legislature made up of lifetime appointees who are beyond the review of the people or of the other branches of Government. Are these views not what the framers had in mind when they divided the authority of Government between three separate and distinct branches in order to avoid the dangerous accumulation of autonomy in any one branch or power within the governmental framework? I believe that they are what the Constitution requires and the framers, given a fair interpretation of intent, sought. Thus, I believe in Judge Bork's justifiable concern for an unrestrained, nonreviewable role of the Court. To do otherwise would do violence to the concept of the separation of powers and what has come to be known as the system of checks and balances—that indefeasible guarantee that the people will never become isolated from the mechanism that governs them.

At this point, I ask if this judicial philosophy is one that may be labeled—and has been labeled by opponents of Judge Bork—as an extremist judicial philosophy? I think not. As Chief Justice Warren Burger declared during the confirmation hearings, "It would astonish me to think that he is an extremist any more than I am an extremist * * *. Senator, if Judge Bork is not in the mainstream—of American judicial thought—neither am I, and neither have I been."

Thus, in the mind of this Senator, Judge Bork's belief of judicial restraint results not in a Constitution that is static, worthless, wholly lacking in interpretative flexibility to deal with a rapidly changing environment,

but instead, the Bork constitution is indeed dynamic and vital. Consider the expansion of the first amendment protection to the electronic media and the fourth amendment to electronic surveillance, as examples.

Judge Bork has clearly stated throughout the hearings that when social change is mandated by a principle within the Constitution or a statute, then the Court has a legitimate warrant to bring about expanded liberty and freedoms. As Judge Bork explained, "Brown versus Board of Education" brought about enormous social change, and properly so.

Mr. President, I believe after much review and thought that Judge Bork represents a judicial philosophy not of the minority, but indeed the majority of the American citizenry. I sincerely hope that he will have a chance to show the nay sayers and the skeptics that the wisdom, courage and foresight reflected so clearly and vividly in our Constitution can be placed in the hands of a man who respects this great document so much and is eminently qualified to serve as a member of the Supreme Court. I am confident that he possesses the qualities, character, integrity, and intellect of the finest of our country's Supreme Court Justices and that with his strong personal commitment to justice, the Constitution will continue to be the solid anchor holding our Nation in place through trial and tribulation, storm and crisis, opportunity and achievements, now and in the future.

In conclusion, I must acknowledge and thank the many citizens of Nebraska who took the time to communicate with my offices in Nebraska and Washington and with me personally as I traveled the State on this most important subject.

Such input was not a referendum on the nominee and the decision I have just made is mine and mine alone considering many factors as I have stated. However, I sincerely appreciate each citizen's active participation by sharing with me their thoughts and questions. I am proud to represent the great people of the State of Nebraska. I will always encourage such communication on any issue of concern.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. HELMS. Mr. President, I thank the Chair for recognizing me. I commend the distinguished Senator from Nebraska for his excellent remarks.

Mr. KARNES. I thank the Senator.

Mr. HELMS. Senator KARNES is the newest Member of the Senate, but he hit the ground running when he arrived here. His eloquence was apparent in that statement, and I thank him.

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate continued with the consideration of the bill.

Mr. HELMS. What is the pending business, Mr. President?

The PRESIDING OFFICER. Senate bill 1394.

Mr. HELMS. I judge that it is open to amendment?

The PRESIDING OFFICER. That is correct.

Mr. HELMS. Mr. President, I have several amendments on behalf of a number of Senators. These have been cleared on both sides, I might add.

### AMENDMENT NO. 899

Mr. HELMS. I send an amendment to the desk on behalf of the distinguished Senator from Wisconsin, Mr. KASTEN, and ask it be stated.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from North Carolina (Mr. HELMS), for Mr. KASTEN, proposes an amendment numbered 899.

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

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

The amendment is as follows:

At the appropriate place in the bill, add the following new section:

SEC. . REPORT ON POLICIES PURSUED BY OTHER COUNTRIES IN INTERNATIONAL ORGANIZATIONS.

The last sentence of section 117 of the Department of State Authorization Act, Fiscal Years 1984 and 1985 is amended by inserting before the period the following: "together with the amount and type of foreign assistance (if any) made available by the United States for the preceding fiscal year to each such country under the Foreign Assistance Act of 1961, the Arms Export Control Act, the Export-Import Bank Act of 1945, and the Peace Corps Act".

Mr. KASTEN. Mr. President, I have two amendments to this legislation which I am certain are noncontroversial and which have been accepted in the House relating first to the voting practices report which is required yearly and second, the problem of the use of secondment by the Soviet Union in order to circumvent the United Nations' hiring freeze.

### FOREIGN AID AND UNITED NATIONS VOTING PATTERNS

The first amendment would change the current law so that in addition to requiring voting reports each year, that report would also contain the amount of foreign assistance, if any, which is made available by the United States for each country enumerated in that report.

The voting report has become a very useful tool in trying to determine the support or nonsupport of countries in the United Nations, and I believe it would be of even more use and interest if it included U.S. foreign assistance which goes to those countries. Mr. President, this amendment is identical to section 183 of H.R. 1777.

### SOVIET USE OF SECONDMENT TO CIRCUMVENT U.N. HIRING FREEZE

Mr. President, my second amendment, which is also identical to a provision of the House passed bill, section 199(g) of H.R. 1777, addresses the problem which I raised early last summer relative to the use of secondment by the Soviet Union and Eastern bloc countries in the United Nations to circumvent the hiring freeze. This amendment addresses these concerns in three fashions. First of all, it criticizes the Soviets for failing to adhere to the personnel practices spelled out in the United Nations Charter, second, it calls upon the president to take all necessary steps to ensure compliance with the United Nations hiring freeze, and third, it requires the Secretary of State to annually report to the United States Congress on the status of secondment by the Soviet Union and Soviet bloc nations in the United Nations. It also asks for a report on actions taken by the United States and the United Nations to enforce the provisions of the charter which governs the activities of U.N. employees.

Mr. President, I believe that both of these amendments are acceptable and would urge my colleagues to support them.

Mr. HELMS. I support the amendment of Senator KASTEN, and it has been cleared on this side.

For the record, Mr. President, let me summarize the provisions of the amendment.

The amendment expressed the sense of Congress that:

The President should take any action necessary to ensuring compliance with the hiring freeze, including withholding all United States assessed contributions to the United Nations and denying visas to new Soviet-bloc officials.

The President convey to the United Nations that the hiring freeze continue indefinitely, or until the United Nations complies with group of 18 recommended reductions in U.S. personnel.

The Secretary General should revoke all exceptions to the hiring freeze.

Violations of articles 100 and 101 of the U.N. charter and abuse of secondment by Soviets and Soviet-bloc are reprehensible.

The United Nations should adopt the G-18 recommendation that no member-nation be allowed to second more than 50 percent of its nationals.

The Soviet Union be condemned for its refusal to adhere to the principles of the U.N. charter calling for an international civil service and its abuse of secondment.

*The last step is to keep dreaming and aiming high.* At a time when so many in public and private life seem to be seeking the lowest common denominator of public and personal conduct, I hope you will dream and set new examples of service and courage.

Dr. Benjamin Mays, a former president of Morehouse College and role model for me said: "It must be borne in mind that the tragedy of life doesn't lie in not reaching your goal. The tragedy lies in having no goal to reach. It is not a calamity to die with dreams unfulfilled, but it is a calamity not to dream. It is not a disaster to be unable to capture your ideal, but it is a disaster to have no ideal to capture. It is not a disgrace not to reach the stars, but it is a disgrace to have no stars to reach for. Not failure, but low aim, is sin." We must aim high for our children and teach them to aim high.

I'd like to end with part of a prayer for children written by Ina Hughes of South Carolina.

We pray for children
who spend all their allowance before Tuesday,
who throw tantrums in the grocery store and pick at their food,
who like ghost stories,
who shove dirty clothes under the bed, and never rinse out the tub,
who get visits from the tooth fairy,
who don't like to be kissed in front of the carpool,
who squirm in church and scream in the phone,
whose tears we sometimes laugh at and whose smiles can make us cry.
And we pray for those
whose nightmares come in the daytime,
Who will eat anything,
Who have never seen a dentist,
who aren't spoiled by anybody,
who go to bed hungry and cry themselves to sleep,
who live and move, but have no being.
We pray for children who want to be carried and for those who must,
For those we never give up on and for those who don't get a second chance,
For those we smother . . . and for those who will grab the hand of anybody kind enough to offer it.

Please offer your hands to them. Let your Amen be in your committed actions to help black children when you leave here. They desperately need your help on a one-to-one basis and in the political arena. We must all work to redirect the nation's foolish priorities which favor bombs and missiles over babies and mothers upon whom our real national and community security rest.●

## NOMINATION OF JUDGE ROBERT BORK

● Mr. BOSCHWITZ. Mr. President, I ask that that testimony of Jewel LaFontant, given before the Judiciary Committee in support of Judge Bork be entered into the RECORD.

Mr. President, this is remarkable testimony given by this Nation's first Deputy Soliciter General who was a woman. She worked for Judge Bork during his time as Solicitor General.

Since so many people have questioned Judge Bork's attitude on issues regarding women, I felt this testimony would be helpful to insert into the RECORD.

As the testimony indicates, only one Senator was present throughout her testimony. It is indeed regretful that others did not hear it.

The testimony follows:

STATEMENT OF JEWEL LAFONTANT

The CHAIRMAN. Thank you, Mr. Randolph. Ms. LaFontant?

Ms. LAFONTANT. Good afternoon, Mr. Chairman and Members of the Committee.

Judge Bork has asked me to appear on his behalf. I have reviewed most of the relevant court cases; I have read his writings; and I have watched and listened to his testimony as well as that of many witnesses who have appeared before your. There has been a thorough discussion of the cases in which he has been involved and an unending criticism of much of his writings. I must say that I don't recognize the Judge Bork I know from so much of what has been said by his opponents here.

You see, I knew him well. Let me tell you about the heart of the man. In 1973 after I left the United Nations, I came to the Office of the Solicitor General. I was a rarity, if not an oddity: there never had been a woman, black or white, Deputy Solicitor General of these United States. And my presence here is due to the high regard I have for Judge Bork, based upon my personal experiences with him.

Judge Bork placed me in charge of the entire Civil Division where I reviewed hundreds and hundreds of cases that had been determined first in the United States district courts and then in the United States courts of appeal. I say I was an oddity—and it's not just my assessment; it appeared that there was also the perception of the staff in the offices of the SG. You see, attempts were made to isolate me. On one occasion, a secretary who had warmed up to me after a few months after my arrival, she said: I am going to tell you something, Mrs. LaFontant, that you are not going to like—the other deputies meet regularly, and you are not included. How do you know this, I asked. She continued: I was told to call the deputies in to a meeting and the names were called, and I said: "And Mrs. LaFontant?" The response was: oh, no, just the men. The response could have been: oh, no, just the whites.

I immediately reported this to Solicitor General Bork, and it is an understatement to say that he was appalled. And though he is usually a calm and even-tempered person, he exhibited strongly his dismay and sputtered his unhappiness about this attempt to exclude me and to discriminate against me. The very next day was the beginning of my attending so many briefings—I was bombared with meetings—that I wondered to myself whether I had been wise in complaining in the first place.

But those meetings were very important, not only because the current cases were discussed, the relevant law reviewed, but the cases for argument before the Supreme Court were assigned at those meetings, and those in charge of assigning have the pick of the cases to present to the various lawyers.

By being kept out of these discussions, my education of course was being limited, to say the least, and I was not given the choice cases to argue.

But Judge Bork handled this in his usual low-key, quiet but determined and fair manner—no confrontation, no embarrassing accusations—things just changed. He had seen to it that I was treated the same as the others.

And during my entire tenure there, Judge Bork exhibited complete fairness and openness. He was always open for debate—actually enjoyed the give and take of debate. He believes, and has said: intellect and discussion matter, and can change the world. He doesn't have a closed mind.

Bob Bork's devotion to women's rights was further exhibited in his support of the Federal Women's Program of the entire Department of Justice. In fact, the Federal Women's Program was founded in my quarters of the Solicitor General's Office, and I became its first chair, which could not have happened without the blessing and encouragement of Judge Bork.

The purpose of the Federal Women's Program was the elimination of sexism, to enlarge the recruitment and promotion of women. It seemed there was an invisible ceiling at about Grade 12 for women when I was here. Our group studies and tracked women and men from their entry into the Department and throughout their careers, and found that women with the same or similar credentials as men could not rise above Grade 12. We sensitized, through written and verbal contact, the department heads to the discrimination against women at the Department of Justice, and held what was called "women's exposition" at the Justice Department each year for several days, and included all agencies of government and even the surrounding business and civil community. We put in place programs to combat the sexism that was rampant. Our efforts played no small role in opening the doors of opportunity for women and improving the status of women. We take some credit for increasing the number of female employees, as well as an improvement in their overall distribution to more responsible positions.

I do believe that Bob Bork, by putting the weight of his office behind this program, caused the department heads to sit up and take notice.

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.

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

But what I like about him further is that he can be persuaded. In his 1963 "New Republic" article, he opposed the public accommodations provision of the proposed 1964 Civil Rights Act, but ten yeas afterwards, in '73, while I was in the Solicitor General's Office, he changed his mind. He admitted he was wrong, and he has been severely criticized for his change of heart. To me that is a sign of true intellect, that you can admit you made a mistake. Bork said: "I was on the wrong track, the civil rights statute has worked very well. Were it to be proposed today. . ."—and he was talking in 1973—"I would support it."

Judge Bork's commitment to and great and unusual respect for precedent was made clear to me when he was Solicitor General.

He preached the importance of the stability of the law. He stated at these hearings that he would respect precedent. I believe him.

When he states he now accepts Brandenburg, I believe him. Recently I asked Judge Bork a question: Is a case that was decided by a 5-to-4-vote, such as Roe versus Wade, just as much a precedent as one that was determined by a 9-to-0 vote? His response was: you bet you. He is no ideologue, but an objective clearthinking jurist who, in spite of his difference with the rationale of Roe versus Wade, testified along with Archibald Cox against the pro-life bill, or the human life bill proposal that would have made abortion murder, as defining life as beginning at conception.

But no matter how well you know a person, in evaluating the judicial competency and suitability of one who is being considered for appointment to the Supreme Court, there is no looking glass into which we can gaze and with accuracy and credibility determine or predict with certainty how an Associate Justice will perform, reason, decide, and vote in the abstract. The Justices, as I understand the situation, decide cases on the basis of the facts before them, the nuances of the circumstances, and the controlling precedent.

Indeed, no attempt should be made to really obtain prior commitments as to how he will vote. It's inappropriate to attempt to fetter the judicial freedom of a jurist by seeking or demanding to know how he will decide issues and cases in the future.

I see that my time is up. I have submitted a paper. I'd like at this time to say thank you very much, and I am open to questions.

Senator HUMPHREY. Ms. LaFontant, if you are nearly finished, why don't you go ahead and complete your statement, if you wish?

Ms. LAFONTANT. Well, there is a notable situation involving the great controversy and debates—I should say thank you very much—there is a notable situation involving the great controversy and debates which arose during confirmation hearings of the nomination of Mr. Justice Hugo Black to the Supreme Court in 1935.

Before the hearings, it was widely published and disseminated that Hugo Black in early life, while an elected official in the political life of Alabama, had been a member of the Ku Klux Klan. When confronted with this allegation, he admitted indeed he had been a member of the Klan. Justifiably, the black community, fair-minded people, were seriously and appropriately concerned about a former member of the Klan becoming a member of the Supreme Court of the United States.

In spite of this prior Klan membership, he was confirmed. And Mr. Justice Black, the former Alabama Senator and former KKK member, once confirmed and sitting, became a champion of the rights and interests of the oppressed and downtrodden and especially of the black citizens of the United States.

Justice Black's opinions were and are among the most liberating in bringing blacks into the mainstream of the American society and releasing them from the shackles and servitudes of an unsavory history and period of segregation and discrimination.

It is certainly within the realm of probability that when confirmed, Mr. Justice Bork could very well emulate the distinguished and liberating career of Mr. Justice Black.

As a woman and a black woman, I have no fear of entrusting my rights and my privilges to Robert Bork as an Associate Judge of the Supreme Court. I believe in him.

I ask this Committee and the Senate without reservation to give this learned jurist, this legal scholar and philosopher, this craftsman of jurisprudence, this man with heart, an opportunity to serve on the highest Court.

Thank you very much.

Senator SPECTER. You have arrived at a time which may be less desirable than ten o'clock at night; you have arrived over the lunch hour. And I just stepped out for a brief bite. It is perhaps an opportunity for Senator Humphrey and myself to make a motion and to decide what the Committee will do here in the absence——

Senator HUMPHREY. I am delighted, whatever it is.

Senator SPECTER [continuing]. In the absence of the Chairman or anybody from the other side of the aisle.

Ms. LaFontant, let me direct my next question to you. I note that your statement recounts Judge Bork's concern about your status as a woman in the Department. And I notice that you refer to your years as Secretary of the Chicago Branch of the NAACP and the Board of Directors of the American Civil Liberties Union.

Ms. LAFONTANT. That should also be the Illinois Division of the American Civil Liberties Union.

Senator SPECTER. It will stand as amended—and a number of other qualifications. And the question I have for you relates to Judge Bork's attitude on the issue of minorities and the Public Accommodations Act, which has been the subject of considerable discussion here, and the opposition that he had early on, his New Hampshire article of 1963. And I would be interested in your view of Judge Bork's sensitivities to the issue of blacks, public accommodations, women. It is probably going to exceed my time, but I think the Chairman will allow you to answer the question.

Ms. LAFONTANT. Thank you. I think the Sixties and Seventies changed America, especially in the civil rights area. The article written by Judge Bork was in 1963. America has changed since then, people have changed, and I believe Judge Bork definitely has changed. After he wrote that article in '73, he said, "I made a mistake. I was on the wrong track."

Senator SPECTER. Did he say that to you?

Ms. LAFONTANT. No. I am quoting from a written statement that he made. But I would say since then he has said he made the mistake, definitely, yes.

Senator SPECTER. Well, I am very much interested in your testimony, and I do not wish to interrupt you and prolong it, but I had thought he might have said something to you personally, or some insights you gleaned personally, which might provide an additional dimension of help to the Committee. That is why I had interrupted you.

Ms. LAFONTANT. Certainly, Judge Bork has said to me he made a mistake, and that he was on the wrong track. And even though I would say personally that I was on the right track long before Judge Bork got on the right track, I do not hold it against him. All my life, I have been involved in the civil liberties area, civil rights area, have argued cases and been active with every organization you can imagine. I just threw out a few of them here. You might hold it against me if I throw out a few more.

So I was on the right track because I had a heritage that has sensitized me, not only because I am black and female, but I had a father and a grandfather who were lawyers and extremely active in the civil rights movement. My father was a great labor lawyer, representing A. Phillip Randolph in the founding of the Brotherhood of Sleeping Car Porters Union.

So I would say since childhood I have been sensitized, I have known the problems, and I was on the right track. Judge Bork was not on the right track in '63, but he recanted, he changed, and in '73, he came out and said it in writing. I talked with him just last month because, when he asked me to come here and testify in his behalf, I flew to Washington to talk with him about some issues that were of concern to me. He reiterated his belief in civil rights, equality for women as well as blacks. And I am sold on the fact that he is completed devoid of racial prejudice. He is not prejudiced against women. I am convinced of it.

I heard his testimony here, and it is like a jury trial. You look at the witness, and you assess him from the way he appears. So that has to be left with you—how did he appear to you. To me, he is an honest, fine man who would not tell me these things if he did not sincerely believe them.

I even asked him a question about affirmative action when I came to visit with him. And his position is that affirmative action is a good thing; it has been good as a remedy, to remedy the wrongs. And he is for it until the imbalance is cured. Now, some people might say, well, that may be forever; but he said he is for affirmative action as a remedy until the imbalance of this discrimination is cured.

Senator SPECTER. Thank you very much, Ms. LaFontant.

Thank you all, and thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Humphrey.

Senator HUMPHREY. Ms. LaFontant, you cited your family history; your grandfather and your father both were involved in civil rights struggles. Tell us about some of these other organizations in which you have served. What are some of the things you have done in this area, in addition to serving as Deputy Solicitor General?

Ms. LAFONTANT. Let me say at this point that I am director of the Southern Christian Leadership Conference.

Senator HUMPHREY. You are a director?

Ms. LAFONTANT. Yes. Of course, I've been active with the Black Bar, National Bar Association which was founded by my father with three other people during a time that Blacks could not join the American Bar Association. I've kept up my activity in that kind of setting also.

Then also I've worked very hard in the majority community of law, of civic affairs, and I'm sure you don't want to have a whole list of all the civic affairs. I'm trying to get them together in my own mind.

Senator HUMPHREY. I would if I had unlimited time, but may I ask, Mr. Chairman, that Ms. LaFontant be offered the opportunity to provide and be directed, in fact, to provide us a more comprehensive list of her affiliations and activities and achievements in this area?

Ms. LAFONTANT. Yes, I could do that at the end of this testimony.

Senator HUMPHREY. Happy to have you.

I've heard, only hearsay, that you were under some pressure not to appear and testify on behalf of Robert Bork, is that correct?

Ms. LAFONTANT. I don't know that I like the word "pressure". Let's say on the Hill we call it lobbying, don't we.

Senator HUMPHREY. You were lobbied——

Ms. LAFONTANT. Yes.

Senator HUMPHREY [continuing]. By some mainline minority groups, is that it? Or do you care to say? Individuals or groups?

Ms. LAFONTANT. Primarily individuals representing various groups, yes.

Senator HUMPHREY. You know these nuances. You mentioned the importance of looking the members of the jury in the eye and the witnesses in the eye, and so on. Certainly we have had an opportunity to do that, and a lot comes out in the way of nuance.

So can you give us a little more detail in the way of nuance about the event that you described when you went to Robert Bork while he was Solicitor General and complained that all of the men deputies were being invited to important meetings but you were being excluded and that furthermore because you were being excluded you were missing out on the details of the department's work and were not being offered an opportunity to argue some of the important cases?

Can you give us a little bit more about that? You went and saw Robert Bork face-to-face or was it a phone call or a letter? How did it work?

Ms. LAFONTANT. No. I went right in to see him. He was that kind of boss, so to speak, that he didn't stand back on ceremony. You didn't have to call and make an appointment. You go into his office, and if the secretary said he was in, you asked to see him, and he let me see him immediately.

At that point, I did not know how important it was that I was not at some meetings since this was my first affair. I just know that I rebel against being left out of anything where I am supposed to be, and I don't carry a chip on my shoulder, but I was aware of the fact that there had never been a Black at the deputy solicitor general's level.

We had had a Black Solicitor General which was Thurgood Marshall, but there had never been a woman, Black or White, and the way I was treated when I first went there—I was aware of the fact that I was being ignored because I had been ignored before.

But it was so important to me to have the opportunity to argue our government's cases in the Supreme Court that I won't say I adjusted, but I tried to put it behind me, the fact that I was being ignored.

But when I was told that I was being isolated and kept out of these meetings and I went to Bob Bork, I really did not know the importance of it. I just knew that this was something that was happening because of my color or because of my sex.

He knew what was happening at that time, and that's why I think he was so upset because he had just come onboard himself. I came in in February of 1973, but Bob Bork did not come until about May.

Senator HUMPHREY. Yes.

Ms. LAFONTANT. So he couldn't believe it. He said, "Are you sure?" And I told him what I had heard and he took care of it right away. No nuances except he is a very straightforward guy. He saw an injustice and decided to correct it.

When we started our Federal Women's Program, he was behind it 110 percent, and actually when we would have our activities, what I call women's expo, Judge Bork actually participated in the program. He lent the weight of his office to this endeavor and we were very grateful for it.

Senator HUMPHREY. Well, even though in the case of rectifying the wrong involving discrimination against you with respect to not being invited to the meetings, even though he was brand new in the job, just getting his feet on the ground, one would think he wasted no time in righting that injustice.

Ms. LAFONTANT. That is right.

Senator HUMPHREY. Well, an old Chinese proverb says—I'm really making this up—but an old Chinese proverb says that actions speak louder than old articles.

Ms. LAFONTANT. And a late convert is sometimes the best.

The CHAIRMAN. Thank you very much. An questions from my colleague from Alabama?

Senator HEFLIN. I will pass.

The CHAIRMAN. Senator Leahy?

Senator LEAHY. I will pass.

The CHAIRMAN. I want to thank you all very much for your being here. Again, thank you for allowing us to take one of the witnesses out of order.●

Mr. BYRD. Mr. President, orders have been entered with respect to the program at the beginning of the day on tomorrow, which I would like to vitiate.

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

## ORDERS FOR THURSDAY

### RECESS UNTIL 8:30 A.M.

Mr. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until the hour of 8:30 tomorrow morning.

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

### RECOGNITION OF CERTAIN SENATORS

Mr. BYRD. Upon the completion of the two orders for the recognition of the leaders, which would be reduced to 5 minutes each, I ask unanimous consent that Mr. PROXMIRE be recognized for not to exceed 5 minutes; and that Mr. REID be recognized for not to exceed 15 minutes.

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

### MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that at that point, there be a period for morning business not to exceed 5 minutes with statements limited therein to 1 minute each; and that upon the conclusion of the morning business period, the Senate resume consideration of the Foreign Relations authorization bill.

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

### ORDER OF PROCEDURE ON THURSDAY

Mr. BYRD. Mr. President, at that point, I will suggest the absence of a quorum. That will be a live quorum. And there will be a motion to instruct the Sergeant at Arms.

I ask unanimous consent that when that motion is made, and if the yeas and nays are ordered thereon, I ask unanimous consent that there be a 30-minute rollcall vote; and that the call for regular order be automatic at the end of 30 minutes.

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

Mr. BYRD. Mr. President, I ask unanimous consent at this time that it be in order to ask for the yeas and nays on the motion to instruct the Sergeant at Arms tomorrow morning.

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

Mr. BYRD. 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.

## PROGRAM

Mr. BYRD. Mr. President, let me just state my intentions. I do not think I am stating any intention here that is adverse to the wishes of the Republican leader and the manager on the other side. It would be my intention on tomorrow upon the completion of the Foreign Relations authorization bill to move to go into executive session to consider the nomination of Mr. Verity. I may be able to do that by unanimous consent in which case there will not be any need for a rollcall vote.

It will be my intention on tomorrow to move to the Verity nomination, and also it may be that I would also tomorrow afternoon go to the prompt payment legislation, on which there has already been a time agreement. I have consulted with the distinguished Republican leader, and I think it is agreeable to him that I do that tomorrow if the situation would appear to be favorable to my doing that.

Mr. President, also in view of the fact that there has already been an order that the Senate go to the catastrophic illness legislation on tomorrow, I ask unanimous consent that the order be changed, and that I be authorized to go to it at such time as I may wish on tomorrow or Friday following consultation with the minority leader.

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

Mr. BYRD. So that then gives us some flexibility on tomorrow on the Verity nomination, on the prompt payment legislation, and on catastrophic illness.

### ORDER ON THE ENERGY-WATER APPROPRIATION BILL

Mr. BYRD. Mr. President, I ask unanimous consent that the majority leader may at any time after consultation with the minority leader proceed to take up the appropriation bill on energy-water.

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

The purpose of this amendment is to waive the residency requirement for U.S. citizenship as it applies to these two Bay of Pigs veterans and to four other veterans who were similarly held for long periods of time in Cuban jails after their capture in 1961. This amendment does not waive any other citizenship requirements. Only the waiting period which is otherwise required for U.S. citizenship is eliminated. All other requirement will still apply. But because these Bay of Pigs veterans spent so many years in Cuban jails after their capture, the Congress should recognize that it is only fair that these six individuals be given special treatment in their efforts to become American citizens.

The American people owe these six individuals a debt of gratitude. They went to Cuba as patriots, and they have returned to the United States with a desire to become American citizens. They have already waited too long. No more waiting should be necessary.

It is my understanding that this amendment has been cleared by both sides of the aisle, and I urge all Members of the Senate to support it.

Mr. HELMS. I want the Senator from Massachusetts to hold on to his desk. This is a splendid amendment. I am delighted to support it.

Mr. KENNEDY. Mr. President, if we are abiding by the time agreement, I yield back any remaining time.

The PRESIDING OFFICER. Is all time yielded back? The question is on agreeing to the amendment of the Senator from Massachusetts.

The amendment (No. 908) is agreed to.

Mr. KENNEDY. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. PELL. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. HELMS. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from Virginia.

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

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

The Senator from Virginia.

## ORDER OF PROCEDURE

Mr. WARNER. Mr. President, I ask for unanimous consent that I may proceed for 3 minutes as if in morning business.

The PRESIDING OFFICER. Is there objection? Hearing no objection, the Senator from Virginia.

## 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 prepare, and the opportunity to participate in a debate of the Senate as a whole.

The constitutional responsibility under advise and consent in connection with the judicial branch, I believe, is unique. It is distinguishable, I believe, from our responsibility to nominees for Cabinet posts, 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 debated, 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 my declaration at an appropriate time either in the course of that debate or at the time the vote is taken.

I thank the Chair.

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate continued with the consideration of the bill.

eling with their spouses, they had no opportunity to work and thereby build up their own entitlement to a pension benefit. Moreover, until recently, the Foreign Service was not covered under Social Security—so most are not eligible for benefits under that system. As a result, many of these women are virtually destitute today.

These are women whose plight prompted Congress to include pension and survivor benefits for former spouses in the Foreign Service Act of 1980. Ironically, these women have never benefited from the enactment of that legislation, as the 1980 act excluded individuals divorced prior to February 14, 1981.

The legislation we are considering today makes pension and survivor benfits available to these spouses. In addition, it permits former Foreign Service spouses divorced prior to May 7, 1985, to participate in the Federal Employees Health Benefits Program on the same basis as other divorced spouses.

The amendment I am offering makes a minor adjustment in the section of S. 1394 dealing with survivor benefits. This adjustment addresses a situation faced by a small number of former spouses. These are spouses who were designated as beneficiaries of survivor benefits under existing provisions of the Foreign Service Act. The election made regarding these spouses provides them with a much smaller benefit than they would be eligible to receive under this bill. My amendment would permit these spouses to receive the same level of survivor benefits made available to all other eligible former spouses.

I urge adoption of the amendment.

Mr. HELMS. Mr. President, as the distinguished Senator from Kansas [Mrs. KASSEBAUM] has said, the State Department authorization bill contains several provisions of enormous importance to a group of 70 or 80 divorced Foreign Service spouses.

Most of the women in the group are now in their sixties, and Senator KASSEBAUM has moved in a very special way to correct this inequity and improper matters that have needed correcting for a long time.

I yield back the time on this side.

Mr. PELL. Mr. President, I am familiar with this amendment and have talked with some of the Foreign Service spouses who found themselves in this very tough situation. I think it is a good amendment, and I recommend its passage.

The PRESIDING OFFICER. Is there further debate on the amendment? If not, the question is on agreeing to the amendment of the Senator from Kansas [Mrs. KASSEBAUM].

The amendment (No. 912) was agreed to.

Mr. PELL. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. HELMS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. BUMPERS. Mr. President, I ask unanimous consent that I be permitted to proceed on another matter until such time as the managers tell me that I need to quit so they can get back to the bill.

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

## OPPOSITION TO CONFIRMATION OF JUDGE BORK

Mr. BUMPERS. Mr. President, I have always believed that the Senate's advise and consent role is one of our most important duties. Some Senators argue that the President should "have his man," but nothing could be further from the intent of the Founding Fathers. As a matter of fact, there were four votes in the Constitutional Convention on sharing Supreme Court appointments with the President and four times it failed. Only toward the end of the Convention was the President even given the power to nominate, and they retained the power of approving a nomination in the Senate, because they did not want the President to have the power to just appoint "his man." They said, in arguing to give the Senate power to name Supreme Court Justices, that "it would be less easy for candidates to intrigue with them, than with the President." So the duty of Senators is clear.

The suggestion that the opposition to Judge Bork in the Senate is the result of some kind of powerful public relations campaign is an insult to every Member of this body. I cannot remember a nominee to anything ever having been accorded 30 hours to explain his philosophy and intellect. And I know from private cloakroom talk that this nomination was very troubling to many Senators for and against who followed the hearings, read Judge Bork's writings and opinions, and very carefully evaluated him. His academic credentials are unquestionably impressive, but, of course, that is only one consideration. Judge Bork must be evaluated for his intellect, character, compassion, judicial temperament, and, most importantly in my view, his views on the Constitution.

I was generally familiar with Judge Bork's career before he was nominated. And though I was troubled by his views on the Constitution and his role in the Saturday Night Massacre, I withheld judgment in the interest of fairness and decency and an effort to give him a chance to clarify his writings and his philosophy regarding the so-called doctrine of original intent. I attentively listened to and watched with interest much of the Judiciary Committee hearings and read extensively, hoping to hear Judge Bork speak of his compassion for his fellow man, especially the less fortunate, minorities, and women. I listened to see if he felt that the most powerful and compelling thrust of the Constitution was that it speaks of justice and liberty for each one of us and says, in effect, "Each one of us counts" and that our Judeo-Christian guide says we each have worth that must not be ignored or trampled.

I gained the distinct impression, rightly or wrongly, that Judge Bork is so intellectually wrapped up in what I view as a very narrow, original intent theory of the Constitution that he is not fully cognizant of the fact that people—living, breathing human beings—can and often do suffer irreparable damage as a result of decisions by the Supreme Court.

I had hoped to hear Judge Bork say in the hearings that he believed in "letting justice roll down like the waters" as the prophet Amos spoke about in the Old Testament; for some evidence of a willingness, in the really close cases under the Bill of Rights—and virtually all cases that reach the Supreme Court are close cases—to reach out in a principled way for protection of the individual.

Sadly, what I saw instead was a judge who is uncomfortable with the great elasticity that must bound in the realm of constitutional interpretation; a judge who longs for constitutional certainty and who finds it in the doctrine of original intent; a judge who is willing to apply that doctrine even though it might result in wholly unjust outcomes and which would erode, if not destroy, the spirit of liberty, due process, and equal protection; a judge whose constitutional philosophy seems almost always to lead to a crabbed interpretation of individual rights and liberties. Even assuming the validity of the doctrine or original intent, which I do not, it would unquestionably lead to a severe limitation on constitutional guarantees we cherish.

In the hearings I heard a clinical, mechanical discussion of the Constitution; about what it did not say, and how we must not read things into it that the framers did not intend or foresee. Without belaboring the point, this doctrinaire approach to constitu-

tional interpretation, would, in my view, turn the clock back, and provide basic liberty only if granted by a majority in the State legislatures at any given time.

Each of us has a philosophical rudder, and Supreme Court Justices are no different. But no Justice should be such a slave to ideology that he or she is incapable of rending simple justice under the Constitution. Freedom is more important than an airtight and invincible ideology. As former Congresswoman Barbara Jordan testified:

When you experience the frustrations of being in a minority position and watching the foreclosure of your last appeal and then suddenly you are rescued by the Supreme Court of the United States, Mr. Chairman, that is tantamount to being born again.

I detected no humility in Judge Bork, though if confirmed, his task would be awesome—sorting out and giving meaning to the greatest legal document ever devised by the mind of man, a document full of majestic phrases and words that regale the dignity and importance of every American. In such an enterprise, Mr. President, there is little room for the arrogance of certainty about what the founders may have intended. As a matter of fact, the hearings raised an additional concern that I had not anticipated, and that is that on some issues Judge Bork seemed to accept precedents he had formerly condemned, indicated he did indeed believe in precedent and generally left me with a serious question: "Who is the real Robert Bork?" But my principal concern is that he is such a slave to ideology that he might be incapable of rendering simple justice. And I question whether Judge Bork would for the sake of ideology reopen old wounds and settled doctrines that the American people, especially southerners, do not want reopened. We in the South have been through traumatic times and feel that we dealt with our problems in an exemplary way. We know there is much that remains to be done, but we do not want to revisit those problems we have worked so hard to resolve. And I note that virtually every Southern Senator opposes Judge Bork.

Judge Bork's answers to important questions about the Constitution were fundamentally wrong, in my view. On the most basic questions facing a jurist, Judge Bork is not just marginally wrong—the kind of thing about which reasonable people can differ and argue. He starts with a fundamentally bad premise, and this would make it very difficult for him to come to the "just" answer, the right answer, in specific cases.

I believe the critics of Judge Bork have missed a very important point. They have argued with him about his reasoning in various cases and have thereby neglected the much more important and basic question, which is whether he could reach a just result in a given case by some means other than that of which he disapproves. He suggested such a possibility in the hearings but never gave a specific example. In a case he called fundamentally unconstitutional, Griswold versus Connecticut, the Supreme Court ruled unconstitutional a Connecticut law which would literally dictate conduct by a husband and wife in the privacy of their bedroom. The Supreme Court ruled this Connecticut law was unconstitutional because it constituted an invasion of privacy. Any other conclusion would seem bizarre to me, but not to Judge Bork, who disagreed because the word "privacy" was not found in the Constitution. Despite the historic sanctity of the home and the family, Judge Bork could find no right to personal privacy protected by the Constitution. I might add that there is also no right to travel between States specifically outlined in the Constitution, but the Supreme Court has held that such a right exists, and I do not believe Judge Bork has taken issue with this decision. Privacy, however, means the right to be left alone. People do not want their government telling them what to do or say or peering in their bedroom windows.

I believe that Judge Bork is not merely wrong in a few cases but fundamentally wrong about the nature of the Constitution and the source of the power of sovereignty. Original intent is the notion that the intentions of the founders in that hot summer of 1787 should be our guideposts to specific questions about rights and remedies of aggrieved parties. Judge Bork has made original intent the starting point and ending point for all analysis of both private rights and intergovernmental relations.

The preamble says "We the People," not "We the Founders of this Constitution," or "We the Wise Men gathered in Philadelphia in 1787." It also says the Constitution is established "for ourselves and our posterity." Our Constitution has survived for 200 years because of the flexibility built into it by such broad phrases as "no unreasonable searches and seizures," "freedom of speech," "privileges and immunities," "due process of law," and "equal protection."

Each generation has reinterpreted and reapplied these values in light of the specific problems facing the Nation—from Civil War to world war, from prosperity to recession to depression. None has been limited by the remedies specifically known to the Founding Fathers.

In the area of personal liberties, original intent is especially limiting. What can the founders have thought about prayer in public schools when there were no public schools in their generation? Are we limited to their specific thoughts about the privacy of communications in the days before electronics? In the 18th century, pickpockets were hanged in the public square; women were considered the property of their husbands with no right to own property, much less vote; slavery was accepted in most parts of the country. Should we so limit the rights and remedies of the Bill of Rights to whatever the Founding Fathers thought and knew in those circumstances?

It is in the area of personal liberty that I am most concerned about the direction in which Judge Bork might try to take the Court. Although the Constitution does not mention a right to privacy in so many words, the concept and spirit of privacy is clearly enshrined in the fourth amendment's protection against searches and seizures without a warrant; in the majestic guarantees of the first and fifth amendments; and in the broad language of the ninth amendment which says, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." Edmund Randolph, a vocal participant at Philadelphia, said the framers had put broad principles in the Constitution so it would accommodate times and events in the future.

As historian Arthur Schlesinger points out, the drafters knew how to be specific: The President must be 35 years old, Senators must be 30, and treaties must be ratified by a two-thirds vote, and it will require a two-thirds vote to override a Presidential veto. But on difficult or general issues, they used broad and sweeping phrases which enshrined certain values from our religious and political heritage—such as the fourth amendment protection against unreasonable searches and seizures, and the first amendment protection of freedom of religion, speech, and the press. Justice Felix Frankfurter wrote of these phrases that "their ambiguity is such that the Court is compelled to put meaning into the Constitution, not to take it out."

Finally, there is an arrogance in proclaiming to know the original intent of the writers of our Constitution. It assumes a certainty about events that occurred two centuries ago. Original intent casts Supreme Court Justices in a role of high priests or historians, whose sacred responsibility it is to see into the minds of men dead for almost 200 years and to divine their will for facts and circumstances which they could not begin to imagine. Worse, it says nothing at all about how we are to resolve conflicts in the record as to what the founders contemplated on some issues, or how to read amendments to the Constitution which have

fundamentally altered the balanced of power between the States and the National Government, and between the Government and the people. How can Judge Bork claim to know the original intent of the framers when Madison and Hamilton, two chief architects of the Constitution, argued strenuously about intent 6 years after the Constitution was ratified? Would Judge Bork repeal the doctrine of judicial review, which allows the Supreme Court to declare a law unconstitutional? The doctrine, declared in the case of Marbury versus Madison, was not mentioned in the Constitution, and created an uproar when Chief Justice Marshall wrote the decision, even amongst some who were in Philadelphia that hot summer. Yet, we now know that but for that decision, the Constitution would have become a meaningless and irrelevant document.

We must not forget that the Bill of Rights was adopted to limit the power of the National Government against individuals. Likewise, after the bloodiest war in our history, the 13th, 14th, and 15th amendments were drafted as fundamental limitations on the power of the States to abuse their citizens. The Southern States were required to ratify these amendments as a condition of readmission to the Union, and these amendments changed forever the relations between the States, their citizens, and the National Government which had been laid down in 1787. Whose intent governs interpretation of the 14th amendment? Is it the Members of Congress who drafted the amendment, or is it the statements made by State legislators on the floor of their respective bodies as they debated whether or not to ratify it? Which bears more weight, statements on the floor of the Senate, or a report from the Judiciary Committee? In these cases, original intent is of little help.

Justice Robert H. Jackson, whom Judge Bork says he admires, wrote in 1954:

> The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate, and trustworthy custodian that our system affords for the translation of abstract into constitutional commands. (The Supreme Court in the American System of Government, p. 23, 1954.)

The words of one of the Founding Fathers, who did not serve in the Constitutional Convention because he was serving as our Ambassador to France, come to mind. Thomas Jefferson wrote:

> I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the process 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 wear still the coat which fitted him when a boy as a civilized society to remain ever under the regimen of their barbarous ancestors.

Finally, Mr. President, I consider one who says he is a conservative to be one who believes States have some rights. One of those rights is to govern utility company operations, including the setting of utility rates. I have a parochial interest, admittedly, in a case which imposed an historic burden on the people of Arkansas by forcing them to pay 36 percent of the costs of a $3.5 billion nuclear plant, though the Arkansas Commission, charged with responsibility for permitting plant construction and setting the rates to be charged for amortizing constructions costs, was never even consulted as to our need for the power. Judge Bork, in a decision, which I consider to be judicial activism at its worst, as well as an evisceration of States' rights, has held that 36 percent was probably not enough and ordered FERC to justify not exacting even more than 36 percent of the costs from the people of my State.

Mr. President, I am deeply disturbed by Judge Bork's slavish devotion to original intent and his unwillingness to find any right to privacy in our constitutional guarantees. I believe that government invasion of privacy can be a prelude to tyranny. I do not wish to reopen old wounds and settled doctrines on which we have grown to rely. I would not be troubled in the least if he were a mainstream conservative. The Senate has now confirmed 322 Reagan judicial appointees to U.S. district and circuit courts, and heretofore I have only opposed 3 of them. Moreover, I voted for Justices O'Connor and Scalia and to elevate Justice Rehnquist to Chief Justice. But sadly, Mr. President, although I have not opposed 99 percent of President Reagan's judicial nominees, I must oppose Judge Bork.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

## JUDGE BORK

Mr. SARBANES. I thank the Chair.

Mr. President, I want to commend my able friend from Arkansas for his very thoughtful statement.

Mr. President, I, too, want to address the matter of the nomination of Judge Robert Bork to be a Justice of the Supreme Court of the United States.

Mr. President, it is difficult to exaggerate the importance of a Supreme Court appointment. The Supreme Court stands at the head of the judiciary, the third independent and coequal branch of our Government. Throughout the history of this Nation the judiciary has played a particularly significant role in defining the nature of American society. It is the Supreme Court's responsibility to expound and interpret the Constitution, which is our basic charter and lies at the very heart of what our Nation stands for and represents.

Mr. President, I think the Senate, as it considers judicial nominations submitted to it by the executive, needs to review them from a more independent position than might be the case in considering nominees to the executive branch. After all, nominees to executive branch positions are to help the President carry out his responsibilities for that branch of the National Government for which he is responsible.

In contrast, a judicial nominee becomes a member, upon confirmation, of the third independent branch of our National Government. I believe, therefore, we are called upon to make a more independent judgment with respect to such nominees—particularly given that, once confirmed, they serve for life.

In the thorough hearings that have taken place in the Judiciary Committee with respect to Judge Bork's nomination, in the course of which both his proponents and opponents have been heard at length, a number of areas of significant concern have emerged. They do not reach to Judge Bork's scholarship and ability but rather to his judicial philosophy and the constitutional values which he perceives as being encompassed within the Constitution.

These areas of concern are matters on which Judge Bork in the past has been explicit in stating his positions: The one-man-one-vote principle, which was essential in giving true meaning to our political democracy; civil rights, on which our Nation has made such progress in just the last quarter of a century. Access to the courts, which provides the measure by which our people can seek a lawful resolution of their grievances.

Or consider: The area of individual liberties. It must be remembered that at the very founding of the Republic, our people were so concerned about the protection of individual liberties from the potential tyranny of government that the undertaking for a bill of rights was necessary to obtain ratification of the Constitution; the principle of equal protection of the laws which has been expanded to encompass all of our population, and is an assurance of equal justice under law for all Americans.

Consider also the question of the balance between the executive and the legislative branches where Judge Bork has consistently supported executive power; and finally consider an area which has not attracted as much attention as in my view it deserves—Judge Bork's views on economic issues where there is an insensitivity to the problems of small business and to the danger of economic concentration to

the functioning of our competitive system.

In the course of his testimony, Judge Bork offered a number of explanations in these various areas with respect to positions he had earlier enunciated. His supporters point to his opinions as an appellate judge as a clear indication of his views. Mr. President, I submit that Judge Bork's rulings as an appellate court judge are much less an indication of his basic constitutional philosophy than his writings and speeches because, as a lower court judge, he is obligated to decide cases within the rulings which has been handed down by the Supreme Court.

In carrying out his responsibilities on the appellate court, he is required to reach decisions consistent with the constitutional framework in which Supreme Court decisions have placed him.

It is a matter of the deepest concern that repeatedly in the past, as the Court was reading decisions in these areas: One-man, one-vote; civil rights; access to the courts; individual liberties; equal protection of the law; a balance between our branches of government; a competitive economy; Professor Bork, or lawyer Bork, expressed sharp disagreement with the Court. He was sharply critical of many landmark decisions in these areas, even going so far in some instances as to label some of them "unconstitutional."

It is worth reflecting on the fact that at the time those rulings were made, had Judge Bork had his way, they would have been decided very differently. What I think most Americans regard as significant constitutional advances would not have taken place. Even now, in retrospect there is considerable doubt as to how Judge Bork views some of those rulings. But in any case it is clear that had he been heading the determination at the time the decisions were made, when the issues were posed, when the questions of the nature of our constitutional system were before the Courts, those landmark decisions would not have taken place.

Mr. President, it is my conclusion that while Judge Bork is a powerful logician, he is a powerful logician on behalf of an overly constrictive view of the Constitution. He starts from premises which result in a highly diminished view of what the Constitution should stand for.

As a consequence, I believe he would end up restricting constitutional values which are essential for a fair, tolerant, just America.

Mr. President, I join with those of my colleagues who oppose this nomination. I thank the Chair.

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate continued with the consideration of the bill.

The PRESIDING OFFICER. The Senator from Maryland has yielded the floor. The Senator from North Carolina.

Mr. HELMS. Mr. President, Senator PELL and I have a bit of a dilemma. We want to accommodate all our colleagues who wish to speak on the Bork nomination, but we also feel that we have an obligation to the leadership to try to move this bill along.

I urge Senators, certainly on this side, who have amendments, to check in with us and let us move as many amendments as we can.

I do not want to offend anybody but if we have a 2- or 3-minute gap where a Senator is on his way to call up an amendment and a quorum call is in progress, I would object to it being called off until the Senator presents his amendment. But we want to work with Senators who want to make statements on the Bork nomination.

I will say to the chairman that there is still the Pastore rule that maybe some of the newer Senators are not familiar with. Anyway, we want to accommodate anybody we can, but we ask their forebearance in terms of lengthy speeches, as we need to move some of these amendments.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. PELL. I thank the Senator from North Carolina for his observations.

Our belief, our hope, our expectation is to get this bill through by 2 o'clock this afternoon and we cannot do that if we have a lot of statements about Judge Bork. So I would hope that my colleagues, particularly addressing those on this side of the aisle, would be able to resist the temptation to talk unless there is a real gap or quorum call going on, until after this bill is passed.

That is the only way we will get it passed. I think we have a very good chance of doing that by 2 o'clock if my colleagues will follow along the line that the ranking member and I have suggested.

Mr. HELMS. I agree with that statement by the chairman.

### AMENDMENT NO. 913

(Purpose: To provide for the imposition of further sanctions against drug-transiting countries unless such countries curtail corruption and cooperate with the United States to combat drug trafficking)

Mr. ROTH. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Delaware [Mr. ROTH] proposes an amendment numbered 913.

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

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

The amendment is as follows:

At the end of the bill add the following:

That (a) section 802 of the Trade Act of 1974 is amended—

(1) in subsection (a)—

(A) by striking out "or" at the end of paragraph (3);

(B) by redesignating paragraph (4) as paragraph (7);

(C) by amending paragraph (7), as so redesignated, to read as follows:

"(7) take the action described in paragraph (6) and any combination of the actions described in paragraphs (1) through (5)."; and

(D) by inserting after paragraph (3) the following new paragraphs:

"(4) limit by one-half the number of visas that may be issued for aliens born in that country for nonimmigrant status described in section 101(a)(15)(B) of the Immigration and Nationality Act;

"(5) take the steps described in subsection (d) to curtail air transportation between the United States and that country;

"(6) withdraw the personnel and resources of the United States from participation in any arrangement with that country for the pre-clearance of customs by visitors between the United States and that country; or";

(2) in subsection (b)—

(A) in paragraph (1), by inserting "corruption by government officials and" after "preventing and punishing";

(B) in paragraph (2)(A), by striking out "and" at the end thereof;

(C) in paragraph (2)(B), by striking out the period at the end thereof and inserting in lieu thereof "; and"; and

(D) by adding at the end thereof the following new clause:

"(C) has taken the legal and law enforcement steps necessary to eliminate, to the maximum extent possible, corruption by government officials, with particular emphasis on the elimination of bribery."; and

(3) in subsection (c), by inserting "paragraph (1), (2), or (3) of" after "under"; and

(4) by adding at the end thereof the following new subsection:

"(d)(1)(A) The President shall notify the government of a country against which is imposed the sanction described in subsection (a)(5) of his intention to suspend the rights of any air carrier designated by the government of that country under the agreement between the United States and that country relating to air services to service the routes provided in the agreement.

"(B) Ten days after the imposition of the sanction described in subsection (a)(5), the President shall direct the Secretary of Transportation to revoke the right of any air carrier designated by the government of that country under the agreement to provide service pursuant to the agreement.

"(C) Ten days after the imposition of the sanction described in subsection (a)(5), the President shall direct the Secretary of Transportation not to permit or otherwise designate any United States air carrier to provide service between the United States and that country pursuant to the agreement.

"(2)(A) The Secretary of State shall terminate the agreement between the United States and that country relating to air services in accordance with the provisions of that agreement.

transmit the report to the Congress, together with—

(1) an evaluation of the security program or programs described in Section 1, to include a certification that the Under Secretary approves or disapproves of the program or programs; and

(2) any further statement, comments or recommendations he wishes to submit regarding the security of the United States diplomatic and official facilities and personnel which are the subject of the report.

TWO GIANT STEPS FORWARD

Mr. DOLE. Mr. President, I am pleased to join the distinguished Senator from Delaware, Mr. ROTH, in cosponsoring this amendment. It represents one small but significant step we should take to deal with a problem that has become all too real and immediate—the breakdown of security at our embassies overseas.

American secrets have been flowing to the Soviets, and their allies and surrogates, at an alarming rate. The flow must be stopped, now.

ANNUAL REPORT FROM RESPONSIBLE OFFICIALS

The main element of the amendment is a requirement for an annual report submitted by each American diplomatic mission in the Soviet Union and other high risk countries—high risk in terms of a foreign intelligence threat. The report would be signed by the Ambassador—so there would be no doubt who was responsible for its contents and conclusions.

It would cover all relevant security concerns at the post. And it would go to the senior management of the State Department, in the person of the Undersecretary for Management, who would have to review and evaluate it; and then submit it to Congress.

The report could contain classified information, and would be appropriately controlled if it did. It must be comprehensive—but obviously discretion would be necessary in its preparation, to protect especially sensitive information.

The bottom line is: The Ambassador and the Undersecretary for Management would have to sign on the dotted line, personally, on the security situation at each of these high risk embassies. The Congress would have a thorough report, annually updated, on the threat they face; the precautions they have taken; the plans they are making.

That will be an enormous spur to make sure things are done right; and an important guide in assigning appropriate responsibility when things are done wrong.

The object is not to find scapegoats; it is to make sure those who have the security job, do it; those who have the security responsibility, take it.

So, Mr. President, I am convinced this is a needed, and will be an effective, amendment. And I urge its overwhelming approval.

Mr. HELMS. Mr. President, this amendment has been agreed to, I might add, by both sides.

The PRESIDING OFFICER. Is there further debate? If not, the question is on agreeing to the amendment of the Senator from Kansas.

The amendment (No. 916) was agreed to.

Mr. PELL. I move to reconsider the vote by which the amendment was agreed to.

Mr. HELMS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

## NOMINATION OF JUDGE ROBERT H. BORK

Mr. MITCHELL. Mr. President, I will vote not to confirm the nomination of Judge Robert Bork to the Supreme Court.

Before deciding how to vote on the nomination, each of us must first decide what factors should be considered. The President says that Senators should limit their examination to the nominee's legal ability, experience, and judicial temperament. Those are relevant factors. But they are not the only relevant factors.

In the President's view, we should not consider Judge Bork's legal philosophy. But his view is refuted by history and by common sense. The Constitution contains nothing to suggest that the Senate's role is so limited. It says the President, "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Judges of the Supreme Court. * * *"

Our history has been consistent with those words. Since 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 constrast, 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.

For similar reasons, President Johnson was forced to withdraw the nomination of Abe Fortas to be Chief Justice. Fortas was nominated in 1968, an election year in which Republicans expected to win the Presidency. Within 24 hours of his nomination, 19 Republican Senators, including then-Senator Howard Baker, issued a statement that "the next Chief Justice should be selected * * * after the people have expressed themselves in the November elections. We will * * * vote against confirming any Supreme Court nominees by the incumbent President."

Thus, 19 Senators committed themselves to voting against any nominee, regardless of his qualifications or his views.

Senator 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."

Senator THURMOND said that "a man's philosophy, both his philosophy of life and his philosophy of judicial interpretation, are extremely important."

Senator Robert Griffin, Republican of Michigan, who led the fight, repeatedly acknowledged that Fortas' qualifications weren't the issue.

The withdrawal of the Fortas nomination was forced, not by a directly voted rejection, but through the filibuster of a Senate minority, even though there were more Senators for him than against him.

It is ironic to hear some of those who opposed Justice Fortas because of his legal philosophy now argue that it is wrong for this Senate to consider Judge Bork's philosophy.

It is clear that there is no constitutional, legal or historical basis for the assertion that the Senate should not consider the legal philosophy of this or any other nominee to the Supreme Court.

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 post.

The reasons for that are clear. The Supreme Court is one of the three governing institutions of this country. Only at the time of confirmation is there any opportunity for the public, through Congress and the President, to have any influence on the Court.

The constitutional role of the Senate is as an equal participant with the President in appointments to the judiciary. The Senate is not a rubber stamp.

So the standards governing Supreme Court nominations, as opposed to other judicial nominations, are different because the Supreme Court is different.

The Supreme Court establishes the precedents that lower courts are bound to follow. Supreme Court decisions influence the quality of justice for the entire Nation. Supreme Court decisions are final. Other than the Court overruling a prior decision—a rare occurrence—the only recourse from a Supreme Court decision a change in the law, when a statute is struck down, or a constitutional amendment, when a question of constitutional significance is at stake.

If one Congress writes a law, the next Congress can change it, repeal it, or pass a new law. But Supreme Court decisions can and do remain unchanged for decades, outlasting the service of any one Justice or any elected official. And precisely because they can affect our society for decades, it is important that the men and women who will be making those decisions be given careful scrutiny.

In 1896, the Supreme Court ruled in Plessy versus Ferguson that the guarantee of equal treatment under the law did not prohibit segregated carriages on the Nation's railroads. That ruling became the foundation for segregated facilities for more than six decades.

In 1928, the Supreme Court ruled in Buck versus Bell that the State of Virginia could surgically sterilize people with low IQ scores. More than four decades of personal tragedies followed, as 7,500 persons were sterilized until that law was abandoned in 1972.

So when the Senate considers the Supreme Court nominee, it is making more than a contemporaneous choice; it is deciding part of the future as well.

The questions that flow from that fact go beyond any individual nominee's views. They reach directly to our vision of what kind of Nation we are, and want to be.

Ideas have consequences. We would not meet our responsibility if we failed to recognize that ideas which cannot be easily reconsidered have potentially graver consequences than those which are subject to regular review.

That responsibility does not demand review of a nominee's specific views on individual cases. But it does require review of the overall record of what a nominee has said and done.

Based on that review, and applying the considerations already outlined, I believe Judge Bork should not be confirmed to the Supreme Court.

Judge Bork has attempted in the Judiciary Committee hearings to portray himself as a mainstream, conservative jurist. But his own writings, on and off the court, are to the contrary.

Judge Bork's view that the Government is the source of individual rights for Americans is not conservative. The conservative view is precisely to the contrary.

A conservative view limits the power of Government and extends to the maximum the rights of individuals.

Judge Bork, by contrast, believes that the power of Government is unlimited except where an individual right is specifically written into the Constitution.

Such a viewpoint grants Government virtually unlimited power to intrude into the private lives of the people.

So, instead of proposing the conservative view that Government's powers are limited, Judge Bork actually takes an opposite view that expands Government's powers to the maximum and contracts individual rights to the minimum.

And as between the branches of Government, a traditional conservative approach seeks to restrain the Executive power and to preserve the power of the legislature.

But in every such contest where Judge Bork has been called upon to rule, he has sided with the Executive power against the legislative. That is not a conservative view.

Justice Frankfurter said constitutional adjudication is statecraft: A recognition of the practical needs of Government. His view was that the Constitution is a living framework through which the changes induced by time and altered circumstance can be applied. Statecraft demands men and women with insight into the needs of their own generation; not the mechanical application of theory divorced from reality or regardless of practical effect.

Much has been said of the theory of jurisprudence known as "original intent," as though the slogan self-evidently describes the results it produces.

But like other slogans, it means little standing alone.

Ironically, those who speak loudest of their reverence for "original intent" choose to ignore what is most clearly the ultimate original intent: The creation of a system of Government that does not encroach on the liberties of the people.

What we know of the debates at the convention, the language of the Constitution itself, and the specific instructions of those who conditioned their acceptance of it on the adoption of an explicit bill of the rights—all make clear that the purpose of the Constitution was to create a government limited in its ability to restrain individual liberty.

That premise was clearly spelled out by James Madison himself:

> The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative Departments of Government, but in the body of the people, operating by the majority against the minority. (I Annals 437)

The text of the Constitution and the Bill of Rights embodies precisely that view. It places certain rights beyond the reach of any majority.

One of the bedrock principles of constitutional law was laid down by Chief Justice John Marshall in McCulluch versus Maryland, in 1819. Faced with a conflict and given no specific wording in the Constitution that covered the conflict, Marshall laid down the principle which has guided our judicial system ever since:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

As to the power of Government, Judge Bork has readily adopted Marshall's view and recognized the existence of powers nowhere mentioned in the Constitution.

But as to the rights of individuals, if a right is not specifically mentioned in the Constitution, Judge Bork says it doesn't exist.

Two examples make the point.

Nowhere does the Constitution mention "Executive privilege," which is the power of the President to withhold information from Congress or the public. Despite its absence from the Constitution, Judge Bork has had no problem in finding and supporting such a power.

But when it comes to an individual citizen's right to privacy, Judge Bork says that no such right exists because it's not mentioned in the Constitution.

Aside from inconsistency, the problem with that view is that few of the individual rights in our Constitution are specifically defined. But they are there.

Take the right of individual privacy, which Judge Bork says doesn't exist. The third amendment forbids the Government from quartering troops in private houses. That right involves privacy.

The fourth amendment forbids the Government from searching the "homes, papers and effects" of Ameri-

cans without reasonable cause. That right involves privacy.

The fifth amendment recognizes a personal right not to incriminate oneself, the right to remain silent. That right involves privacy. And the first amendment establishes the right of a free conscience. The American Government may not inquire into the personal beliefs of any American for any reason. That right involves privacy.

Each of these rights involves and protects some aspect of an individual right of privacy. To assert, as Judge Bork repeatedly has, that because privacy does not appear directly in the Constitution it cannot therefore exist as a constitutionally protected right is not a conclusion reached by logic. It is a conclusion that reflects Judge Bork's preference.

Neither American tradition nor American law supports that preference.

The liberties that the Constitution was written to preserve arise from human experience, knowledge and custom shared across time and embodied in traditions of common law, religious faith, political practice, and history.

The fundamental American understanding, from the time of the Revolutionary War to this day, is that government is the servant of the people. The people do not exist to serve the ends of government.

The idea of individual rights is deeply rooted in our tradition and our law. It is on this crucial point that Judge Bork's jurisprudence is most disturbing. For whenever an individual right is not precisely defined, he is unable to perceive it. It is precisely this narrow perspective which is so at odds with the history and meaning of the Constitution and the Bill of Rights.

In his writings over the course of more than three decades, Judge Bork has criticized the Supreme Court for finding it impermissible for the Government to dictate to Americans what they do in the most personal, intimate decisions of their lives.

Since he first claimed in 1971 that the idea of an individual right of privacy is not based on any principle, Judge Bork has maintained that view.

In 1986, he said that "the right of privacy strikes without warning. It has no intellectual structure to it so you don't know in advance to what it applies."

But the right of privacy does have an intellectual structure. It also has a long history.

Since the last century, the Court has recognized the right of privacy. In 1897, the Court said:

> The "liberty" mentioned in [the fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling. *Allgeyer* v. *Louisiana* (1897)

In 1923, the Court said:

> Without doubt, it [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *Meyer* v. *Nebraska* (1923)

The famous dissent of Justice Brandeis in Olmstead versus United States, in 1928, sums up for most Americans the core value that the Constitution and the Bill of Rights are intended to preserve. Justice Brandeis wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

All our great Justices, many of them conservative, have recognized that the broad phrases and generous words of the Constitution must be construed to expand, not constrict, the liberties of individual citizens.

Justice Frankfurter wrote:

> Great concepts like * * * liberty * * * were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.

By contrast, Judge Bork has repeatedly said that liberty consists of what the majority decides at any one time and place.

But if one thing is clear from the structure and language of the American Constitution it is that from its very initiation certain rights were withdrawn from the power of the majority.

The prohibitions against ex post facto laws, against punishing a family for the treason of one member, and the specific protections in the Bill of Rights are all limits on the power of the majority.

They are all efforts to place beyond popular vote the fundamental rights which constitute the liberty that our Government was created to protect.

In this important area, Judge Bork's views are inconsistent with two centuries of American constitutional law and the common understanding of the American people.

There is another principal area of concern I have with this nomination. It is the tragedy of racial discrimination, the most divisive issue in American history.

The Constitution could not remain as the Founders wrote it because they left undisturbed the institution of slavery. That institution was washed away by the blood of the Civil War. The amendments to the Constitution that followed abolished slavery, guaranteed to all persons equality before the law, and extended to black men the fundamental right of every citizen in a democratic society, the right to vote. In doing so, those amendments fundamentally altered the original Constitution.

But not until nearly a century later, with the 1954 Supreme Court decision in Brown versus Board of Education, did we begin to take the steps necessary to bring true racial justice to our society. Progress was painfully slow. It was enhanced by the courage of men like Martin Luther King, who was willing to go to jail to protest unjust laws. It was helped along by brave Federal judges who applied the law that the Supreme Court handed down, often in the face of political intransigence and public violence.

By contrast, Judge Bork criticized as wrong every major law which sought to enhance the civil rights of black Americans.

It is especially astonishing, in light of our history of racial injustice and conflict, that Judge Bork could say, as he did in response to a question by Senator SPECTER in the hearing, that his theory of "original intent" would not have permitted the Supreme Court to order the desegregation of District of Columbia schools on the same day it determined that the 14th amendment prohibited segregated schools in the States, because the District of Columbia is not a State.

Judge Bork denied that the fifth amendment, which provides for "due process" could be read to reach such a conclusion. The Supreme Court unanimously held that it must be so read.

Although he has said he recognizes that the 14th amendment outlaws discrimination based on race, he denies that the language gives Congress any power to fulfill that pledge except to fashion remedies for damage already done. In testifying on proposed efforts to enforce equal educational opportunity against de facto discrimination, Judge Bork said in 1973:

> * * * it is suggested that Congress' power under the Amendment is broader than the Courts. * * * The solution leaves the legislative power where it belongs, in the Congress. * * * The solution seems improper, however, for it leaves the legislative power where it belongs only as between Congress and the Courts and shifts it impermissibly to Congress from the state legislatures. There is no warrant in the language or history of Sec. 5 to suppose that it is a national police power superior to that of the states.

The power to "enforce" the Fourteenth Amendment is the power to provide and regulate remedies, not the power to define the scope of the amendment's command or to expand its reach indefinitely.

But despite his asserted reliance on legislative majorities to correct those areas into which he believes courts should not venture, Judge Bork denies that equality of suffrage is an important element in ensuring fair elections.

In a long string of writings, he has consistently maintained that the one-man one-vote rule enunciated by the Supreme Court in Baker versus Carr has no constitutional basis. He has said it is contrary to "the text of the 14th amendment, the history surrounding its adoption and ratification, and the political practice of Americans from colonial times up to the day the Court invented the new formula."

Judge Bork opposed the Court ruling which struck down a Virginia poll tax. He said it was a very small tax—even though the record in the case showed that State legislators at the turn of century adopted the poll tax explicitly to prevent black citizens from voting.

By contrast, the words of Chesterfield Smith, a former president of the American Bar Association, reflect the realities of political change, democracy and representation which have flowed from Baker versus Carr and similar rulings. Mr. Smith told the Judiciary Committee:

I think the greatest single act of government that ever happened in our nation was Baker versus Carr. I think that when the Court, that Supreme Court, decided one man, one vote they gave the states to be revitalized, to free themselves from the special interests that totally controlled them, to get out to the people where they can be concerned about civil rights, civil liberties and economics. They changed the South * * * I saw our state take power away from Washington and move it back down to Tallahassee and meet the needs of the people because a court was willing to act.

There is an unmistakable pattern in Judge Bork's thinking that rights are the Government's to grant or withhold. But it's really the other way around. The people have rights that Government is bound to respect.

The debate over this nomination has been difficult and divisive. There has been exaggeration and invective on both sides. For Judge Bork and his family, and for all of us, it is a sad time.

Those who support the nominee are understandably disappointed. Some, in their disappointment, attack some members of the Judiciary Committee and blame the special interests for the outcome.

But with all due respect to those who fought on both sides, Judge Bork will not be confirmed for one simple and profound reason. The American people agree with the Supreme Court. They don't agree with Judge Bork.

For nearly a quarter of a century, Judge Bork has harshly attacked the Supreme Court. On the most difficult and divisive issues of our time—racial justice, personal privacy, one-man one-vote, free speech—he has heaped scorn and ridicule on the Court's decisions.

But the verdict of history is with the Court. Those decisions have been widely accepted by the American people and become deeply embedded in American society. That is because on these issues, the American people have never doubted that the Court acted with justice, with humanity, in the spirit of the Constitution, and in the way that is right for 20th century America.

These momentous decisions are what the Constitution and the Supreme Court are all about.

Judge Bork himself recognized that on the eve of his confirmation hearings. But his modifications at the hearings were too little, too late.

The American people don't want to go backward on race, on privacy, on one-man one-vote, on free speech. And they know that the Supreme Court is the one institution in our country that has historically preserved our Constitution and protected our individual liberities.

In this 200th year of our Constitution, those are valuable lessons to relearn.

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## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate continued with the consideration of S. 1394.

AMENDMENT NO. 917

Mr. GLENN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. Without objection, the Helms amendment is set aside temporarily.

The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Ohio [Mr. GLENN] proposes an amendment numbered 917.

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

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

The amendment is as follows:

On page 78, beginning on line 23, through page 81, line 11, strike out all text and insert the following:

(3) the Director of the National Science Foundation;

(4) the Director of the National Academy of Sciences;

(5) the Administrator of the National Aeronautics and Space Administration;

(6) the Administrator of the National Oceanic and Atmospheric Administration;

(7) the Administrator of the Agency for International Development;

(8) the Director of the United States Geological Survey;

(9) the Secretary of Energy; and

(10) the heads of other appropriate Government agencies, and other persons knowledgeable about the problems of global warming, as the Chairman and Vice Chairman may determine.

(d) ADVISORY ROLE.—The chairmen and ranking minority members of the Committee on Foreign Relations; the Committee on Commerce, Science and Transportation; the Committee on Governmental Affairs; and the Committee on Environment and Public Works of the Senate and the Committee on Foreign Affairs; the Committee on Science and Transportation; and the Committee on Energy and Commerce of the House of Representatives shall serve as advisors to the Task Force, along with any other Members designated by the majority and minority leaders of the Senate and the Speaker of the House of Representatives.

(e) TASK FORCE REPORT.—Not later than 12 months after the date of enactment of this Act, the Task Force shall develop and transmit to the President a United States strategy on the global climate, which shall include—

(1) a full analysis of the global warming phenomenon, including its environmental and health consequences;

(2) a comprehensive strategy, including the policy changes, further research, and cooperative actions with other nations that would be required to stabilize domestic and international emissions of atmospheric pollutants at safe levels; and

(3) an analysis of the impact of deforestation worldwide on the global climate.

SEC. 404. REPORT TO CONGRESS.

Not later than 3 months after receipt of the United States strategy on the global climate, the President shall submit such strategy, together with recommendations for further legislative action, to the Speaker of the House of Representatives and the chairmen of the Committee on Foreign Relations, the Committee on Governmental Affairs, and the Committee on Environment and Public Works of the Senate.

SEC. 405. AMBASSADOR AT LARGE.

To coordinate and lead the participation of United States Government agencies in various multilateral activities relating to global warming, including United States participation in planning for the International Geosphere-Biosphere Program scheduled for the early 1990's, the President shall appoint an Ambassador at Large, who shall also represent the Secretary of State in the operations of the Task Force.

SEC. 406. INTERNATIONAL YEAR OF GLOBAL CLIMATE PROTECTION.

In order to focus international attention and concern on the problem of global warming, and to foster further work on multilateral treaties aimed at protecting the global climate, the Secretary of State shall undertake all necessary steps to promote, within the United Nations system, the early designation of an International Year of Global Climate Protection.

SEC. 407. CLIMATE PROTECTION AND UNITED STATES-SOVIET RELATIONS.

In recognition of the respective leadership roles of the United States and the Soviet Union in the international arena, and of their joint role as the world's two major producers of atmospheric pollutants, the Congress urges that the President accord the problem of climate protection a high priority on the agenda of United States-Soviet relations.

The amendment (No. 917) was agreed to.

Mr. GLENN. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The question recurs on the Helms amendment.

Mr. HELMS. Mr. President, I suggest the absence of a quorum, while I confer with the distinguished chairman.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

Mr. HELMS. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

The clerk will continue to call the roll.

The assistant legislative clerk continued the call of the roll.

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

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

Mr. HELMS. Mr. President, I ask the Senator from Iowa, just as an accommodation to me, how long he intends to take.

Mr. HARKIN. I thank the distinguished Senator. Less than 10 minutes—probably 5 to 7 minutes.

Mr. HELMS. Will the Senator agree to 7 minutes.

Mr. HARKIN. I can get through in 7 minutes.

The PRESIDING OFFICER. The Senator from Iowa.

## NOMINATION OF JUDGE ROBERT BORK

Mr. HARKIN. Mr. President, when the nomination of Judge Bork, to be a Justice of the Supreme Court, comes before the full Senate, I will vote against confirmation.

I will do so because I have come to believe that Judge Bork's judicial philosophy is incompatible with the constitutional ideals to which our great Nation aspires.

The United States has always looked beyond mere survival. Our accomplishments over the past 200 years have been far more than our military successes or our growth in GNP. Americans possess a sense of high moral values which have guided us toward greater achievements—the recognition of dignity of all human beings, the understanding that the doors of opportunity should be open to all Americans, and the realization that certain personal liberties should not and cannot be usurped by the Congress or the States.

Granted, some of these achievements were too long in coming. At our Nation's birth, all men were proclaimed to be equal, but in practice, all men—and women—were not treated as equal. But because our Constitution is a living, growing document, and because the Supreme Court has been free to view it as such, our inner values triumphed over time-worn prejudices. Uncovered were the rights of all Americans to live free from government discrimination, coercion, and intrusion.

Because, unfortunately, electoral politics often silences strong voices of moral leadership in the legislative and executive branches of government, the Supreme Court has evolved into a protector of individual liberties—a role which I believe to be not only appropriate, but essential. However, I fear that Judge Bork does not share that belief. Thus, I cannot support his elevation to the highest court in this land.

When Judge Bork was first nominated by President Reagan, I knew certainly of his service in Government as Solicitor General and Federal Appeals Court Judge, and I was aware of his reputation as an intellectual and legal scholar. However, I was not familiar with the details of his record or philosophy. Therefore, I decided to wait until the Senate Judiciary Committee hearings had been completed—affording me an opportunity to listen to and read his testimony—before making my own decision. Moreover, because many eminent politicians, lawyers, and scholars whom I respect were more familiar than I with Judge Bork's work and record, I wanted to hear what they had to say. Also, I felt it was ironic that many people who were accusing Judge Bork of being close-minded were doing so on the basis of quick summaries and snap judgments. Judge Bork was entitled to be heard in full by the Senate Judiciary Committee and, for my own part, I wanted to be sure that that entitlement was not denied him and that I did not approach his nomination with a closed mind.

During the course of the Judiciary Committee hearings, I found Judge Bork to be a very interesting person who possesses many qualities which are refreshing. He is certainly not boring. He has a varied background and has experienced the rough and tumble of life. He is a thinker who is not afraid to test the edges of controversial thought. However, Judge Bork's views on the role of the Supreme Court and the Constitution manifest a posture which would starve rather than nourish the American attitude that justice and equality should always prevail.

One of my concerns about Judge Bork's philosophy relates to his comments regarding what he calls a redistribution of liberty. To quote from one of his 1985 speeches, 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 hearings, Judge Bork responded that "it's a matter of plain arithmetic."

I think this comment reflects a very narrow vision of the Constitution on Judge Bork's part. His view gives very little value to the guarantees of the due process and equal protection clauses. I believe, as Senator SIMON does, that when you increase the scope of fundamental human rights for one, you increase them for all. To strip the Constitution of this fundamental belief would be to belie the progress we have made in guaranteeing fundamental human rights in our society.

I remember when, in the 1960's, we were finally making strides in the civil rights area through the recognition of the full equality of blacks. At long last, blacks could go to school, could vote, could eat at public restaurants without the fear of restraint and harassment and humiliation. And when that freedom came for blacks, freedom also came for whites. Enlarging the sphere of rights for minorities was indeed enlarging the sphere of freedom and liberty for the Nation as a whole.

I am also concerned about Judge Bork's unwillingness to recognize a constitutionally guaranteed right to privacy. He has attacked court rulings supporting a right to privacy as unprincipled. Far from being unprincipled, these decisions, I believe, recognize that there is a realm of personal integrity which the government cannot invade. To deny a person the right to control his or her own personal life is to tear at the fabric of our family oriented society. As Judge Brandeis wrote, "the right to be let alone (is) the most comprehensive of rights and the most valued by civilized men."

Contrary to his narrow reading of the Constitution with regard to the rights of individuals, Judge Bork holds a very expansive interpretation of the power of the executive branch. Our Founding Fathers created three equal branches of Government. Yet Judge Bork seems to shun this necessary balance. His testimony and opinions have supported a strengthening of executive power. In any case or situation where Congress and the President come head to head, Judge Bork has consistently favored the President over Congress. He has opposed the Special Prosecutor Act, congressional standing, and limitations on the President's foreign affairs activities such as

those embodied in the War Powers Act. We are a democracy not a monarchy. But Judge Bork's views clearly favor the emergence of an imperial Presidency.

So, in closing, Mr. President, 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 a living, growing document embodying 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.

I thank my friend and colleague from North Carolina for giving me this opportunity.

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate continued with the consideration of the bill.

AMENDMENT NO. 918

Mr. HELMS. Mr. President, I send to the desk an amendment on behalf of the distinguished Senator from Washington [Mr. EVANS] and the distinguished Senator from Minnesota [Mr. BOSCHWITZ] and ask that it be stated.

The PRESIDING OFFICER. Without objection, the Helms amendment No. 914 will be temporarily laid aside.

The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from North Carolina [Mr. HELMS for Senators EVANS and BOSCHWITZ, proposes an amendment numbered 918.

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

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

The amendment is as follows:

In Section 108, delete subsection (c) and insert the following new sections:

(c) LIMITATION ON CONTRIBUTIONS.—Notwithstanding subsection (a), for fiscal year 1988, the United States contribution to the regular budget of the International Committee of the Red Cross shall not exceed nor be less than the amount contributed by the United States to the regular budget of the International Committee of the Red Cross in fiscal year 1987.

(d) RECOGNITION OF THE RED SHIELD OF DAVID.—It is the sense of Congress that a diplomatic conference of governments should grant identical status of recognition to the Red Shield of David (Magen David Adom) as that granted to the Red Cross and the Red Crescent and that the Red Shield of David Society of Israel be accepted as a full member of the League of Red Cross Societies and the quadrennial International Conferences of the Red Cross.

Mr. EVANS. Mr. President, I am offering an amendment for myself and Senator BOSCHWITZ. The amendment limits the U.S. contribution to the regular budget of the International Committee of the Red Cross to the contribution in fiscal year 1987. The second part of the amendment states the sense of Congress that a diplomatic conference of governments should grant identical status of recognition to the Red Shield of David—Magen David Adom—as that granted to the Red Cross and the Red Crescent and that the Red Shield of David be accepted as a full member of the League of Red Cross Societies and the quadrennial International Conferences of the Red Cross.

Let me offer an historical perspective.

In 1864, a diplomatic conference convened in Geneva to establish, by international treaty, the neutrality of medical services of armies in the field. The conference prepared the first Geneva Convention and adopted the red cross on a white background as its emblem. The emblem was to be the sole, distinctive, uniform symbol for the protection of all military medical personnel, military hospitals and ambulances evacuation parties and all personnel enjoying neutrality.

In 1876, during the Russo-Turkish war, Turkey announced that it would use the red crescent on a white background as its protective symbol.

In 1918, the Magen David Adom Society of Israel was formed, with the Red Shield of David as its emblem.

In 1929, a diplomatic conference officially recognized the Red Crescent and the Persian Red Lion and Sun as emblems.

In 1949, the new State of Israel acceded to the 1929 Geneva Convention. During the 1949 diplomatic conference, Israel sought recognition of the Red Shield of David as its official emblem; this recognition was not granted.

A number of times during the intervening years, Israel's Magen David Adom Society has sought recognition for itself and its emblem.

The Magen David Adom is caught in a catch-22. The International Committee for the Red Cross has the authority to grant recognition to new societies, if and only if, they meet ten requirements, as specified in article 38 of the Geneva Convention adopted in 1949. One of the requirements is that the society adopt the red cross as its emblem. The red cross has long since ceased to be the sole emblem. Given these circumstances, clearly, Israel's humanitarian society has a right to its emblem.

The ICRC does not have the authority to grant exceptions to these requirements—it is merely the executor of the Geneva Convention as it pertains to International Red Cross membership. Exceptions can only be granted by member governments, meeting in a diplomatic conference. Thus far, the Magen David Adom has not fared well in such conferences.

I commend the efforts of the American Red Cross in seeking recognition of the Magen David Adom. The Congress has gone on record many times expressing its desire to see this recognition granted. I know that this is a matter of personal conviction to Senator BOSCHWITZ and to the chairman of the Foreign Relations Committee. They have worked tirelessly in the past to secure recognition. Unfortunately, their efforts have been to no avail.

I was at a loss to find alternative ways to impress upon the other members of the International Red Cross the seriousness with which we view this issue. I therefore offered a provision to this bill, a provision that was adopted by the Foreign Relations Committee, to limit the United States contribution to the International Red Cross to the 1987 levels until the Red Shield of David is recognized.

Mr. President, the provision got their attention. I knew when I offered the provision that the ICRC itself does not have the authority to make exceptions to the requirements for recognition. Nonetheless, I am certain the ICRC carries great weight with member governments. I wanted to impress upon them and the other member governments the seriousness of our commitment to this issue. I believe they are now impressed with the seriousness of our commitment. I expect the ICRC to work for the recognition of the Magen David Adom and the acceptance of the Magen David Adom Society as a full member of the League of Red Cross Societies.

Mr. President, I have the utmost respect and admiration for the work of the International Red Cross and its international and national members. Since its creation in 1864, the International Red Cross and its national societies have kept alive the spirit of humanitity and caring that is uniquely human. The proliferation of small wars and endless conflicts and our awareness of the world's disasters has increased the demands on the ICRC. Even in these times of financial asuterity, especially with respect to our international obligations, I believe it is imperative that the United States maintain its current level of contributions to the ICRC regular budget. We must also respond to special appeals for additional contributions to cover emergencies.

This amendment allows us to fulfill our obligations to the International Committee of the Red Cross and reiterates our strong desire to see the Red Shield of David recognized. I urge my colleagues to accept this amendment.

Mr. BOSCHWITZ. Mr. President, I find it outrageous that the symbol of the National Red Cross Society of Israel, the Red Shield of David—Magen David Adom, has not been ac-

the salaries of supposed United Nations staffers who actually work for the Soviet bloc.

Mr. PELL. Mr. President, this is an excellent amendment and fills a gap. I recommend its adoption.

The PRESIDING OFFICER. Is there further debate? If not, the question is on agreeing to the amendment.

The amendment (No. 929) was agreed to.

Mr. HELMS. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. PELL. Mr. President, I move to lay that motion on the table.

The motion to lay on the table is agreed to.

AMENDMENT NO. 930

Mr. PELL. Mr. President, I send an amendment to the desk on behalf of Mr. PRESSLER and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Rhode Island [Mr. PELL], for Mr. PRESSLER, proposes an amendment numbered 930.

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

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

The amendment is as follows:

On page 109, lines 10 and 11, delete everything after the word TRANSYLVANIA.

Mr. PELL. Mr. President this amendment is purely a technical correction. In the markup session of this bill we deleted certain provisions from section 516 of the bill. Due to an oversight, the title of the section was not adjusted to reflect these changes. This technical amendment corrects the oversight and brings the title of the section in conformity with its content.

Mr. HELMS. I have no objection.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 930) was agreed to.

Mr. PELL. I move to reconsider the vote by which the amendment was agreed to.

Mr. HELMS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

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

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

Mr. STEVENS. Mr. President, I seek to exercise the right to use one of the time slots that the distinguished majority leader mentioned earlier.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator may proceed.

## NOMINATION OF JUDGE ROBERT BORK

Mr. STEVENS. Mr. President, when Judge Bork was nominated by the President, I indicated on a trip to my home State, as I think the occupant of the Chair did, that I would await the completion of the hearings and an opportunity to examine the record before I would make any decision concerning this nomination.

I want to say in the beginning, Mr. President, that I am disturbed about the trend we are seeing in the Senate. We schedule hearings and invite people to come to us from all over the country to give us their points of view. They arrive to testify only to find the Members of the Senate reading prepared statements, stating their point of view before the hearings even commence. That happened in this instance and it bothered me. It bothered me considerably.

Then, as time passed, I found one after another Members of the Senate stating their positions before the hearings had been completed, before there was any recommendation to the Senate, and, I think, without an adequate time to determine which of the competing claims concerning Judge Bork's qualifications to become a member of the U.S. Supreme Court had merit.

I have now received the committee print of the hearings and I have them here, Mr. President. I have to confess I have not read them completely, but I have gone through them and found statements of many good friends and many good people I have known and relied upon for years on both sides of this issue.

Then I was presented by my good friend, the Senator from New Hampshire [Mr. HUMPHREY] with a compilation of key excerpts from the hearing record which I found quite helpful to me.

I might say that this is not the final hearing record as I understand there are some corrections to be made.

My findings are these: Robert Bork was Solicitor General from 1973 to 1977. He was confirmed by the Senate. I was a Member of the Senate at that time. Twenty-five Members of the Senate who accepted him unanimously as Solicitor General at that time are here now.

In December 1981, he was nominated to become a member of the Court of Appeals for the District of Columbia, probably the most important circuit court from the point of view of Government activity in our Nation. He was confirmed unanimously on February 8, 1982. Seventy-two Members of the Senate at that time, any one of whom could have objected and had a rollcall vote on his nomination, are still in this body today.

He has now been involved in 416 cases as a member of the court of appeals. In 95 percent of the cases that he has been involved in as a member of the court of appeals, he was in the majority.

The Supreme Court of the United States has never reversed a decision that Judge Bork was involved in as a member of the majority.

He has written 20 dissenting opinions. On six occasions the Supreme Court has considered cases in which Judge Bork has written dissents, and in each case they have reversed the court of appeals majority and sent the case back because they agreed with Judge Bork.

Last year we confirmed Judge Scalia unanimously; a very competent jurist who came from the same court of appeals.

In looking over the record, I find that Judge Bork agreed with Judge Scalia 98 percent of the time when they sat together on the court of appeals. In the two cases where they did differ, Judge Scalia, interestingly enough, criticized Judge Bork as being too liberal in his interpretation of the Constitution.

The current judges of the Circuit Court for the District of Columbia are predominantly appointees from Democratic administrations, and yet Judge Bork has agreed with his colleagues, who were appointed by former administrations, 75 to 90 percent of the time. Justice Powell, whom Judge Bork would replace, agreed with the position taken by Judge Bork 9 out of 10 times in cases that were reviewed by the Supreme Court.

I have gotten the impression from listening to other Members of this body that somehow or other this man is not in the mainstream. So my attention was taken by this publication I have in my hand, a special issue of Benchmark, a bimonthly report on the Constitution and the courts, prepared by the Center for Judicial Studies, a center with which I have had other contacts, and so have reason to rely upon their work.

I found this to be one of the most interesting studies that I have ever seen of any judge. This is a review by a series of professors, practicing lawyers, and resident scholars at the Center for Judicial Studies of the judicial record of Judge Robert Bork. They come to the conclusion, and it is a conclusion I now share, that Judge Bork would make an excellent member of the Supreme Court.

One of the things that interested me, for instance, is on page 140 of this report. It is this statement:

In cases involving statutory construction, for example, Judge Bork adhered to the view that legislative intent controls regardless of whom that may benefit.

One of the real difficulties I have had in 19 years as a Member of this body is trying to understand judges who totally ignore congressional intent. We go to the trouble of writing reports, of having dialog on the floor trying to establish the intent of Congress and time after time I have seen it discarded with one sentence: "We know the intent of this statute."

Here is a man who has been attacked because he has a strict construction philosophy, and that strict construction is based upon the concept that legislative intent should control.

For anyone who is still in doubt about Judge Bork, I would recommend that book. I think I have never seen a more scholarly approach by a group, an independent nonpartisan, nonprofit group reviewing objectively the work of a judge.

I am a former U.S. attorney, a former prosecutor. I am now married to a former prosecutor. My wife Catherine is a good lawyer and was an excellent prosecutor. We believe that one of the problems we have faced in our country in recent years has been the inability of the public to secure a fair hearing in criminal cases, that at times courts have gone astray. I believe it is time for a criminal justice system that is not only fair but is tough. I think the President has brought forward a judge who has a record demonstrating he shares that philosophy.

So if people are talking now about the concepts of not only protecting the constitutional rights of the accused but also protecting the rights of the public, law-abiding citizens to be free from criminal activity to the maximum extent possible under our democracy and pursuant to our constitutional rights and privileges, then I think this man's record as Solicitor General and as a judge confirms that he supports this concept and would do so as a Justice on the Supreme Court.

I was really taken by the fact that a whole series of former Attorneys General—the Attorney General under whom I served, two of them, as a matter of fact, Attorney General Brownell and Attorney General Rogers; also my good friend, former Attorney General Richardson, as well as former Attorney General Griffin Bell, whom I have had the pleasure to visit with only recently—have come forward in support of this nomination. I am currently a member of the Commission on the Bicentennial of the Constitution, and I was interested to see that our former Chief Justice, Warren Burger, who has dedicated himself to that Commission, also came forward and made an excellent statement in behalf of the nominee. Carla Hills, a former Cabinet Secretary, came forward and testified in his behalf.

For those who worry about Judge Bork's record on civil rights, I think they should look to the statement that was made by a young woman, Jewel LaFontant, a former Deputy Solicitor General, now in practice as a senior partner in a law firm. She came forward to tell of her experience as a young lawyer working with Judge Bork when he was Solicitor General; an excellent statement, and she was extremely fine under questioning according to the record.

I am not one who sits in my office and watches televised reports of what is going on in hearings. I do not have cable television at home, so I do not see these things at night. I rely upon the hearing records. I again have to put on the RECORD that I am saddened that we are almost compelled to come forward and state our position prior to the time that the nominee is called before the Senate. This is developing as part of the nomination process, and I think we should take a look at it.

Finally, Mr. President, Judge Bork is slightly younger than I am. He comes from almost my generation. I was interested that he served in the Marines, started in law school and left law school to go back for a second tour in the Marines during the Korean days. The dedication that this man has shown to his country, his dedication to his former wife, and his obvious dedication to the law support the judgment I have now reached that if his name comes before the Senate, I shall vote for him.

I should note in passing also that I have high regard for Lloyd Cutler, who was formerly President Carter's attorney in the White House, and who has also recommended the confirmation of Judge Bork.%

All in all, Mr. President, I am hopeful that some people will reconsider. They should look at this record and they should examine this document of the Center for Judicial Studies. It is called, A Constitutional Inquiry, the Judicial Record of Judge Robert H. Bork. If they did that, I think they would agree with me that this man deserves to be fairly treated as a nominee and we should vote to confirm him.

If my good friend wishes to make the statement, I yield the floor.

Mr. WARNER addressed the Chair.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. I seek recognition in my own right to make a brief statement relating to the procedures of the pending nomination of Judge Bork.

The PRESIDING OFFICER. The Senator is recognized for that purpose. The Chair might note that two of the four slots have been used on this side of the aisle, so there would be two remaining. Senator WARNER would be using one of those.

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

(Mr. WARNER's remarks are printed earlier in the RECORD.)

Mr. INOUYE. Mr. President, I ask unanimous consent that I be allowed to proceed for 8 minutes.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. INOUYE. On Monday, October 5, I met with Judge Robert H. Bork. I, with many other Americans, heard his commanding voice and saw him on television as he testified before the Senate Judiciary Committee. However, I wanted to meet and talk with him personally before reaching a final decision on his nomination.

After the President submitted Judge Bork's name to the Senate on July 7, 1987, I received an avalanche of reading material on his educational background, scholarly achievements, and professional prowess. Like many other Americans, I was impressed with his accomplishments and the many articles that he has authored. We politicians frequently give speeches, but seldom sit down to frame our views for publication and for posterity. I was also impressed with Judge Bork's academic record.

I further disagree with some of the objections that have been raised against Judge Bork's nomination. I would not question a person's qualifications to serve on the Court because he or she once entertained ideas that today seem questionable. Further, I would not condemn a person for experimenting with different political philosophies, or for changing his or her mind over time.

I also do not fault Judge Bork's mastery of the law. However, as indicated in a recent editorial in the Washington Post, a Supreme Court Justice requires more than technical legal ability. To put it simply, Supreme Court decisions should not be rendered in a vacuum. Rather, Justices must appreciate the "real-world" consequences of their decisions.

The purpose of the Court is not to design a vast edifice of impeccably logical legal rules. As one legal scholar noted, in this country the courts must do what is necessary and impossible—necessary because justice and decency require it; impossible because we often lack the courage, compassion, and sensitivity that our system demands of us.

There is a difference between technically applying legal rules and achieving justice. A legal technician could logically argue that there is no constitutional basis for prohibiting discrimination on the basis of sex, sexual preference, or race. However, in my view, the Supreme Court exists to pursue justice and not just to conduct exer-

cises in logic. The Supreme Court is not a debating society convened to determine who has the most powerful intellect.

Judge Bork has stated that he wants to become a member of the Court to enjoy an "intellectual feast." I commend his enthusiasm for ideas. However, I believe that the role of the Supreme Court is to work with the executive and legislative branches of Government to carry out the commitments stated and implied in the Constitution.

I agree with Judge Bork that we must be unfailingly loyal to the Constitution and to its framers' intent. However, I cannot understand or accept his very narrow assumptions about the intentions of those who founded our Nation. I believe the framers differed on too many issues to resolve them in detail. Accordingly, they deliberately used language that invites us to continue the process of shaping a just and decent society. I am certain that they expected us to be flexible, realistic, sensitive, and compassionate.

The Supreme Court, through the years, has embraced these values to uphold not only the words but also the spirit of our Constitution. The Court has been called upon when the executive and legislative branches of Government either refused or lacked courage to act.

For example, the Court, in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), overruled the "separate but equal" doctrine adopted in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), holding that the segregation of school children solely on the basis of race violated the 14th amendment right to equal protection.

The Court acted similarly in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), to protect a married couple's right to use any form of birth control or for a physician to counsel a married couple with regard to contraception. It's decision was based upon the right to privacy implicitly protected by the Bill of Rights or its penumbra.

Moreover, in a unanimous decision, the Court, in *Meritor Savings Bank* v. *Vinson*, 106 S. Ct. 2399 (1986), ruled that unwelcomed sexual advances creating an offensive and hostile working environment constituted sexual harassment in violation of the equal protection clause. The issue of whether the employee "voluntarily" engaged in such conduct was held not to be paramount to a finding of sexual harassment.

Further, in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), the Court held that silence for meditation or voluntary prayer violates the freedom of religion clause of the Constitution. This first amendment freedom protects the right to select any creed or none at all. Accordingly, the Court reasoned that an individual's freedom to choose a religion is equally balanced by the right to refrain from accepting a particular religion established by the majority.

These decisions embody the concept of domestic tranquility as contained in the preamble of the Constitution of the United States. I do not recall any references to "domestic tranquility" in the volumes of testimony delivered before the Senate Judiciary Committee. However, I submit that it is a concept central to our constitutional system, which has, on many occasions, been preserved by Supreme Court decisions allowing people of disparate views and traditions to live and work together.

I believe a special place was reserved for the Supreme Court in our constitutional system to provide for both continuity and change in our society, and to protect the inalienable and implicit rights of our people. We can differ about the meaning of the words used by the framers of the Constitution, as they differed among themselves. However, we cannot dispute the basic system they created which commands that the Court concerns itself with the realities of human lives.

Most respectfully, I believe that Judge Bork's view of the Court diminishes its responsibilities and trivializes our system. As Supreme Court Justice Oliver Wendell Holmes said, "The life of the law is not logic but experience." Judge Bork may be a superior legal technician, but unfortunately he has not displayed an appreciation of the need for compassion, sensitivity, and justice in constitutional interpretation.

Accordingly, I do not support the nomination of Judge Bork to serve on the U.S. Supreme Court.

The PRESIDING OFFICER (Mr. ADAMS). The time of the Senator from Hawaii has expired.

## MAKE A WISH

Mr. McCAIN. Mr. President, I rise to make a few remarks about a remarkable and wonderful foundation called the Make a Wish Foundation.

This foundation, a nonprofit, volunteer organization, was started in Arizona in 1981. The purpose was to grant the wishes of children under 18 years of age suffering from life-threatening illnesses. Over 1,000 children last year had their wishes granted. These wishes range from a trip to Disneyland to a trip to Mexico City, a visit with their elected Governors; indeed, on occasion, the wishes of these young Americans are to visit their elected representatives in Washington.

Funds for this organization are privately raised. Local chapters receive funding assistance from the national organization, and there are substantial contributions received in goods and services that lead directly to granting wishes of children.

Mr. President, we lead a rather hectic life, and sometimes a frustrating one, here in the U.S. Senate; but, fortunately, on occasion our lives are touched by those who show courage, enthusiasm, and love in the face of serious problems which confront them. Such a young man is here today with me in Washington—Mr. Tom Foley, of Tucson, AZ. He and his family have been here since Monday. Tom Foley will receive an operation for a bone marrow transplant next week.

I have been touched by his courage and impressed with his enthusiasm, and I am proud that he is a fellow Arizonan. He is a young man who not only we in Arizona are proud of, but all Americans are proud of. Our thoughts, hopes, and prayers will be with him next week as he undergoes an operation that we all hope will be successful.

The PRESIDING OFFICER. The time has expired under the unanimous consent request.

## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate continued with the continuation of S. 1394.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HELMS. 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. HELMS. Mr. President, I believe the distinguished Senator from New Hampshire has an amendment.

The PRESIDING OFFICER. Does the Senator request unanimous consent that the Helms amendment be set aside for the consideration of his amendment?

Mr. HUMPHREY. I ask unanimous consent for that agreement.

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

AMENDMENT NO. 931

Mr. HUMPHREY. Mr. President, I ask for the consideration of this amendment which I send to the desk.

The PRESIDING OFFICER. The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from New Hampshire [Mr. HUMPHREY] proposes an amendment numbered 931.

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

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

which have been adopted—which I will speak on later—which I do not believe belong on this bill. We have trivialized a very important piece of legislation, and I hope we do not trivialize it further.

Mr. HELMS. If the Senator will permit me, I have been corrected. It was a one-vote margin, but it was nine to eight. There were a substantial number of proxies cast on both sides.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from North Carolina [Mr. HELMS]. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The bill clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Tennessee [Mr. GORE], the Senator from North Carolina [Mr. SANFORD], the Senator from Illinois [Mr. SIMON], and the Senator from Colorado [Mr. WIRTH] are necessarily absent.

Mr. SIMPSON. I announce that the Senator from Kansas [Mr. DOLE] is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 48, nays 47, as follows:

[Rollcall Vote No. 314 Leg.]

YEAS—48

| | | |
|---|---|---|
| Armstrong | Garn | Mitchell |
| Bingaman | Glenn | Murkowski |
| Bond | Gramm | Nickles |
| Boren | Grassley | Packwood |
| Burdick | Hatch | Pressler |
| Byrd | Hecht | Proxmire |
| Chafee | Heflin | Quayle |
| Cochran | Helms | Roth |
| Conrad | Humphrey | Shelby |
| D'Amato | Karnes | Stafford |
| DeConcini | Kasten | Stennis |
| Dixon | Leahy | Symms |
| Durenberger | McCain | Thurmond |
| Exon | McClure | Wallop |
| Ford | Melcher | Weicker |
| Fowler | Mikulski | Wilson |

NAYS—47

| | | |
|---|---|---|
| Adams | Graham | Moynihan |
| Baucus | Harkin | Nunn |
| Bentsen | Hatfield | Pell |
| Biden | Heinz | Pryor |
| Boschwitz | Hollings | Reid |
| Bradley | Inouye | Riegle |
| Breaux | Johnston | Rockefeller |
| Bumpers | Kassebaum | Rudman |
| Chiles | Kennedy | Sarbanes |
| Cohen | Kerry | Sasser |
| Cranston | Lautenberg | Simpson |
| Danforth | Levin | Specter |
| Daschle | Lugar | Stevens |
| Dodd | Matsunaga | Trible |
| Domenici | McConnell | Warner |
| Evans | Metzenbaum | |

NOT VOTING—5

| | | |
|---|---|---|
| Dole | Sanford | Wirth |
| Gore | Simon | |

So the amendment (No. 941) was agreed to.

Mr. HELMS. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. FORD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. HOLLINGS. Mr. President, I ask unanimous consent to extend my remarks out of order for 10 minutes.

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

## THE NOMINATION OF JUDGE ROBERT BORK

Mr. HOLLINGS. Mr. President, in 1969, I visited with President Richard Nixon and submitted the name of Clement Haynsworth for Associate Justice of the U.S. Supreme Court. President Nixon was looking for a Southerner, one 55 years of age or younger with judicial experience and, of course, a supporter. When the name of Haynsworth was first mentioned that morning, the President said he couldn't remember him. I told how he had met Haynsworth on a visit to Greenville, SC; that Haynsworth was a summa cum laude graduate of Harvard Law School, that he was chief judge of the Fourth Judicial Circuit, that he was 55 years of age and that when I was running the Kennedy campaign in South Carolina in 1960, Haynsworth was for Richard Nixon. His memory refreshed, the President put on a broad smile and immediately requested that I submit this to him that day in writing.

I returned to my office on the Hill, wrote the Haynsworth letter to the President and at 6 o'clock that evening, Attorney General Mitchell called to say that the President was selecting Haynsworth. In due course, the Haynsworth name was submitted along with Warren Burger to the American Bar Association, which gave both Burger and Haynsworth their highest rating. Then, White House politics set in. Burger would be submitted first to the Senate and thereafter Haynsworth separately, to milk the appointment for political credit in the South. But after the approval of Chief Justice Burger, the powerful Republican minority leader, Everett Dirksen, died, and special interest politics took over. They moved in to the local scene, painting Haynsworth as a racist, a bigot, antilabor, who constantly ruled with conflicts of interest. The United States Code forbids a judge recusing himself from presiding in a case when only a minimal interest is involved and Judge Haynsworth adhered to the code.

No one in any case ever suggested that Clement Haynsworth had a conflict of interest. The statute leaves the question discretionary—easily manipulated to mob hysteria. It was difficult to find a Republican to talk in Haynsworth's behalf. Day in and day out Republican voices cried for the President to withdraw the nomination. I scurried around over the weeks of Senate consideration, each day wondering whether the Clement Haynsworth being caricatured was the same Clement Haynsworth I knew. Judge Haynsworth lost confirmation by five votes. Since that time, at least seven Senators have individually recanted to me.

Now, with the Bork nomination, I could immediately see the gathering storm. Bork had been approved for Solicitor General 15 years ago and as judge of the circuit court of appeals 5 years ago. Until now, he has borne the reputation of being one of the outstanding jurists in this land. So much so that the chairman of the Judiciary Committee last year when asked about a possible Bork nomination to the Supreme Court stated, "I would have to vote for him and if the groups tear me apart that's the medicine I will have to take * * *." But it didn't take long to tear him apart.

The Leadership Conference on Civil Rights moved to organize some 300 interest groups ranging from environment to labor, including such organizations as the Epilepsy Foundation of America, the United Cerebral Palsy Association, and the Retarded Citizens Association. Norman Lear highlighted the onslaught with TV shorts and the mob was on the march. Threatening Senator MOYNIHAN that he had better vote against Bork, a board member of the NAACP stated, "I have the votes in New York to defeat him."

In South Carolina, the executive director of the State NAACP said, "If HOLLINGS supports Bork, he might as well forget the black vote." The threats and the pressures were on. While we are mature enough to understand these threats, I was determined not to join the mob. I stated that I had voted for Judge Bork as Solicitor General, that I had voted to confirm Judge Bork as a circuit court judge and I expected to confirm him for the Supreme Court barring any unforeseen developments at his hearings. The Bork hearings were historic.

Habitually, those coming for elevation to the Supreme Court of the United States appear with the bland defense, "Well, Senator, I have yet to be confirmed. If and when I am confirmed, I will study the circumstances involved and under the law and the facts make a decision at that time." In this innocent but uninformative fashion, most nominees answer nothing and one never knows anymore about the nominee after the hearing than before. In contrast, Judge Bork did not hide. He was forthright. The judge is experienced as a practitioner, as a professor, lecturer, Solicitor General, and as a presiding judge. He was downright masterful in his more than 60 hours of testimony. He took on all comers and in a constitutional and understanding fashion proved his reputation as one of the outstanding jurists of our time.

A famous political axiom of former Speaker Tip O'Neill is that all politics

is local. President Reagan appeared in my State last year opposing my reelection and such was the case of many of the Senators elected. I am not indebted to the President for my reelection. But I do owe a debt of gratitude and understanding for the overwhelming black support that I received. Were it not for my experience in the Haynsworth defeat, were it not for the distinguished character and ability of Bork the man, it would be easy politically to find something wrong or puzzling and vote "no" on Bork. Being reminded time and again by strong supporters that this is a vote they won't forget—and they won't—makes it difficult to vote "aye." But vote "aye" I must.

For somewhere, sometime in this Senate we must stand up to the onrush of contrived threats and pressure. As the world's most deliberative body, we must return to our roots. We must deliberate. Celebrating the 200th anniversary of our Constitution, we must be reminded of the inner discipline in our form of government; the discipline that sprang from the character of the framers and the character of the times. There was a discipline or responsibility, there was a discipline of consensus. The theme of the Constitution is the discipline of checks and balances. The framers would not suffer undisciplined, direct democracy. Rather, they crafted a disciplined, representative democracy and the greatest threat to our Constitution today is the tendency toward direct democracy. We are governing by political poll. The most deliberative body in the world is becoming a rigged jury.

The charges against Bork are contrived. The calls from my State say that Judge Bork is against civil rights where in truth as Solicitor General and judge, he has expanded and enforced the civil rights laws that protect the interests of minorities and women in this country. They ask where was Robert Bork while the civil rights battles of the last two decades were being fought. The answer is clear: Arguing before the Supreme Court in a case after case to expand the opportunities of blacks and women in this country.

For example, in 17 significant cases before the Supreme Court, Solicitor General Bork argued for a position at least as favorable and often more favorable to the interests of women and minorities than the Supreme Court ultimately supported. In addition, in cases in which both the Solicitor General and the NAACP Legal Defense Fund filed briefs before the Supreme Court, the NAACP supported the position taken by Robert Bork 9 out of 10 times. The list of landmark civil rights victories in which Robert Bork participated could go on and on. Just two examples: In Runyon versus McCrary, Solicitor General Bork successfully argued that the civil rights laws prohibited private schools from denying admission to children solely because they were black. And in General Electric versus Gilbert, Bork argued that discrimination by employers on the basis of pregnancy was prohibited sex discrimination under title VII. On the court of appeals, Judge Bork has continued to uphold the rights of women and minorities. In seven out of eight cases, Judge Bork voted in favor of minorities and women, asserting a substantive civil rights claim.

The calls from home contend that Judge Bork should not be confirmed because to do so would open old wounds. If this were true, I would oppose Judge Bork because I lived through those turbulent, troubled times in the South and I do not want to relive them. But this is patently false. Judge Bork not only would not reopen old wounds but was himself instrumental in healing those wounds in the past.

The calls from my home State say that he is against the Voting Rights Act where in truth Judge Bork has time and again applied the Voting Rights Act—most notably in County Council of Sumter County, SC versus The United States of America. In that case, Judge Bork, in upholding the constitutionality of the Voting Rights Act of 1965, allowed seven black citizens of the county to intervene, long after the statutory deadline had passed.

Opponents say these are "confirmation conversions" where in truth Robert Bork stated before the Senate over 15 years ago that the voting rights decision of South Carolina versus Katzenbach was correct.

They say that Judge Bork dismisses the ninth amendment to the Constitution as "an inkblot" where in truth Judge Bork has only adhered to the dictum of Doe versus Bolton wherein Justice William O. Douglas stated that, "The Ninth Amendment obviously does not create federally enforceable rights." This is why Judge Bork has stated that if the courts cannot discover what role the framers intended for the ninth amendment then they cannot treat the amendment as a blank check to legislate for the nation. This is in lockstep with the great civil libertarian Justice Hugo Black who stated of the ninth amendment, "Use of any such broad, unbounded judicial authority would make this Court's members a day to day constitutional convention."

They say that Judge Bork can find a "penumbra" for the rights of government in the Constitution but is unwilling to look for a similar "penumbra" to find individual rights. In truth, the Constitution constitutes the government. It does not enact a legislative code. Judges are forced to look to the structure and relationship the Constitution creates. Judges will find that the checks and balances of the Constitution answer the questions about governmental power and responsibility. And Judge Bork has consistently applied this same approach in the area of individual liberties. Judge Bork has argued that the right of the individual to free speech and to contest government is manifest in our republican form. On this ground Judge Bork argued that the landmark decision in Baker versus Carr, upholding the rights of minorities, was correct.

They say that Judge Bork in disputes between the executive and legislative branches always sides with the executive where in truth he does not favor the executive power, the judicial power, or the legislative power. He favors separation of powers. This respect for the separation of powers is the source of Judge Bork's philosophy of judicial restraint. The opposite of this philosophy—judicial activism—represents above all, an assumption by the judiciary of the authority to make public policy.

This power rightly belongs only to us in the Congress and the other elected representatives, not to unelected judges. In resisting the encroachment of one branch's power by another, the judge has opposed the human life bill, court stripping bills, and attempts by the executive to assume authority over the Congress. Thus, Robert Bork as a lawyer in the executive branch argued against the use of the pocket veto by the President as a device to avoid the possibility of a congressional override of his veto. In the case of the city of New Haven, Judge Bork argued against Presidential rescissions of funds appropriated by Congress.

They say that Judge Bork opposes congressional standing where in truth Judge Bork opposes governmental standing. The idea that officials of the government—whether Members of Congress, executive branch officials, or judges—can go into court to sue members of another branch or members of their own branch every time they have a dispute is very disturbing. This doctrine of governmental standing would turn every political dispute into a legal dispute to be resolved by the courts. This would cause a significant shift in power away from Congress and away from the President in favor of an all-powerful judiciary.

They state that Judge Bork is a radical, an extremist, or perhaps he would develop into an extremist, when in truth, he has written 100 majority opinions and never been reversed.

They say that Robert Bork is insensitive when in fact the opposite is true. Mrs. Jewel Lafontant, former Deputy Solicitor General of the United States, former secretary of the Chicago branch of the NAACP and member of

the board of directors of the ACLU, testified at his confirmation hearing:

As a woman and a black woman * * * let me tell you about the heart of the man * * * I have no fear of entrusting my rights and my privileges to Robert Bork * * * not only is he a supporter of equal treatment for women, I sincerely believe he is devoid of racial prejudice or else I would not be here.

They state that Judge Bork would fail to safeguard the liberties guaranteed by the Constitution where their real complaint is that Judge Bork will not bend or ignore the Constitution in order to reach results they want but cannot achieve through the political process.

They state Judge Bork is controversial where in truth the opposition manufactured the controversy. None of the interest groups petitioning now for Judge Bork's defeat appeared at his confirmation hearings for Solicitor General or circuit judge. Only weeks after scandalous disinformation was packaged and piped out did these groups join the fray. Former Chief Justice Warren Burger who appeared with other justices stated that Judge Bork was the most qualified individual to be nominated in the past half-century. Chief Justice Burger stated further that never before had he witnessed such a sustained campaign of disinformation and distortion.

This disinformation has now taken root. Public opinion polls against Judge Bork are consistently cited. Winston Churchill stated, "Nothing is more dangerous than to live in the temperamental atmosphere of a Gallup poll, always feeling one's pulse and taking one's temperature. * * * There is only one duty, one safe course and that is to try to be right. * * *" But today the Senate is responding to the polls and a brilliant jurist is left lying in the dust and the reputation of the Senate with him. As David Broder stated, "It's something else when judges are lynched to appease the public."

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## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

The Senate continued with the consideration of the bill.

The PRESIDING OFFICER (Mr. LAUTENBERG). The majority leader is recognized.

Mr. BYRD. Mr. President, I ask for the yeas and nays on passage.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. PELL. Mr. President, what is the pending business?

The PRESIDING OFFICER. The pending business is S. 1394. The amendment of the Senator from North Carolina is pending.

Mr. HELMS. Has the Senator had the opportunity to review it?

Mr. PELL. We have had a chance to go over it and have it properly cleared on this side.

Mr. SIMPSON. Mr. President, I speak from my deep concern that we should not lightly, and on an ad hoc basis, amend the Refugee Act of 1980.

The Refugee Act was enacted in 1980 to bring some order and rationality to one of the most important traditions of this country: providing asylum for persons from around the world who flee political persecution in their homelands. For 35 years following World War II, we followed a case-by-case, or country-by-country, refugee program, admitting refugees and displaced persons in fits and starts in a manner which Congress determined to be inadequate, discriminatory and out of touch with refugee and asylum needs in the 1980's

The Refugee Act was drafted to establish a policy which would treat all refugees and asylees fairly and assist all refugees and asylees equally. It was intended that the piecemeal approach we had followed previously would be replaced by a coherent, comprehensive policy.

Yesterday, Mr. President, we debated an amendment which urged a special refugee policy for one particular region of the world—an amendment which will distort the working of the Refugee Act. The amendment before us now would make changes in our Refugee Act where particular countries are concerned; and I believe both amendments are a real step backward from the Refugee Act which has eliminated the former geographical and ideological restrictions on the admission of refugees. I fear we are returning to the old patchwork of different programs that evolve in response to specific areas of concern—or pressure.

I do understand the sponsor's strong feeling about the Medvid incident. I share his concern and distress about the initial handling of that situation, but we should not amend the Refugee Act based on one isolated incident. The Refugee Act was specifically drafted to be ideologically neutral. We should not change that.

But more importantly, we surely don't need to amend the Refugee Act. The protection this amendment would seek is available under current law stating:

The Attorney General shall not deport or return any alien (other than a Nazi who participated in the persecution of others) to a country, if the Attorney General determines that such aliens life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 243(h)(1), Immigration and Nationality Act.

Mr. President, the current law and our traditionally generous refugee and asylum policy cover very well the situation this amendment would address. The amendment is unnecessary, and would only encourage additional "country specific" amendments to the Refugee Act which, as I have said, was enacted to avoid exactly this kind of off the cuff refugee and asylum policy.

Further, this amendment would create an extraordinary intrusion into the jurisdiction and authority of the Justice Department, which, under current law, is the designated agency to determine asylum status and the admissibility of refugees. We should not now shift all or part of that duty to the State Department which is ill-equipped to handle it. Nor should we transfer jurisdiction over this matter in Congress from the Judiciary Committee to the Foreign Relations Committee, as the amendment would do in its reporting requirements. Its a bad way to go.

Mr. KENNEDY. Mr. President, I want to join my colleague, the Senator from Wyoming [Mr. SIMPSON], in voicing my opposition to this amendment.

It really turns the clock back on our efforts to treat all refugees from all countries fairly and equitably. It undermines The Refugee Act of 1980—which seems to have become fair game on this bill.

That act mandates that we treat all refugee and asylum claims the same, from whatever country. It also stipulates that we shall not return any person seeking asylum on our shores who can claim a well-founded fear of persecution and who would face danger if he or she were returned to their country.

It doesn't take this amendment to do that. That, Mr. President, is our international obligation as a signatory to the "United Nations Convention and Protocol Relating to the Status of Refugees"—which was incorporated into our immigration laws by the Refugee Act of 1980.

Finally, I am astonished anyone would propose that we treat refugees fleeing Communist persecution any differently than we treat refugees fleeing persecution of the left or right. Why not add Iran, South Africa and Chile to the list of countries identified in this amendment? Surely refugees from those countries are deserving of our humanitarian concern.

It is time we stop, through ad hoc amendments, picking and choosing which refugees should be helped, to the exclusion of others. It is time we stopped interfering with the effective implementation of the Refugee Act, as the pending amendment so obviously does.

Mr. President, I strongly oppose its adoption.

The PRESIDING OFFICER. Is there further debate on the amendment? If not, the question is on agreeing to the amendment.

The amendment (No. 914) was agreed to.

*proceed to executive session and to the* nomination of Mr. C. William Verity.

The PRESIDING OFFICER. Is there objection? Without objection, it *is so* ordered.

Mr. BYRD. Mr. President, I ask unanimous consent that Mr. COHEN may speak as in legislative session for not to exceed 10 minutes.

## DEPARTMENT OF COMMERCE

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read the nomination of C. William Verity, Jr., of Ohio, to be Secretary of Commerce.

The Senate proceeded to consider the nomination.

## ORDERS FOR FRIDAY, OCTOBER 9, 1987

RECESS UNTIL 8:30 A.M.

Mr. BYRD. Mr. President, so that Senators will know about the schedule tomorrow, as in legislative session, I make this statement and these requests:

I ask unanimous consent that when the Senate completes its business today it stand in recess until the hour of 8:30 tomorrow morning.

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

RECESS IN LEGISLATIVE SESSION

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate stand in recess in legislative session.

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

RECOGNITION OF SENATOR DOMENICI

Mr. BYRD. Mr. President, I ask unanimous consent that, on tomorrow after the two leaders have been recognized for not to exceed 5 minutes each, the Senator from New Mexico, Mr. DOMENICI, be permitted to speak for not to exceed 20 minutes.

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

ORDER OF PROCEDURE ON FRIDAY

Mr. BYRD. Mr. President, I ask unanimous consent that upon the completion of the remarks by Mr. DOMENICI, that an automatic quorum call begin, and that on the motion to instruct the Sergeant at Arms to request the attendance of absent Senators—there will be the yeas and nays ordered thereon—on that vote, which later will become a rollcall, that that vote last for not to exceed 30 minutes and that the regular order be automatic at the end of 30 minutes.

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

## PROGRAM

Mr. BYRD. Mr. President, all Senators are informed that there will not be any more rollcall votes today; that the Senate will go out after a while until 8:30 tomorrow morning.

*After the two leaders have been* recognized for not to exceed 5 minutes each on tomorrow morning, Mr. DOMENICI will be recognized for not to exceed 20 minutes, after which there will be a quorum call. It will be live and a motion to instruct the Sergeant at Arms to request the attendance of absent Senators will come very early.

I ask unanimous consent that it be in order now to order the yeas and nays on that motion, which I will make.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. BYRD. Mr. President, I ask for the yeas and nays, as in legislative session, on that motion.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. BYRD. Then, following the rollcall vote on tomorrow morning, it will be my plan to go to the War Powers Resolution. Rollcall votes could occur during the day. I intend to keep my commitment to Mr. WEICKER and Mr. HATFIELD.

As I have indicated to all Senators, unless we can reach some agreement this evening as to when a vote will occur on the Verity nomination, then I will have to put a cloture motion in this evening.

I should say one final thing: That if, perchance, it is agreed during the evening that the rollcall vote could occur tomorrow morning at 9 o'clock in place of the rollcall vote on the motion to instruct the Sergeant at Arms, that that would be the vote that would occur. But I do not know that I have good reason to believe that will be the case or not.

I thank the distinguished Senator for his patience and I thank all Senators.

## JUDGE ROBERT BORK

Mr. COHEN. Mr. President, the nomination of Judge Robert Bork to the Supreme Court has set off frenzied attacks and endorsements that are unprecedented during my service in the Congress for the past 15 years.

His approval or rejection, while important, is not an imperative of fatal consequence to the Court. If approved, he would not lead the Court off over the edge of the rightwing world. If rejected, the Court will continue to function with an excellence that has not been impaired by his absence.

But the manner in which the Senate goes about deciding his future and fate will have profound consequences for the country and for this institution.

I have spent the past few weeks reviewing articles and opinions written by Judge Bork as well as his testimony before the Senate Judiciary Committee. I have been asked to express support or opposition even before the Judiciary Committee voted on his nomination just 2 days ago. Apparently, we have reached the point in our political process where we insist upon a wonderland mandate of "verdict now, evidence later."

Frankly, I have been appalled by some of the pettiness and invective leveled against Judge Bork, just as I have been struck by some of the moral pieties of some of his supporters.

While I do not support much the President's social agenda, the fact remains that the President is entitled to nominate individuals to the Supreme Court that he believes view the world through the same philosophical prism as he does. And it is my belief that the Senate, as an institution, must be convinced that his choice *is so* lacking in intelligence, personal or professional integrity, or judicial competence that the nominee's confirmation would result in a disservice to the Court and to the country.

While I do not share the restrictive interpretation of the Constitution that Judge Bork has articulated, I am not persuaded that his views are so extreme as to place him beyond the pale of judicial acceptability.

Judge Bork's past essays are valid objects of examination as they are key to understanding his deductive abilities and philosophical convictions. But his writings as a professor should not be viewed in isolation or without regard to his service as Solicitor General or that on the Circuit Court of Appeals for the District of Columbia.

It is argued that he must be held to his words even though his views may have evolved. That is a standard to which we would not hold ourselves.

A number of Senators from the South, for example, resisted the coming of civil rights in the 1960's and the early 1970's and are now strong advocates of enforcing and, indeed, even enlarging those civil rights.

Justice Thurgood Marshall recently observed that President Johnson had the best record of any President on civil rights. As a President, perhaps; as a Senator, hardly. Were President Johnson's—and those of his Senate colleagues—change of views the result of pragmatic expediency or rather that of an evolving enlightment? Few of us are able to look behind the words into the hearts of those that express them.

I don't know whether Judge Bork has changed his views in a calculated and cynical effort to appease his opponents or whether his expressions consist of a heartfelt admission that the Constitution was not etched in stone and handed down from Mount Sinai and that while the vessel that embodies our political and social values must be firm, it must also be flexible. I

cannot make an absolute determination any more than I could pass judgment on the changing views of my distinguished colleagues. But I do know that Judge Bork is capable of change—from one who embraced socialism, then libertarianism, and now conservatism. I view that capacity for change as a positive element in his character.

Ironically, his capacity for change is now held against him. Predictability is the touchstone by which we shall pass judgment on his worthiness for the bench.

It is interesting to note that Judge Bork's opponents and supporters both subscribe to this view. Opponents view expression of doubt or change as craven expediency. His supporters fear the same. Ideologues, liberal or conservative, tend to view doubt or diviation from their totem pole of tests as unacceptable apostasy.

But Presidents have learned that party labels and prior philosophic views of nominees have not proven a reliable index to their future behavior. Were Oliver Wendell Holmes, Jr., Hugo Black, Earl Warren, and Lewis Power known quantities before they went on the Bench or did they shift into the unknown, the unpredictable, only after confirmation?

I am certain that Judge Bork does not share my views on a number of key issues. But if I were to apply the test of my views to those of past nominees, I would not have voted for Justices Black, Powell, O'Connor, Rehnquist, or Scalia.

Some have suggested that Judge Bork should be confirmed because his successor would be far worse. That is an idle threat because I would have no hesitancy to vote against any one I believe to be unqualified to sit on that august Bench.

A more plausible argument is that if Judge Bork is defeated or withdraws, his replacement is likely to more conveniently predictable, more mainstream, less provocative, and perhaps even rather mediocre by comparison.

I believe that if Judge Bork is confirmed, there are three results that could follow:

First. He, by the sheer force of his intellect, would pull the Court toward rightwing radicalism—which I think is unlikely;

Second. His extremism would drive even the conservative members of the Court to the philosophical center—which is possible;

Third. He will evolve into the same kind of conservative centrist as the man that he is replacing—a result I regard as quite probable.

Late last night, I reread the papers of Justice Felix Frankfurter—"Of Law, Life and Other Things That Matter."

Upon this retirement, his fellow justices wrote Frankfurter a wonderfully sensitive and touching letter. It was signed by Earl Warren, Hugo Black, William Douglas, Tom Clark, John Harlan, William Brennan, Jr., Potter Stewart, and Byron White. Justice Frankfurter responded in kind. In his letter "To his brethren," he left us with some characteristically important words:

> The nature of the issues which are involved in the legal controversies that are inevitable under our constitutional system does not warrant the nation to expect identity of views among the members of the Court regarding such issues, nor even agreement on the roots of thought by which decisions are reached. The nation is merely warranted and expecting harmony of aims among those who have been called to the Court. This means pertinacious persuit of the processes of reason and the disposition of controversies that come before the Court. This presupposes intellectual disinterestedness in the analysis of the factors involved in the issues that call for decision. And this in turn requires rigorous self-scrutiny to discover with a view to curbing, every influence that may deflect from such disinterestedness.

Mr. President, I believe that Judge Bork is capable of measuring up to the intellectual vigor and moral responsibilities required by service on our highest court.

I yield back the balance of my time.

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## NOMINATION OF C. WILLIAM VERITY TO BE SECRETARY OF COMMERCE

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Mr. President, I rise this evening to oppose the confirmation of Mr. C. William Verity as the Secretary of Commerce. I strongly believe that Mr. Verity's confirmation would send a disastrous signal to the Soviet Union, to dissidents and refuseniks, and to supporters of human rights around the world.

Since 1977, William Verity has repeatedly stated his opposition to any so-called barriers to increased United States-Soviet trade. Verity's remarks denouncing the Jackson-Vanik amendment—the cornerstone of this Nation's stated trade policy regarding the Soviet Union—were broadcast over Radio Moscow in 1984. Verity said, and I quote,

> I think the Jackson-Vanik amendment was one of the terrible mistakes that was made by American politicians. * * * It does no good.

In 1979, referring to Soviet Jewish emigration, Verity said that:

> The American Jewish community can never be satisfied on this matter * * * their desires will ever be escalating.

That view is totally unacceptable coming from any would-be U.S. Cabinet officer.

During his confirmation hearing, he grudgingly accepted Jackson-Vanik as "the law of the land," but wasted no time stressing his desire to achieve a waiver of the amendment. His testimony's thrust reflects his overriding desire to increase United States-Soviet trade at the expense of any other policy objectives. I will comment further on his testimony later in my remarks.

Verity's goal of expanding United States-Soviet trade at any cost strikes at the foundation of President Reagan's policy toward the Soviet Union, which links together progress on bilateral issues, regional issues, human rights, and arms control. Verity clearly wants to sever this linkage in order to expand trade.

After 2 years as Chairman of the Helsinki Commission, when I read Mr. Verity's remarks, I compare his views to the words of Natan Shcharansky, Yuri Orlov, and Andrei Sakharov. I believe that his confirmation would undermine years of careful diplomacy in the Helsinki process, as we and our allies have fought for better Soviet human rights compliance.

Mr. Verity's emphasis on increased United States-Soviet trade undercuts and ignores the sacrifices made by Soviet dissidents and refuseniks. His past statements exactly echo Soviet positions taken to blunt Western human rights concerns—that pressing for improved respect for human rights and fundamental freedoms is an unacceptable "interference in the Soviet Union's internal affairs," to quote the Soviets.

Verity's nomination sends absolutely the wrong signal to the Soviets, to our allies, to supporters of human rights, and to world opinion. It tells the world that our principles are for sale—if the price is right.

I believe that the American people put human rights and the hope of international liberty ahead of trade and profit. The Senate should not confirm him as Secretary of Commerce.

I want to discuss at greater length one of the points I raised earlier in my remarks. I raised the question of United States policy toward the Soviet Union and Mr. Verity's opposition to the concept of linkage. This matter deserves a more detailed exploration.

Let us begin by looking at what Mr. Verity himself said during his confirmation hearing. On page 21 of the hearing transcript, responding to a question as to whether fears of the supporters of Jackson-Vanik were well-founded, Mr. Verity responded as follows:

> Jackson-Vanik is the law of the land, and I intend to uphold that. And that's exactly what Mac Baldrige did. And it seems to me that it is a well-founded position.

So far, so good. He went on, however; at a later point he said, and I think this is what Mr. Verity really seeks:

> I would like to qualify that by saying that I do believe that if the Soviet Government would be willing to increase emigration by some amount—

tary procedure are understood, maintained and rigidly enforced.

Today, two hundred years after the Constitution was signed, many people take it for granted. Despite its precision and clarity, few people other than lawyers and legislators have read it, and sometimes we are forced to wonder if they understood it—if they did read it.

Today, more than one hundred years after the publication of Henry Martyn Robert's Pocket Manual of Rules of Order for Deliberative Assemblies, and despite the sale of many millions of copies of the Rules of Order, comparatively few people, including lawyers and legislators, have read and understand the skills, the techniques, and most of all, the philosophy of parliamentary procedure.

Today, as in 1776, as in 1787, as in 1861, as in almost any day of our complex, chaotic world, group decision-making plays an essential role in determining where we are going, how we will get there, and even where we are today. Parliamentary procedure is the ultimate tool of group decision-making.

Today, in 1987, and in all the years to come, there is a challenge here for all of us. If we genuinely desire to insure the objectives voiced by our founding fathers in 1787—the more perfect union, domestic tranquility, provision for the common defense, promotion of the general welfare and the blessings of liberty for ourselves and our posterity—we must always keep before us the single fundamental concept that the true source of power and authority in our nation is—and must always be—written in those first three words—We the People!●

## THE BORK NOMINATION

● Mr. KERRY. Mr. President, we celebrate this year the 200th anniversary of our Constitution. It is a time for reflection on the enduring values which that document embodies, and their meaning in our society. It is not inappropriate, therefore, that we are embroiled now in a painstaking consideration of a nominee for the U.S. Supreme Court, the ultimate arbiter of our Constitution.

While I am not a member of the Senate Judiciary Committee, I am a lawyer and a former prosecutor, and I have followed closely the debate over the nomination of Judge Bork. I did not take an early position on that nomination, because I wanted to hear Judge Bork's testimony and that of other legal scholars before coming to a final conclusion. But several days ago I announced my opposition to this nomination. Now I would like to set forth my reasons.

I have no objection to the appointment of a conservative to the Supreme Court. I have voted for many conservatives nominated by President Reagan to the Federal bench. I have voted for such distinguished conservatives as Antonin Scalia, James Buckley, Douglas Ginsburg, and David Sentelle. In fact, I have voted for nearly all of the President's judicial nominees in his second term, with very few exceptions.

But I am concerned by aspects of Judge Bork's record, and I am concerned about how, in the hearings before the Senate Judiciary Committee, Judge Bork has shifted positions on a number of important issues. He has most recently tried to portray himself as a man who is older and wiser, who has abandoned much of the rhetoric and views which he has espoused over the past 25 years. Anyone can change their mind. In fact, we encourage people to keep open minds and to grow with knowledge and experience. But I find Judge Bork's shifts to be troubling.

I find his "confirmation conversion," as it has been called, to be unconvincing. I have serious doubts whether a man with the strong views of Judge Bork can suddenly cast off the convictions of a lifetime. I am skeptical of his current guise of judicial "moderate," when assuming that guise means disavowing positions held all of his adult, intellectual life.

This conversion does not persuade me. Indeed I find that it casts even more doubt on Judge Bork's judicial personality and his credibility. I can well understand a judge who came before the Senate and said, "These are my views—and here is the rational basis for those views. This is what I have stood for throughout my life, and what I will continue to stand for on the Supreme Court if confirmed." That would be a direct, comprehensible approach. But, as my colleague from Pennsylvania, Senator SPECTER, put it after questioning Judge Bork at length, "What concerns me is, where is the predictability in Judge Bork?"

Or as my good friend from Alabama, Senator HOWELL HEFLIN, expressed it, it might take a psychiatrist to understand all of the changes in Judge Bork's views.

I myself am tempted to ask the question—Will the real Judge Bork please stand up?

I am also troubled by the tone of much of Judge Bork's writings. In those writings there is no absence of arrogance. In some places there is an outright contempt for the views of those who disagree with him, an unwillingness to acknowledge the validity of an opposing point of view. In criticizing various laws and Supreme Court decisions, he has used words and phrases like "unprincipled," "utterly specious," "unsurpassed ugliness," "unconstitutional," "judicial usurpation," and "improper and intellectually empty." Those do not strike me as the words of a man who tolerates differing points of view. Indeed, they are words which seem to scorn traditional judicial temperament.

In order to understand why Judge Bork's testimony is so troubling, it is necessary to review his record over the past 25 years. To do so yields numerous contradictions, and raises further troubling questions.

In 1968, prior to joining the Nixon administration, Robert Bork wrote this:

> The text of the Constitution, as anyone experienced with words might expect, is least precise where it is most important. Like the Ten Commandments, the Constitution enshrines profound values, but necessarily omits the minor premises required to apply them. The First Amendment is a prime example. . . To apply the amendment, a judge must bring to the text principles, judgments and intuitions not to be found in the bare words.

The Judge Bork of today, however, has embraced the "original intent" thesis of Attorney General Meese. He now tells us that constitutional decisions can only be based on the actual text of the Constitution and the intentions of the original framers of that document. And he tells us that, as an "originalist" judge, he would feel free to overrule the decisions of his "non-originalist" predecessors.

I believe that there is a degree of presumption in that formulation—in the assumption that he and he alone understands the true meaning of the Constitution and the original intent of its framers. Judge Bork has shown no hesitation in his writings in singling out past Supreme Court decisions which he believes were wrongly decided.

I am troubled by views expressed by Judge Bork in his "Neutral Principles" article in the Indiana Law Review in 1971. He now claims to have recanted these views to some extent, though it is not clear to what extent. But I would like to know what led him to state, in that comprehensive article, that the Bill of Rights was "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 he would justify this alarming statement with his current view of himself as one adhering to the original intent of the framers. Surely he has read the writings of Samuel Adams, Thomas Jefferson, John Hancock, and James Madison emphasizing the importance of the Bill of Rights, and urging its incorporation into the Constitution.

I am also concerned by Judge Bork's shifts on a number of significant issues, by his almost casual disavowal of views which he has expressed strongly and frequently in his writings.

One example is on the issue of the first amendment and political speech. In his now-famous 1971 Indiana Law Review article, which was and is the most complete and comprehensive statement of Judge Bork's philosophy, he 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 could 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.

The new Judge Bork has 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."

But 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. I find it difficult to believe that he has now seen the light and shifted his views so substantially from what they were before.

I am also troubled by Judge Bork's approach to precedent in the Supreme Court. All of us in this body who are lawyers know of the importance of the principle of stare decisis. We know 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 seems to take a very dim view of stare decisis and of the importance of respecting precedent. He may now claim to be a moderate. He may claim that he, as a Supreme Court Justice, would respect and uphold the precedents that he has criticized for so many years. But his record belies those assurances.

It is useful to examine a list of the major precedents and landmark Supreme Court cases which Judge Bork has rejected, in the areas of civil rights, of privacy, of education, of freedom of speech, and of antitrust law. They reveal the record of a man who would freely overturn precedent to achieve the results that he desires. This record has already been examined by a panel of experts who reviewed Judge Bork's record for the Judiciary Committee, and by those who have testified before the committee in the hearings. But I would like to briefly review that record.

In the area of civil rights, our analysis must begin with Shelley versus Kraemer, a 1948 case in which the Court held that the 14th amendment forbids State court enforcement of a private, racially restrictive covenant. This has long been considered settled law. But in his famous "Neutral Principles" article, Judge Bork wrote that he "doubted" that it was possible to find a "neutral principle" which would "support" Shelley.

Again, on Reitman versus Mulkey, Judge Bork took a similar position. This was a 1967 case in which the Court invalidated a State referendum that prohibited open housing statutes, holding that the referendum "was intended to authorize, and did authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State." Judge Bork criticized this decision in an article entitled "The Supreme Court Needs A New Philosophy," saying that the "startling conclusion—in Reitman—can be neither fairly drawn from the 14th amendment nor stated in a principle capable of being uniformly applied."

In Baker versus Carr in 1962, and Reynolds versus Sims in 1964, the Court considered State legislative reapportionment plans, and adopted the principle of one person, one vote. Judge Bork wrote that "on no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed" in those cases. And in 1973, Judge Bork testified that "I do not think there is a theoretical basis for one man, one vote."

In Katzenbach versus Morgan in 1966, the Court upheld the provisions of the 1965 Voting Rights Act that banned the use of literacy tests in certain circumstances. And in Oregon versus Mitchell in 1970, the Court upheld a national ban on literacy tests. In 1972, Judge Bork criticized the decision in Katzenbach as improper. And in 1981, Judge Bork testified that the two cases were "very bad, indeed pernicious, constitutional law."

In Harper versus Virginia Board of Elections in 1966, the Court outlawed the use of a State poll tax. In 1973, in hearings on his nomination as Solicitor General, Judge Bork said that "as an equal protection case, it seemed to me wrongly decided." He also said that "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." Judge Bork repeated this view in 1985, when he wrote that the Court "made no attempt to justify—its decision—in terms of the historic constitution or in terms of any other preferred basis for constitutional decision-making."

And in 1978, in the famous case of Bakke versus Board of Regents, the Court held that universities may not use raw racial quotas but may consider race, among other factors, in making admissions decisions. Judge Bork was critical of this decision also.

It might be noted that, in the Bakke case, Judge Bork wrote a biting critique of the carefully crafted opinion written by Justice Powell, which staked out a middle ground in the affirmative action dispute. Judge Bork now is presented to the Senate as a moderate, following in the footsteps of Justice Powell. But, in an article entitled "The Unpersuasive Bakke Decision," then-Professor Bork wrote that Justice Powell's opinion was "justified neither by the theory that the amendment is problack nor that it is colorblind," and continued that "it must be seen as an uneasy compromise resting upon no constitutional footing of its own."

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.

Let us review some of the major Supreme Court decisions in the area of privacy, decisions which Judge Bork has strongly criticized.

In Griswold versus Connecticut in 1965, the Court struck down a State law making it a crime to advise married couples about birth control. Judge Bork criticized this in his "Neutral Principles" article as an "unprincipled decision." In 1985, he said that there was "no supportable method of constitutional reasoning underlying it." In 1986, he wrote in the San Diego Law Review that Justice Douglas' approach in Griswold should be replaced with "a concept of original intent," and that this was "essential to prevent courts from invading the proper domain of democratic government."

Now, in his confirmation hearings, the new Judge Bork tells us that he has no problem with the decision in Griswold. Somehow, I find that assertion unconvincing in light of his earlier statements.

In Skinner versus Oklahoma in 1942, the Court struck down a law that authorized the involuntary sterilization of criminals. Judge Bork wrote in "Neutral Principles" that the Skinner decision was "as improper and intellectually empty as Griswold."

And, of course, Judge Bork had criticized the Court's landmark 1973 decision in Roe versus Wade, which recognized a constitutional right to abortion. Judge Bork has testified, in hearings on the "Human Life Bill", that Roe versus Wade "is, itself, a serious and wholly unjustifiable judicial usurpation of State legislative authority.

The new Judge Bork now tells us in his confirmation hearings that "There may be someway to do it. I have heard fairly strong moral arguments for abortion, just as I have heard fairly strong moral arguments against it. Whether those moral arguments could be rooted to the constitutional material, I really do not know."

Who are we to believe—the new Bork or the old Bork? For this Senator, the guidance must come from the views which Judge Bork has expressed consistently throughout his career—the views which are consistently hostile to any finding of a right of privacy, and to any case which upholds that right.

I am also deeply concerned by Judge Bork's repeated criticism of cases upholding freedom of speech. I have already discussed his limited view of the first amendment. That view is amply demonstrated by his criticisms of leading Supreme Court cases in this area.

In the Pentagon Papers case in 1971, the Court dissolved an injunction against the Washington Post and the New York Times, and permitted them to publish the Pentagon Papers in spite of the Government's claims of national security considerations. Judge Bork criticized this decision as one in a line of cases which in his view were wrongly decided. He stated that "in some of these cases, it is possible to believe, the press won more than perhaps it ought to have." He stated that, in his view, the Pentagon Papers case was "stampeded through to decision without either Court or counsel having time to learn what was at stake." He also said, in his Michigan speech in 1979 on "The Individual, the State, and the First Amendment," that "these cases are instances of extreme deference to the press that is by no means essential or even important to its role."

In that same speech, Judge Bork also criticized several other important Supreme Court decisions dealing with freedom of speech. He criticized Landmark Communication versus Virginia, a 1978 case in which the Court blocked the criminal prosecution of a newsman who published the name of a judge who was being secretly investigated by the State judicial review commission. Judge Bork commented that "one may doubt that press freedom requires permission * * * to publish the details of an investigation which the State may lawfully keep secret." Judge Bork also was critical of the Court's decision in Cox Broadcasting Corp. versus Cohn in 1975, in which the Court struck down a statute that prohibited publication of the name of a rape victim.

And he criticized the Court's 1976 decision in Buckley versus Valeo, which sustained the Federal Election Campaign Act's limitations on contributions to a candidate for office, but struck down its limits on a candidate's personal expenditures. Judge Bork stated in the Michigan speech that "it is arguable that—Buckley was—the most important first amendment case in our history * * * and it was there that the amendment went soft at its center."

Judge Bork also criticized the Court's decisions in "offensive language" cases such as Cohen versus California (1971), Rosenfield versus New Jersey (1972), Lewis versus New Orleans (1972), and Brown versus Oklahoma (1972). The Court held that "one man's vulgarity is another's lyric * * * The Constitution leaves matters of tastes and style so largely to the individual." Judge Bork criticized this line of cases, saying that "these cases might better have been decided the other way on the ground of public offensiveness alone * * *. If the first amendment relates to the health of our political processes, then, far from protecting such speech, it offers additional reason for its suppression."

Judge Bork has also criticized dissents of Justice Holmes, joined by Justice Brandeis, in Abrams versus U.S. (1919) and Gitlow versus New York (1925). In these dissents, which are now accepted historically as representing the better and accepted view, Justice Holmes created the test that the government may only forbid speech when it presents a "clear and present danger." Judge Bork wrote in "Neutral Principles" that "the 'clear and present danger' requirement (is improper) because it erects a barrier to legislative rule where none should exist. The speech concerned has no political value within a republican system of government." In the 1979 Michigan speech, Judge Bork added that "in fact the superiority of the famous dissents by Justice Holmes and Brandeis is almost entirely rhetorical."

These comments are ironic in view of Judge Bork's recent attempts to cast himself in the mold of Justice Brandeis, as one who would respect and uphold precedent.

Judge Bork has also criticized the Court's holdings in two more recent free speech decisions, Brandenburg versus Ohio (1969), and Hess versus Indiana (1973). Brandenburg held that speech can only be restricted when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." In Hess, the Court overturned the conviction of a campus demonstrator, holding that his words were "mere advocacy of illegal action at some indefinite future." Judge Bork, in the Michigan speech, said that both of these cases were "fundamentally wrong interpretations of the first amendment."

And Judge Bork has also found fault with two other first amendment cases decided by the Supreme Court. In Virginia Board of Pharmacy versus Virginia Citizens Consumer Council (1976), the Court struck down a statute prohibiting advertising the prices of prescription drugs. And in Bates versus State Bar of Arizona (1977), the Court struck down a rule against advertising by attorneys. Judge Bork critized these decisions as "eccentric," and said that they reflected a trend "in which the Constitution becomes diffuse and trivialized at the hands of an activist judiciary." He added "that is not the sole force at work * * *, The first amendment seems to have gone soft at its center."

Perhaps Judge Bork is right in all of these cases, and the Supreme Court is wrong. 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, if our legal traditions of precedent and stare decisis are to con-

tinue to have meaning, then I believe that these precedents must be accepted, and Judge Bork's views must be rejected.

Judge Bork has also been critical of a long line of Supreme Court cases involving religious and ethnic minorities in public education. In Meyer versus Nebraska (1923), the Court held that there was a right to teach or study a modern foreign language in school. Judge Bork, in "Neutral Principles," said that this case was "wrongly decided."

In Pierce versus Society of Sisters (1925), the Court held that there was a right to operate or attend private schools. In Judge Bork's view, this case was also "wrongly decided." He wrote that "perhaps Pierce's result could be reached on acceptable grounds, but there is no justification for the Court's methods."

In Engle versus Vitale (1962), the 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, criticized this as a "noninterpretivist" decision.

In Lemon versus Kurtzman (1971), the Court established a three-part test for evaluating challenges that a given law establishes a State religion. Judge Bork challenged each part of the test, calling it "inconsistent" with the meaning of the establishment clause.

And in Aguilar versus Felton (1985), the Court invalidated New York City's use of Federal funds to pay public school employees teaching in parochial schools. Judge Bork in 1985 said that Aguilar "illustrates the power of the three-part test to outlaw a program that had not resulted in any advancement of religion but seems entirely worthy."

Judge Bork has also been very critical of the Supreme Court, as well as the Congress, in the area of antitrust law. Ironically, for a man who claims to believe that Congress, not the courts, should make the laws, he has been scathingly critical of Congress in the area of antitrust. In fact, in his book "The Antitrust Paradox," Judge Bork wrote that "Congress as a whole is institutionally incapable of the sustained rigor and consistent thought that the fashioning of a rational antitrust policy requires."

If Judge Bork is correct, if Congress is "institutionally incapable of sustained rigor and consistent thought," why should that be limited only to the area of antitrust? Why should Congress be entrusted with the power to enact laws in the area of civil rights, or the budget, or defense, or any other area? In fact, as Senator SPECTER brought out in his questioning in the hearings, Judge Bork's attitude toward Congress in the antitrust area is indicative of a basic contradiction in his philosophy.

But his criticism is not limited to the Congress in the antitrust area. He also has been equally critical of the Supreme Court as well. In Brown Shoe versus United States (1962), the Court outlined the factors to be used in assessing the effects of a merger, and documented a congressional intent under the antitrust laws to protect small businesses. Judge Bork wrote in his book that "Brown Shoe was a disaster for rational consumer-oriented merger policy."

In Federal Trade Commission versus Proctor & Gamble Co. (1967), the Court articulated its theory prohibiting some conglomerate mergers. Judge Bork criticized this decision, saying that it "makes sense only when antitrust is viewed as pro-small business—and even then it does not make much sense."

In Standard Oil versus United States (1949), the Court defined the limits of exclusive dealing arrangements. Judge Bork criticized this decison in his book, saying that it rested "not upon economic analysis, not upon any factual demonstration, but entirely and astoundingly, upon the asserted inability of courts to deal with economic issues."

And in Dr. Miles Medical Co. versus John D. Park and Sons Co. (1911), the Court created a per se rule forbidding resale price maintenance. Judge Bork criticized this case as well, calling it "a decisive misstep that has controlled a whole body of law."

To summarize, Judge Bork has criticized and rejected Supreme Court precedents dating back to the beginning of this century in several important areas of law. In the area of civil rights, he has rejected major precedents going back to Shelley versus Kraemer in 1948, which I and many others studied in law school as a cornerstone of modern civil rights law. In the area of privacy, he has criticized the entire line of Supreme Court decision starting with Skinner versus Oklahoma in 1942. Indeed, he still refuses to acknowledge that the Constitution even contains an implicit right to privacy.

In the area of free speech, he has rejected the entire line of cases dating back to Abrams versus U.S. in 1911, in which Justices Holmes and Brandeis articulated what is now the accepted view of the Supreme Court on the "clear and present danger" test. In the area of education, and the separation of church and state, Judge Bork has rejected Supreme Court cases going back as far as 1923, in Meyer versus Nebraska, and 1925, in Pierce versus Society of Sisters. And in the area of antitrust law, Judge Bork has rejected the entire line of Supreme Court decisions going back to Dr. Miles Medical Co. versus John D. Park and Sons in 1911.

Perhaps Judge Bork is right in all of these cases. 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. 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 women 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 people of the United States. I urge my colleagues to reject the nomination of Judge Bork.●

## PRESIDENT REAGAN'S OAS SPEECH

● Mr. HARKIN. Mr. President, I read with great dismay and alarm President Reagan's address before yesterday's session of the Organization of American States.

with the administration to fight recession with easy money. So what happens when the next recession strikes? If this administration—or its heirs are still in office—we will certainly see a desperate effort to persuade the Fed to push our way out of the recession by reversing Volcker. You will, when the recession hits, see a swift and vigorous expansion of the Nation's credit supply by the Fed. Temporarily it will work. In the short run it will tend to hold down the price of credit, otherwise known as interest rates. But in the longer run it is certain to have the same effect that a big and sudden monetary stimulus always has. It will accelerate inflation. So what will happen to the price level with a $300 billion plus deficit and a fat dose of easy money? The answer is sure and simple. Inflation will zoom. And, as always, when inflation rises, interest rates will rise even faster than inflation. The result will be a national, in fact, a worldwide economic disaster.

What can we do about it? At this point—after living so far beyond our means, for as long as we have, even the wisest policies will bring us a period—perhaps a year or more of pain in the form of lower living standards, rising unemployment, failing businesses. But in the long run our economy will be far healthier if we accept the discipline of reduced Federal spending, higher taxes and a tougher, Volcker-style monetary policy of restraint. The sooner we recognize there are no gains without pains, the sooner we will get our great economy back on track.

Mr. President, I once again thank my good friend, the majority leader, and I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Wisconsin has yielded the floor.

The majority leader.

## VITIATION OF ORDER

Mr. BYRD. Mr. President, I ask unanimous consent that the earlier unanimous-consent order reached to authorize me to proceed to H.R. 2700, an act making appropriations for energy and water development, be vitiated.

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

## RESERVATION OF TIME OF MINORITY LEADER

Mr. BYRD. Mr. President, I ask unanimous consent that the time of the distinguished Republican leader be reserved for him.

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

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

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

The assistant legislative clerk proceeded to call the roll.

Mr. DOMENICI. 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.

## RECOGNITION OF SENATOR DOMENICI

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from New Mexico is recognized for not to exceed 20 minutes.

Mr. DOMENICI. I thank the Chair.

## THE NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

Mr. DOMENICI. Mr. President, the U.S. Senate has been a focus of my life for nearly 15 years. I hold this body, and my colleagues, in the highest respect.

To a great extent, what I honor and hold dear is the civility with which we act, the decency with which we address each other and the issues of the day.

Sadly, I fear that our sense of decency and fair play has vanished in the rush by many to destroy a truly fine man, Robert H. Bork.

It has saddened me to reflect on the manner we savaged this decent gentleman, treating him in a manner that the Washington Post said "did not resemble an argument so much as a lynching."

I want my colleagues and the people of New Mexico to know that I support the nomination of Robert Bork to the Supreme Court. I do so, confident that Robert Bork would make, if given the opportunity, one of the great justices of this era.

I have heard from more than 5,000 New Mexicans on this issue—phone calls, post cards, and many thoughtful letters. A slight majority said they supported Judge Bork.

While these views are important to me, we have clearly not had an election in New Mexico on Robert Bork. The Constitution envisions no such referendum. Yet that is what many have wanted to convert the Bork nomination into.

And this has been full-bore political campaign, one that has been as negative as anything any member of the Senate has had to suffer. Is that what the framers of the Constitution contemplated?

The flags of the campaign have been 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."

Behind these ads has come a wave 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 has become a tool for fund raising. The Senate ought to investigate how much cash was raised through anti-Bork pleas.

I will place in the RECORD one that is an example of such an invitation to send to the Senator their opposition, but asking that they send $100 to the organization that is opposing the Judge.

And the TV ads. Ads as slick as anything peddling beer or soap, distorting a life in 30 seconds. Is this advice and consent?

I know. I have heard that he is a racist, that he holds views that are antiwomen, and anti most other groups that comprise this Nation.

As a Senator from a State of wide cultural and ethnic diversity, if I had 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, I would be leading the campaign against him.

But the antiwoman, antiblack, anti-everything Robert Bork has no basis in reality. 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, for some reason clearly peculiar to their own interest.

Again, let me quote from the Washington Post editorial, an editorial that referred to the "intellectual vulgarization and personal savagery" of the attacks on Judge Bork, "profoundly distorting the record and the nature of the man." That is the view of an unfriendly paper.

What frightens me, and should frighten anyone who believes in our Constitution, is the lack of fair play in the anti-Bork campaign. What does it portend for the furture?

Since the anti-Bork campaign could find no fault with his intellect, his experience, his morals, or his integrity, they had only distortion upon which to float their campaign. And, as a matter of fact, distortion is too kind a word.

Distortion is too kind a word.

Let me examine some of the specifics of Mr. Bork's record, particularly on the key issues of race and sex discrimination. In the eight cases that came before him on the Court of Appeals that involved substantive questions of civil rights, Judge Bork voted for the civil rights claimant in seven of the eight cases.

These cases involved 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. In fact, and this will surprise both critics and supporters alike, Judge Bork ruled in favor of a homosexual who had been fired illegally.

Just as important is Judge Bork's record as Solicitor General of the United States, from 1973 to 1977. The most eleoquent testimony in this regard came from Jewel LaFontant. Ms. LaFontant served as Deputy Solicitor General with Robert Bork. She was the first woman Deputy Solicitor General. She also happened to be black.

Ms. LaFontant testified how Judge Bork personally halted attempts to discriminate against her. She also detailed his devotion to women's rights and his opposition to racial discrimination. She said:

> As a woman—and a black woman—I have no fear of entrusting my rights and privileges to Robert Bork.

The critics of Judge Bork argue that he stands outside the mainstream of legal thinking, citing a 1971 Indiana Law Review article. He is not like Justice Hugo Black, we are told, or like Chief Justice Earl Warren, or maybe like one of the real Supreme Court greats, Oliver Wendell Holmes.

What would have happened if we had hung those men on a past—and truly reprehensible—opinion or single incident, an opinion or incident much farther outside the mainstream than anything Robert Bork has been accused of saying or doing.

Justice Black was a member of the Ku Klux Klan.

While serving as attorney general of California, Earl Warren played a major role in the internment of American citizens of Japanese ancestry during World War II.

Justice Holmes wrote in support of forced sterilization of the mentally handicapped:

> Three generations of imbeciles are enough.

Would any of the three have survived the savage attacks those issues would justify in today's marketplace? I use the word with real thought—marketplace of advise and consent.

Maybe we should write into the English language a new word, "to Bork," meaning to destroy by inuendo or distortion.

Judge Bork has been painted as a constitutional Neanderthal. His opponents have defamed his wife. They rummaged through the records of his videotape rentals. I even received one letter complaining about his alleged drinking problem.

Under the Constitution, the Senate has the duty to offer "advice and consent" on judicial nominees. The Senate must scrutinize the nominee to determine whether he or she possesses the qualities that the people have a right to expect in judges. The Senate, however, must respect a President's right to appoint qualified persons to the judiciary.

As long as a nominee is otherwise qualified, the nominee's personal philosophy should never be a consideration unless that philosophy undermines the fundamental principles of our constitutional system or the nominee's dedication to his or her ideological principles is so strong that he or she cannot be an impartial judge.

I might add that I have voted to confirm very liberal judges. I voted to approve Judge Abner Mikva, even though I disagreed with his political philosophy. He was qualified.

It is not a question of whether I agree with everything Robert Bork has ever said. I disagree with his views on some issues. The question is, however, is Robert Bork, evaluating all the information that we have at our disposal, qualified to serve on the Supreme Court?

Clearly, the answer is "Yes," absolutely yes.

Judge Bork was evaluated by the Senate in 1973, when he was nominated to be Solicitor General. He was evaluated again in 1982, when he was nominated to the court of appeals.

In each case, Judge Bork was approved by the Senate. It is interesting that in 1982, when Judge Bork was approved unanimously, 73 of the current Members of the Senate were Members then and voted "aye" for Judge Bork.

Let us look at what some of the experts have to say.

Prof. Forrest McDonald, professor of history at the University of Alabama, did a study of Judge Bork's qualifications and compared them to the qualifications at the time of nomination of the eight 20th century Supreme Court Justices uniformly regarded by scholars as "great." Those Justices are: Holmes, Brandeis, Hughes, Stone, Cardozo, Black, Frankfurter, and Warren.

Professor McDonald testified before the Judiciary Committee that, of these great Justices, only Justices Holmes and Cardozo were better qualified than Judge Bork is. Professor McDonald ranked Judge Bork and Justice Frankfurter just about equal. Judge Bork was held to be better qualified than five of the remaining eight great Justices.

While Professor McDonald admits that his survey is "absolutely and totally unreliable," it does stress that, in terms of lucidity, learning in the law, intellectual keenness, and judicial experience, Judge Bork has the makings of a great justice.

The only question that can be raised is whether Judge Bork's judicial philosophy is in the mainstream of American legal thought.

Judge Bork's critics argue that he is outside the mainstream. I am more than a little confused by this allegation. In the next breath, these same critics argue Judge Bork would be the swing vote on the Supreme Court. How can this be?

If Judge Bork is truly outside the mainstream, he will be an ineffectual gadfly on the court. If Judge Bork will be a swing vote, then Judge Bork's critics believe that fully half of the current members of the Supreme Court are outside of the legal mainstream. In either case, the argument makes little sense.

Daniel J. Meador, professor of law at the University of Virginia, suggested an objective standard for determining whether a nominee's judicial philosophy is in the mainstream of American legal thought. Professor Meador formulated questions that the Senate should ask itself to determine whether a nominee is outside the mainstream.

The first question is: Is confirmation of the nominee supported by a substantial array of lawyers and legal scholars who are themselves well regarded and who come from various parts of the country and diverse legal settings?

The answer to that question must be a definite "yes." Just look at who testified on his behalf: Former President Ford, Former Chief Justice Warren Burger, six former Attorneys General of the United States—Edward Levi, William P. Rogers, Elliott Richardson, Griffin Bell, Herbert Brownell, and William French Smith—and eight former presidents of the American Bar Association.

Furthermore, both Justice Stevens and Justice White have indicated support for Judge Bork. The American Bar Association came forth and proclaimed Judge Bork "well qualified," its highest rating, to sit on the Supreme Court.

The second question is: Do the nominee's views about various legal doctrines and the task and approach to interpreting the Constitution have substantial support among other judges, lawyers, and legal scholars?

Once again, the answer must be "yes." Although Judge Bork has criticized a number of Supreme Court opinions, he is not alone in his criticism. Even the members of the Supreme Court did not all agree on those decisions.

For example, in the poll tax case, Justices Black, Harlan, and Steward dissented. Justice White dissented in Roe versus Wade; Profs. Archibald Cox, Alexander Bickel, and Gerald Gunther, among many others, have criticized that decision.

That is not to say that he is right or they are right. It merely leads to the conclusion that the decision is subject

to interpretation by good legal jurisprudence and judicial minds.

Professor Cox and Prof. Laurence Tribe seem to agree with Judge Bork in his criticism of Shelly versus Kramer, the restrictive covenants case. Justices Black and Stewart dissented in the "one-man, one-vote" case.

I could go on. But my point is clear: In the majority of cases, Judge Bork's views are not eccentric, but rather find support in the views expressed by other respected scholars.

The final question is: Where the nominee is a judge already on a lower court, as is the case here, has he been a "lone wolf," an eccentric continual dissenter with very little company among his judicial colleagues, and has he been reversed a significant number of times by a higher court?

The answer is a resounding "no." Judge Bork has been in the majority in 95 percent of the cases he has heard. Not one of the 400 opinions that Judge Bork has written or joined has ever been reversed by the Supreme Court. In the six cases where Judge Bork has filed a dissenting opinion and the Supreme Court reviewed the case, the Supreme Court agreed with Judge Bork in every one.

On the court of appeals, Judge Bork voted with Judge Scalia, now Justice Scalia, 98 percent of the time. He has agreed with his liberal colleagues on the court in a high percentage of cases: Ruth Bader Ginsburg, 91 percent of the time; Abner Mikva, 82 percent; Harry Edwards, 80 percent; Patricia Wald, 79 percent; and J. Skelly Wright, 75 percent.

Where is the eccentricity? Where is the diversion from the mainstream of American legal thinking?

After reviewing the record, I am convinced that Judge Bork is clearly qualified to serve on the Supreme Court. He is a distinguished scholar and jurist who believes that his role is to interpret the law, not make it. There is certainly nothing wrong with that. Although he may disagree with certain established cases, he has the proper respect for precedent and clearly has judiciously indicated his reasons for dissent.

It is true he has said some provocative things, but when he said most of them, he was a law professor, and that was his job, to be provocative. It is a very different function from being a judge. Since going onto the court, he has demonstrated the moderation we expect.

Judge Bork has an inquiring and powerful mind. He sometimes changes it, but that is what happens when you have an inquiring mind. For my part, I would rather have an intelligent man who changes his mind than a lesser intellect who is not open to alternative views and new ideas.

Mr. President, I am convinced Robert Bork deserves to be confirmed by the U.S. Senate to be an Associate Justice of the U.S. Supreme Court.

In this year of the Constitution's bicentennial, which many of us celebrated in Philadelphia not long ago, I find it ironic that we as an institution may be undermining the independence of the judiciary.

If we allow 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 in the city of Philadelphia.

I hope, I pray, that fairness and truth can return to our evaluation of judicial nominees.

Mr. President, I ask unanimous consent that the "Keep Bork off the Court" circular, obviously mailed to thousands of people, one finding itself in the hands of one of my constituents, including the solicitation accompanying it asking for a $100 donation, be made a part of the RECORD.

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

[Reply Memorandum]

KEEP BORK OFF THE COURT

To: People of the American Way Action Fund: Robert Bork is 30 years out of step with America—we *must* stop his confirmation to the Supreme Court. Please forward the two Congressional Communications I have signed below.

Enclosed is my contribution towards the Action Fund "Keep Bork Off the Court" campaign of $100, $50, $35, $25, Other $——.

Please make check payable to People for the American Way Action Fund and return it with entire form to Post Office Box 96200, Washington, D.C. 20077-4627.

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OFFICIAL CONGRESSIONAL COMMUNICATION

To: The Honorable Pete V. Domenici.

*I urge you to reject President Reagan's nomination of Judge Robert H. Bork to the Supreme Court.*

Bork's view of my rights rejects 30 years of progress in defending liberty, endangers many of my most fundamental rights under the Constitution and threatens the ideological balance of the Court.

Respectfully submitted.

J.C. ADAMS.

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## CALL OF THE ROLL

Mr. DOMENICI. 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, and the following Senators entered the Chamber and answered to their names:

[Quorum No. 28]

| | | |
|---|---|---|
| Byrd | Domenici | Sanford |
| Conrad | Johnston | |

The PRESIDING OFFICER (Mr. CONRAD). A quorum is not present.

Mr. BYRD. Mr. President, I move that the Sergeant at Arms be instructed to request the attendance of absent Senators. I ask for the yeas and nays on the motion.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second. The yeas and nays were ordered.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk called the roll.

Mr. CRANSTON: I announce that the Senator from Delaware [Mr. BIDEN], the Senator from Connecticut [Mr. DODD], the Senator from Tennessee [Mr. GORE], the Senator from Hawaii [Mr. INOUYE], the Senator from Massachusetts [Mr. KERRY], the Senator from Maryland [Mr. SARBANES], the Senator from Illinois [Mr. SIMON], and the Senator from Colorado [Mr. WIRTH], are necessarily absent.

Mr. DOLE. I announce that the Senator from Colorado [Mr. ARMSTRONG], the Senator from Minnesota [Mr. BOSCHWITZ], the Senator from Texas [Mr. GRAMM], the Senator from Utah [Mr. HATCH], the Senator from Wyoming [Mr. SIMPSON], the Senator from South Carolina [Mr. THURMOND], and the Senator from Wyoming [Mr. WALLOP], are necessarily absent.

I further announce that, if present and voting, the Senator from South Carolina [Mr. THURMOND], would vote "yea."

Mr. BYRD. Regular order, Mr. President.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The yeas and nays resulted—yeas 72, nays 13, as follows:

[Rollcall Vote No. 316 Leg.]

YEAS—72

| | | |
|---|---|---|
| Adams | Exon | Melcher |
| Baucus | Ford | Metzenbaum |
| Bentsen | Fowler | Mikulski |
| Bingaman | Glenn | Mitchell |
| Boren | Graham | Moynihan |
| Bradley | Grassley | Nunn |
| Breaux | Harkin | Packwood |
| Bumpers | Hatfield | Pell |
| Burdick | Heflin | Pressler |
| Byrd | Heinz | Proxmire |
| Chafee | Hollings | Pryor |
| Chiles | Humphrey | Reid |
| Cochran | Johnston | Riegle |
| Cohen | Karnes | Rockefeller |
| Conrad | Kassebaum | Roth |
| Cranston | Kennedy | Rudman |
| D'Amato | Lautenberg | Sanford |
| Danforth | Leahy | Sasser |
| Daschle | Levin | Shelby |
| DeConcini | Lugar | Specter |
| Dixon | Matsunaga | Stafford |
| Dole | McCain | Stennis |
| Domenici | McClure | Trible |
| Durenberger | McConnell | Warner |

NAYS—13

| | | |
|---|---|---|
| Bond | Kasten | Symms |
| Evans | Murkowski | Weicker |
| Garn | Nickles | Wilson |
| Hecht | Quayle | |
| Helms | Stevens | |

NOT VOTING—15

| | | |
|---|---|---|
| Armstrong | Gramm | Simon |
| Biden | Hatch | Simpson |
| Boschwitz | Inouye | Thurmond |
| Dodd | Kerry | Wallop |
| Gore | Sarbanes | Wirth |

of General Noriega's government in Washington, DC—and also the administration—that we in the Senate have made a solemn pledge—to cut off all assistance, military and economic, to end all intelligence cooperation, and to eliminate access to all United States grants, loans, leases or credits unless, within 45 days, the Government of Panama has taken concrete steps to restore political freedom and the rule of law to the people of Panama. We stand by that pledge.

Today the future of our relations with the Government of Panama is in the hands of the members of the Panama Defense Forces and the people of Panama. Today, we say to you once again: "The whole world is watching."

I ask unanimous consent that an article from today's Washington Post on this most recent action by General Noriega may be printed in the RECORD.

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

[From the Washington Post, Oct. 9, 1987]

10 AMERICANS ARRESTED IN PANAMA—FORMER ENVOY'S SON RECEIVES JAIL TERM

PANAMA CITY, October 8.—Panamanian riot police arrested 10 Americans, nine of them U.S. servicemen, and five Panamanian civilians, including the son of a prominent opposition figure, police and a progovernment newspaper said today.

Col. Leonidas Macias, Panama's police chief, confirmed that the arrests took place last night. He said the nine soldiers were turned over to U.S. authorities early today, but refused to give further details.

In Washington, a State Department spokesman said the servicemen, who were wearing civilian clothes, were picked up by riot police "patrolling in the wake of demonstration activity." They were released 11 hours later, after being held incommunicado for six hours, he said. The United States "has taken up the issue with the Panamanian government," he said.

[A statement by the U.S. Southern Command in Panama said eight of the servicement—five Air Force and three Navy personnel—were visiting the country on temporary duty and staying in a hotel in downtown Panama City. They were picked up while walking near their hotel, the statement said. The ninth serviceman was an Air Force sergeant assigned to the Southern Command who was riding his motorcycle at the time of his arrest, it said.]

Macias did not say if the American civilian, an employe of the joint U.S.-Panamanian commission that administers the Panama Canal, was turned over to U.S. authorities.

Witnesses said the opposition to the military-dominated government tried to organize a demonstration last night after President Eric Arturo Delvalle addressed the nation on television.

Delvalle warned in the speech that he will not tolerate further antigovernment demonstrations, which have been occurring in the capital off-and-on since early June.

Macias said the five Panamanians were charged with disorderly conduct and sentenced last night to 180 days in prison.

The progovernment newspaper Critica identified the Panamanians as four businessmen and Jose Guillermo Lewis Navarro, son of former ambassador to the United States Gabriel Lewis Galindo.

[In Washington, Lewis claimed that his son was arrested when police searched his car at a roadblock and found two white handkerchiefs in his glove compartment. The opposition waves white handkerchiefs during antigovernment demonstrations. Lewis is conducting a campaign in Washington for the ouster of Panama's strongman, Gen. Manuel Antonio Noriega.

["By (arresting) American servicemen, (Noriega) is attempting to claim that the American government is a source of the opposition in Panama," Lewis said in an interview.

["The cowardly and unjust imprisonment of my son, and other innocent citizens, is designed to frighten me and others who criticize the government," Lewis said. "We fear for his life."]

Minutes after Delvalle's speech, security agents stopped cars at random downtown and arrested anyone carrying weapons or flying a white flag from radio antennas.

The newspaper and Macias claimed that the 10 Americans and five Panamanians who were arrested were inciting people to violence.

## MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that there be a period for morning business not to extend beyond 30 minutes with Senators to speak therein.

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

Mr. BYRD. Mr. President, I ask unanimous consent that no further action occur on the War Powers Resolutions until such time as the majority leader is back on the floor.

The PRESIDING OFFICER. Is there objection?

Mr. GRAMM. Mr. President, reserving the right to object, if I might inquire of the distinguished majority leader, I wanted to offer an amendment to the War Powers Act. Might I ask when we might expect to see it back up?

Mr. BYRD. Mr. WARNER and some of the rest of us are working on an amendment and we were wanting to be protected on the floor until such time as we had the opportunity to get back to the floor. We hope to have it.

Mr. GRAMM. Mr. Leader, if we pull down the War Powers Act, might I inquire what we might go to?

Mr. BYRD. I am not talking about pulling it down. I am simply saying we would not want any action on it, any amendment offered to it or any motion in relation to it, until such time as Senator WARNER and I are back on the floor.

Mr. GRAMM. Would it be then the pending business here for debate the rest of the afternoon?

Mr. BYRD. Yes, it can be the pending business for quite some time. If the Senator wishes to debate it——

Mr. GRAMM. I would like, Mr. Leader, if it is not out of the ordinary, to reserve my right to offer an amendment to it.

Mr. BYRD. This Senator is not going to say anything other than it is the intention of the Senator from Virginia and my intention to offer an amendment. Until that occurs, I do not wish any amendments offered to it. We want to protect our own rights to offer one. We have been working on an amendment.

Mr. WARNER. Mr. President, throughout the morning I have been addressing indirectly the document which the majority leader and I and some others have been working on. I think Senators have been on notice informally that it is the likely intention of the majority leader and myself, and perhaps others, to propose an amendment to the pending joint resolution by the Senator from Connecticut.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request?

Mr. WARNER. Mr. President, reserving the right to object, and I do not intend to, I understand the Senator from Mississippi desires 15 minutes in morning business. I address that to the majority leader. I wonder if the period the majority leader is designating for morning business can include the time for the Senator from Mississippi.

Mr. BYRD. The period was requested in part to accommodate the Senator from Mississippi who indicated he wanted to speak for 15 minutes on the Bork nomination.

Mr. President, I ask unanimous consent that the period for morning business extend for not to exceed 1 hour and that Senators may speak therein and that no action be taken in the meantime until the majority leader is back on the floor in any way related to the War Powers Resolution.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request? Hearing none, without objection, it is so ordered.

Mr. BYRD. I have no objection if Senators wish to discuss it. They can do that in morning business as well, and it could appear in the RECORD at another place.

Mr. COCHRAN addressed the Chair.

The PRESIDING OFFICER. The Senator from Mississippi.

## NOMINATION OF JUDGE ROBERT BORK

Mr. COCHRAN. Mr. President, it is most unfortunate, in the opinion of this Senator, that the processes surrounding the confirmation of Judge Robert Bork have deteriorated to the condition that we observe today. It is also very unfortunate for the institution of the U.S. Supreme Court and for this institution, the U.S. Senate.

We have seen the process contaminated by mass hysteria, intense partisanship, and unfairness. We have heard charges of racism, of sexism, of a police state mentality, of indifference to individual rights, and so on, made against the nominee.

The public mind has been set against Judge Bork by false charges, by insinuations, by inuendos, with a nationwide advertising campaign by special interest groups.

This campaign suggests, Mr. President, that precious American liberties and freedoms are at risk if the Senate confirms Judge Bork.

Of course, we know that that bears very little likeness to the real truth.

I recall, Mr. President, when I was first invited to an interview with a news-gathering agency here in Washington on the subject of the confirmation of Judge Bork. The television reporter came into my office and set up the camera. The first thing he asked was my reaction to Judge Bork's suggestion that the poll tax be reinstated. He wanted to know my reaction to that.

I first of all started to laugh because that was so absurd. I thought he was kidding me. But, this young reporter really believed that was a fact; that Robert Bork favored a poll tax.

Well, I then began trying to answer the question, to respond by saying that the Constitution of the United States had been amended some time ago to specifically repeal that kind of activity, and that there was absolutely no suggestion that that was going to be undone by the confirmation of Judge Bork.

But that is an illustration, Mr. President, of the kind of rumor that, begun as a rumor, takes on characteristics of fact and truth so that as a result of an effort to advertise viewpoints that really were not those held by Judge Bork on issues that would come before the Supreme Court, and past actions that really were not actions of Judge Bork or Solicitor General Bork, millions of Americans today have a mind set against Judge Bork because of the success of that advertising campaign.

I really am not speaking out against the expressions of opinions by anyone on a subject that is before the U.S. Senate. But what distresses me about the way this entire process has unfolded is that the Senate has become a part of the misinformation campaign by the conduct of the hearings in the Judiciary Committee that brought out information designed, in a way, to make the news each evening; it was conveying an appearance of fairness but in truth was not fair at all because essential facts from the record of this nominee were not given very wide circulation through the news or through advertisements that the opponents were getting with their paid campaign and with the coverage that was given to the charges against Judge Bork.

So today, just for a few minutes, because I did indicate early in the process that it was my intention to vote for the confirmation of Judge Bork, I want to tell the Senate why.

I happened to have been serving in the other body, the House of Representatives, during the time Solicitor General Robert Bork was serving at the Department of Justice, and I recall observing his conduct in that position, his performance of duty, as being exemplary. And then as a judge on the Court of Appeals for the District of Columbia, he was widely regarded as an astute jurist, participating in over 400 decisions as a member of that court and not once being reversed by the U.S. Supreme Court.

Before that, although I did not know him at the time, Robert Bork served as a professor, he served as a practicing attorney, and has been described by many who knew him during those times of his life as a brilliant scholar and lawyer.

It occurred to me in observing the proceedings in the Judiciary Committee that most of the charges against Judge Bork came from writings while he was a professor at Yale Law School. Not any real criticism of him was made of him as a judge by those who were trying to defeat his confirmation, and not any real criticism was made of his performance as Solicitor General in arguing in behalf of our Government in cases before the Supreme Court.

Rather, some said that if a person had the views that Judge Bork espoused in a few articles written while a professor, it was clear that he was a threat to individual rights and to rights of minorities and women if he were confirmed as a U.S. Supreme Court Justice.

First of all, there are nine members of the U.S. Supreme Court. If Judge Bork were confirmed, he would have only one vote.

(Ms. MIKULSKI assumed the chair.)

Mr. COCHRAN. Of course, his vote could be decisive in cases that were evenly divided where there were four Justices on one side in favor and four on the other side against. But that is assuming that there are four Justices now serving on the Supreme Court who are also threats to the individual rights of American citizens and to the rights of minorities and to women. I do not think this Senate believes that.

When the opposition makes the charge that Judge Bork is a threat to precious constitutional rights as a new member of this Court, it is in effect saying that our constitutional rights are already in jeopardy because of the current members who serve on the Supreme Court. Surely no reasonable Senator seriously contends that, and that is not the truth.

What is the real objection then to Judge Bork? It is simply that he is more likely to vote on the conservative side of most issues before the Supreme Court than on the liberal side. The fact, however, that a prospective nominee may more often vote in a conservative rather than in a liberal way, or vice versa, is no basis for rejection of a Presidential nominee by the Senate.

That is why the opposition had to manufacture other reasons to stir up citizens and to cause a stampede of Senators to trample this nominee into the dirt.

It should be noted that the charges against him are not based on his conduct as a judge, nor as Solicitor General. They are based only on what he has written as a law school professor. The opposition ignores his record of public service as Solicitor General and as judge of the U.S. Court of Appeals for the District of Columbia. Of course, it is true that as a professor he wrote provocative articles, he thought provocative thoughts and said provocative things. It has always been my understanding, Madam President, that that is what a law professor was supposed to do. I can remember in my law school that one of the most popular and best law professors was one who criticized every decision that we studied and every jurist who wrote the decisions in books. He made us think, he made us question the basis for these decisions by the U.S. Supreme Court and lower courts. It was part of the way you were challenged to think and to question, and that is what Judge Bork did at Yale Law School. For that he has been indicted by his opponents and convicted by a majority of the Senate Judiciary Committee.

But the point I want to make with respect to the charges of his being opposed to individual rights that are protected by the Constitution and insensitive to the rights of minorities and women is that those charges are unfair. They are inappropriate, even to Professor Bork and certainly to Judge Bork.

If you analyze the opinions and the decisions that Judge Bork has written and that he has participated in on the court of appeals, you find that those arguments collapse because there are no facts to support them. There is absolutely no evidence that Judge Bork has ever been unsympathetic to the constitutional rights of minorities or women.

One of the opposition's charges is that Judge Bork's view of the Constitution provides no protection for individual rights of privacy. They suggest that his view would encourage police state tactics against individual citizens. The opposition does not look at anything Judge Bork has written on that

subject but only what Professor Bork suggested on a few occasions. The opponents complain that Professor Bork criticized, for instance, the Supreme Court decision in the case of Griswold versus Connecticut, implying and even stating that his view of that case made him unfit to sit on the Supreme Court.

The Griswold case, as the Senate remembers, was a case where Justice Douglas wrote the majority opinion. He found that a never-enforced State law making the use of contraceptives illegal was prohibited by the U.S. Constitution. In order to make that finding, Justice Douglas, in his opinion, said that the constitutional basis for the Court's authority was not in the Constitution and not in the Bill of Rights, but in suggestions "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

That is not what I would call a very clearly expressed or easy to comprehend source for the Court's decision, and about that this was said: "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."

That sounds like something that the opponents of Judge Bork would accuse him of saying. Who said that, Madam President, was Justice Hugo Black in the dissent in the Griswold case. Robert Bork, in an article criticizing the decision, refers to Justice Black's criticism with approval.

There is also a quote from that same Supreme Court report attributed to Mr. Justice Stewart, who also dissented and made this argument against the Court's decision:

> [I] can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever decided by this Court.

So, unlike what the opposition would say about Judge Bork's comments about that case, he was in agreement with Justices who are widely praised by those same critics who suggest that Bork is way off base on the subject of that case.

Well, I think the conclusion is that Justice Black and Justice Stewart correctly criticized the foundation of the Court's ruling in that case, and they were not considered dangerous threats to the Constitution, although Judge Bork for having the same opinion is accused of being such a threat.

What does Judge Bork in his own words say about the right of privacy which has been brought up as an important issue? It is an important issue.

He says this:

> No civilized person wants to live in a society without a lot of privacy in it. And the framers 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 persons in 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. It 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.

Judge Robert Bork on the right of privacy. So much for the dangerous opinion of Judge Bork on the issue of privacy.

The question has to be asked, Madam President, what kind of judge would Robert Bork be on the Supreme Court? The answer has to lie in the answer we find when we learn what kind of judge Judge Bork has been on the U.S. Court of Appeals. I took pains to find out what kind of decisions he had made, what kind of rulings he had made as a member of that court.

And I was satisfied and still am, Madam President, that he has not been insensitive as a judge to the interests of minorities or of women, and he has shown that he is interested in ensuring the individual rights of citizens are protected by the courts of this land.

There are clear examples to support those conclusions. He has been a diligent and hardworking judge. He has written or participated in more than 400 opinions in 5 years. He has written on a wide variety of subjects dealing with regulatory problems, constitutional issues, and criminal law matters.

The efforts to attack his record as a judge in the hearings were minimal. And in my opinion, they have been altogether unsuccessful.

The opposition tried to show that he had ruled in favor of business in an inordinate number of cases. The analysis of those cases, however, showed he had not. There was a weak and feeble effort to try to prove that he had ruled against individuals in favor of Government as a general rule. Again, though, upon analysis, the facts did not support the charge. We have heard very little about that aspect of his judicial record since the accusations have been so successfully struck down and charges that the decisions he has made are pro business or anti-individual have fallen apart.

The result is that when the opposition examined the record with respect to minorities and women, they found the record to be without a blemish. Indeed, of the eight cases that might be characterized as involving women's rights, Judge Bork ruled in favor of women seven out of eight times.

Madam President, the first case that I read that Judge Bork handled as a Solicitor General presenting an argument before the Supreme Court involving women's rights was in 1976. This case involved General Electric Co. and the sickness and accident insurance that it provided for its employees. The plan provided a specific exclusion for disabilities arising from pregnancy. A class action was brought by women employees of General Electric alleging that this amounted to sex discrimination. Solicitor General Bork took their side and went to the Supreme Court as a friend of the court filing an amicus brief urging that the women were right.

As it turned out, the Supreme Court ruled against them but later the Congress adopted Judge Bork's suggestions that title VII of the Civil Rights Act of 1964 protected women against that kind of discrimination, and Congress has changed the law to clearly give effect to the very argument that Judge Bork was making in behalf of those women plaintiffs in that case. That is not characteristic of someone who is insensitive to the interests of women.

After coming to the court of appeals, Judge Bork had an occasion to hear a case on appeal from the district court in the District of Columbia. It involved women employees of the State Department. A suggestion was made that the Equal Pay Act was not compatible with the Foreign Services merit system. Women employees appealed a case that was adverse to their interests in the district court to the court of appeals. Judge Bork participated in a decision that reversed that case and remanded it saying that women employees of the Foreign Services were protected by the Equal Pay Act, and had a right to bring an action to enforce the administration of that law to protect them against unlawful discrimination.

That case is the case of Ososky versus Wick, that was decided in 1983.

Another case, Madam President, was Laffey versus Northwest Airlines, Inc. This case was fairly well known at the time that it was argued and decided by the court of appeals in 1984. Judge Bork sat on this panel, and he participated in this decision. In effect, it said that female and male cabin attendants working on airlines and doing the same jobs had to be treated alike as far as pay and benefits were concerned. The facts were that Northwest Airlines under its former employment practices called the female attendants "stewardesses" and called the male attendants "pursers." They would provide single rooms in overnight airport lodging facilities for the male "pursers," but the women "stewardesses" had to double up and put two or three in one room. The pay for "pursers" was greater but the court found as a fact that the jobs were substantially the same.

The case was appealed to the court of appeals. Judge Bork participated in a decision that said the women were

right, they were being discriminated against, and they had a right under Federal law for damages and injunctive relief.

That was Judge Bork's decision. Is that a decision made by someone who is insensitive to the rights of women, and who would not use the power of the courts under the Constitution to protect their right to equal pay for equal work? That is what this case was all about.

Finally, Madam President, and I am concluding my review of cases in which Judge Bork has made decisions that show without any doubt that he is sensitive to the interests of women and blacks. There is a case decided in May of this year. It involved a retired naval officer who had spent a career in the Navy. He was black. His name was Emory. He had made captain. He was hoping to make rear admiral. He was passed over. He brought a suit alleging that the Navy unfairly and unlawfully discriminated against him by not having blacks on the selection board, and by the processes the Navy followed to make their selections for rear admiral. And in his case, he argued specifically that the Navy had discriminated against him because he was black.

The district court said you do not have a case; that the U.S. Constitution does not provide the Federal courts with the authority to look behind the Armed Forces selection process to see whether or not they are consistent with constitutional principles. He lost. He appealed to the court of appeals. Judge Robert H. Bork sitting with two other judges rules that he did have the right to fair treatment and to nondiscriminatory treatment even though he was a member of the Armed Forces.

They reversed the case and said that the Federal courts did have jurisdiction to ensure that the selection processes of the Navy were consistent with the constitutional rights against discrimination on account of race. Judge Robert Bork sitting with two other judges made that decision.

Madam President, it is just as clear to me as anything can be looking at the decisions and the writings, and the rulings that Robert Bork has made as a member of the court of appeals that he is a judge who is willing to use the power of the Federal courts to ensure that individual citizens are treated fairly by their Government, and by business, by employers, whether they are women, black, or are trying to assert any other individual right that is protected by the Constitution.

I think it is deplorable that we have seen someone who has a record like this described so successfully as someone who has just the opposite view of the law and of the role of the Federal courts. That is a tragedy.

On October 5, there was an article written in the New York Times by Arnold Burns, Deputy Attorney General. He talks about the confirmation process, the unfair treatment that Judge Bork has suffered at the hands of the Judiciary Committee and those groups who organized to attack and assassinate his character.

I ask unanimous consent that a copy of this New York Times article be included at this point in the RECORD.

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

[From the New York Times, Oct. 5, 1987]

AS THE BORK VOTE APPROACHES HIS JUDICIAL RESTRAINT IS LAUDABLE

(By Arnold I. Burns)

WASHINGTON.—I am an enthusiastic supporter of the nomination of Judge Robert H. Bork to the Supreme Court. This should not surprise anyone. What should be surprising is that there is such a political hullaballoo over this nomination.

If our citizens do not find this surprising, then I would have to say there is an insufficient understanding out there of the role of the Federal judiciary in our constitutional democracy.

The most heated polemics about the Bork nomination come from people who worry about the policy outcomes they believe are apt to result from it. The fact that so many voices have politicized the nomination in this way suggests that our civics teachers have failed us. We no longer understand what judging is and how it differs from legislating.

I say "we," yet I believe it is not really the American people that are confused—merely the activist cadres that have mobilized on the Bork nomination, who treat the process of judging as meaningless in itself, important only in terms of the policy result to which it leads.

This way of thinking about the role of judges ignores or even denies the difference between that role and the role of legislators. To the result-oriented, judging is merely a continuation of legislation by other means, and the Supreme Court is in effect just a third house of Congress, sitting atop the other two, vetoing their enactments or changing those enactments beyond recognition.

Such a role for the judiciary is intolerable in a Government such as ours, where the people are the source of legislative legitimacy. Judges in our system of governance are supposed to adjudicate disputes between and among litigants—that is, to decide cases and controversies.

In the process of dealing with actual cases brought to them, judges must construe and interpret laws, including the Constitution, because, in the exercise of judicial review, they must insure that legislative or administrative actions do not transgress constitutional limits. If, however, judicial review goes beyond this role, and judges make instead of interpret the law, then the personal values of unelected judges are given the force of law. This is wrong.

The foregoing remarks on the nature of judicial review reflect closely the views of Judge Bork. His constitutional reasoning is pristine, and it is appropriate to note, as we celebrate the 200th birthday of our Constitution, his fidelity to the Framers' grand vision. Yet the ruckus goes on, confusing constitutional reasoning with policy preferences.

To take only the most talked about example, look at Roe v. Wade, which established a right to abortion. Judge Bork has been very discreet about his views, if any, on the merits of the abortion issue. This is fine. What are relevant are his views on the constitutional reasoning behind the Court's interpretation in this area.

That Roe is rickety in this regard has been recognized by scholars with widely differing views on abortion, including Justice Sandra Day O'Connor, Prof. John Hart Ely and Archibald Cox. But that has not stopped some from simplistically labeling Judge Bork "antiabortion."

The point is that it is possible to have an opinion on the merits of a decision separately from one's opinion on the merits of the issue. Pro-life groups support Judge Bork because they believe Roe cannot withstand unprejudiced scrutiny. But he has made no pledges, nor will he, nor should he.

In short, the nomination challenges every sector of politics that has been relying on the Court rather than the political process to achieve its agenda. That challenge is this: Can your goals survive being booted back into the truly democratic process—into the legislative arena?

Now, to confirm or not to confirm, that is the question. That issue should be decided on Judge Bork's record as a brilliant student, lawyer, professor, Solicitor General and court of appeals judge never reversed by the Supreme Court. It should be decided on a philosophy of judicial restraint honed over a lifetime. I inveigh against deciding it on pure symbolism—Judge Bork as the false boogeyman of the left who will singlehandedly veto all sorts of social programs and nullify individual rights, or Judge Bork as the ersatz champion of the right who will singlehandedly adopt a conservative policy agenda.

Stuff and nonsense. The American public, I am convinced, wants a decision on the merits.

Mr. COCHRAN. Madam President, on the same day, I happened to be reading the Washington Post and noticed an article written by Robert H. Bork, Jr., the son of Robert Bork. It was very moving to read a son's description of his father, as only a son can know a father.

On the subject of his views about minorities and minority interests, his sensitivity to those who may not always be treated fairly, the son describes a few instances that he knows about that make his father appear to be a much different kind of person from the one described by Gregory Peck in a paid advertisement on radio stations across the Nation. He said this:

The special-interest groups, ranging from the American Civil Liberties Union to the National Organization for Women, would like you to know an evil caricature of Robert Bork, Sr. I know a different picture. I know that:

He never has harbored any biases or prejudices. Our home was always open to our friends no matter who they were or where they came from.

He, as a junior associate, fought for and won a place at his Chicago law firm for a lawyer whom the senior partners didn't want to hire because he was Jewish.

He came to the aid of a black female lawyer in the Justice Department who charged that she was being excluded from meetings by her white male colleagues.

Then he goes on to say:

The special-interest groups are aware of many of these examples and many others where my father reached out personally and professionally to help people. But you don't hear them talking about these things. They know that the only way to kill his confirmation is to ignore the man, his sensitivity—to obscure his record with lies and distortions and assassinate his character.

Madam President, it is a tragedy today to look around the Senate and add up the numbers and find out that this campaign to assassinate character, to impugn the integrity and the record of an honorable and astute jurist, may have succeeded.

I hope that those managing confirmation proceedings in the future will not look to the Robert Bork confirmation proceeding as a model. I hope that they will resist the temptation in the future to become involved as Senators in a political campaign—in a political campaign that distorts the record, that unfairly criticizes the qualifications of a nominee for either a Supreme Court judgeship or a high-ranking position in the executive branch.

Our proceedings ought to be very carefully and thoughtfully managed, to ensure that we find out what the truth really is. I am confident that if Senators were to do that, Robert Bork would be confirmed.

Madam President, I ask unanimous consent to have printed in the RECORD the article by Robert Bork, Jr., to which I have referred.

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

[From the Washington Post, Oct. 5, 1987]

AN "EVIL CARICATURE" OF THE NOMINEE

(By Robert H. Bork, Jr.)

Testimony, cross examination and scrutiny are part of the price of admission to the Supreme Court. But enough is enough. When will there be time for fairness?

Three months ago the president honored my father by nominating him to become an associate justice on the U.S. Supreme Court. Since then our family has endured a relentless and bitter campaign against my father, a campaign designed and executed for the purpose of instilling fear in the souls of all who would listen. It has been a campaign conducted with flash cards printed early by organizations and individuals desperately needing a cause.

Week by week the campaign has mounted. As the distortions were repeated over and over again, we watched my father portrayed as some villainous ideologue, a racist and a sexist. For his opponents the more he is made to look like a crazed neanderthal, the better for them. Indeed, one particularly ugly rumor spread by his opponents to injure him is that my stepmother, Mary Ellen, doesn't believe that the Holocaust happened.

These characterizations, these rumors, are vicious slander and they hurt. They hurt because the people I meet on the street who took the trouble to watch and listen to his testimony before the Senate Judiciary Committee know that they are untrue. My stepmother, brother, sister and I—who know him better than anyone—know they are untrue. And what's more, the special-interest groups that so masterfully have spread these lies know it, too.

But in Washington, if a rumor is sustained long enough, it eventually spills into the press and becomes credible. And it becomes damning.

My father has undergone the most thorough investigation and interrogation of any nominee for the bench, not once, but three times. He was investigated in 1973 when nominated to be solicitor general. He was investigated again in 1982 when he was named to the U.S. Court of Appeals for the District of Columbia Circuit. And every aspect of his life and work was probed and dissected again this summer. One newspaper even got hold of the list of his videocassette rentals hoping to find that he watches X-rated films. The worst they could say about him is that he has a penchant for Alfred Hitchcock and Cary Grant.

No, the special-interest groups ranging from the American Civil Liberties Union to the National Organization for Women, would like you to know an evil caricature of Robert Bork Sr. I know a different picture. I know that:

He never has harbored any biases or prejudices. Our home was always open to our friends no matter who they were or where they came from.

He, as a junior associate, fought for and won a place at his Chicago law firm for a lawyer whom the senior partners didn't want to hire because he was Jewish.

He came to the aid of a black female lawyer in the Justice Department who charged that she was being excluded from meetings by her white male colleagues.

I also know my father's professional record as solicitor general and as a federal judge. I know that at the Justice Department he argued that pregnancy discrimination by employers was illegal sex discrimination. I know that as a federal judge he voted in favor of female flight attendants at Northwest Airlines who had suffered pay discrimination; that he voted in favor of female foreign service officers at the State Department who believed that they had been discriminated against in pay and promotion; and that he voted in favor of a naval officer who claimed he had been passed over for promotion because he was black.

"It tees me off when people say he's uncaring. Bob is a truly decent human being." Those aren't my words. Those are the words of Guido Calabresi, dean of Yale Law School. He and my father disagree on many legal and political issues. But Dean Calabresi is a fair man.

The special-interest groups are aware of many of these examples and many others where my father reached out personally and professionally to help people. But you don't hear them talking about these things. They know that the only way to kill his confirmation is to ignore the man, his sensitivity—to obscure his record with lies and distortions and assassinate his character.

If truth, justice and common decency account for anything in the Senate, my father will win this fight in the end. Those who know him know that he is a compassionate, fair and open-minded man. I hope that the process of judging my father will be characterized as having been fair. Right now, I do not believe that it is. I remain hopeful.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

## CONFIRMATION OF ROBERT BORK

Mr. DURENBERGER. Madam President, on July 1, Ronald Reagan made his appointment of Judge Robert Bork to fill the vacancy on the Supreme Court left by the retirement of Justice Powell. I stated then, and have repeated since, that I would support the President's choice unless and until the nominee talked himself out of the job, or convincing evidence was presented to me that he lacked the integrity or qualifications to hold that position. As of this moment, neither of those events has occurred.

I came to this Senate 9 years ago. One of the most important obligations I took on when I was sworn in was the constitutional responsibility to give advise and consent to appointments by the President to Cabinet secretaries, ambassadors and judgeships. As an attorney and former executive secretary to Minnesota Gov. Harold Levander, I participated in the process of selecting judges, so I am not a novice to the judicial system. The standard I established when I arrived in this body in 1979, and from which I have never deviated, was that the President of the United States, elected by all the people of the United States, has broad discretion under the appointment power. Absent clear deficiencies as to character, quallfication or temperament, the Senate should not substitute its judgment for that of the President of the United States.

As a result, except on two occasions where the character of two Federal judges was in serious question, I have voted to approve each appointment which has come before me as a U.S. Senator, whether they were appointed by President Carter or President Reagan.

An independent judiciary is one of the bulwarks of American liberty. Insulation of our courts from political influence is one of the central features of our constitutional system, a fundamental principle that has often come under attack over our 200 years of history. Such has been our reverence for the place of the law in this society that we have scrupulously protected the structures of justice from the overt influence of politics of the moment.

The confirmation process, like any of our constitutional processes is not explicitly defined. Experience defines and redefines the process as it is used here in this Chamber. Consequently, the nomination of Judge Robert Bork and the process by which that nomination is to be consented to is not an isolated incident. It is precedent for the next appointment and the next and the next. In this Senator's judgment a long shadow today lies over our judicial branch of Government and may continue for decades to come.

Over 14,000 of my constituents communicated with me on the Bork nomination by mail, scores of others stopped me on street corners and literally hundreds talked to me at the Minnesota State Fair. I met with the leaders of various constituency groups, both in Minnesota and here in Washington. I welcome their input and do not mean to denigrate that sincere effort to get their views across. I thank them, each of them, for it.

But the barrage of mass mailings, full page newspaper ads, radio and television ads and enough issue papers to fill this Chamber from wall to wall to a depth of 6 inches—by both sides—have created an atmosphere of hysteria that columnist David Broder compared to a lynch mob. No American from the age of 2 up has been safe from the crush of the Bork propaganda—from both sides. And when judges become media stars, something very important has been lost to this system.

Madam President, I believe the confirmation process which has accompanied the appointment of Judge Bork has diminished from the place of law in this democracy. As much as I recoil from the trivilization of the election process in this country in 30-second TV ads, that is something the Republic can survive. But the "judgeship by plebiscite" which we have just conducted poses a far more serious threat. When judges have to run for office, the American people, especially minorities in society, will get less than the full protection the Constitution was designed to offer them. That is a momentous step backwards.

I am reminded of an encounter the Prophet Elijah had in the Old Testament. A great wind passed before Elijah and broke rocks around him. But the Lord was not in the wind. Next an earthquake occurred, but the Lord was not in the earthquake. Next fire, neither was the Lord in the fire. But it was in the still small voice that the truth could be heard.

In making my final decision, I will avoid the wind and the earthquake and the fire, and seek a still, small voice of my own. At this point in time, I find it in two places. Lloyd Cutler, White House counsel under President Carter testified:

Based on my reading of this written record, and on 20 years of personal knowledge of Judge Bork, I have praised him as a highly qualified, conservative jurist, who is closer to the moderate center than the radical right.

Cutler then went on to caution liberals not to "give a hostage" to a future confirmation process where a nominee more to their liking would be judged by the same standards by which Judge Bork was being rejected today.

And Warren Burger, a son of Minnesota and former Chief Justice of the Supreme Court said:

If Judge Bork is not in the mainstream, neither am I, and neither have I been.

I share the view of these distinguished jurists that Robert Bork, while holding some views at various times with which I disagree, cannot be disqualified on the basis of extremism.

The Constitution of the United States does not call on me to give my advice and consent to judges in such a way as to maintain balance on the Court. It does not call on me to use a different standard to evaluate a swing vote, such as Judge Bork is reported to be, than I used for Justices Scalia or O'Connor. It does not call on me to do a nose count of the Court on key issues and factor that into my decision.

In the judgment of this Senator, Judge Bork is a person of extraordinary intelligence and scholarship. He has shown in the hearings and during his tenure on the bench, a conviction to principle and the moral courage to stick by it. And he has demonstrated the admirable human quality of change and growth, throughout his life.

Madam President, I do not know if the moment will come in this Chamber when the Vice President will ask the clerk to call the roll on the confirmation of Judge Bork. Some hope they will not have to cast this vote. I am not one of them. My mind is not closed now, nor will it be until I cast that vote. But whatever the outcome is, I hope my colleagues and the American people grasp that, to some extent, we may all have been losers in the events that have taken place.

Mr. HEFLIN. Madam President, I ask unanimous consent that I be allowed to speak in the morning business until I conclude my speech, which I believe will be about 6 minutes or maybe 6½ minutes.

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

The Senator from Alabama may proceed.

## THE U.S. MARINE CORPS

Mr. HEFLIN. Madam President, I am delighted to rise today to congratulate Gen. Alfred M. Gray, Jr., who was recently appointed the Commandant of the U.S. Marine Corps. I believe that General Gray will provide outstanding leadership to the corps. I can think of no marine who knows more about the type of service the U.S. Marine Corps provides to this Nation. I have no doubt but that General Gray will lead the Marine Corps to outstanding accomplishments unparalleled in its 211-year history.

General Gray is, in all senses of the term, a marine's marine. He enlisted in the Marine Corps in 1950 and served overseas with the amphibious reconnaissance platoon in the Pacific attaining the rank of sergeant. He was commissioned a second lieutenant on April 9, 1952. After attending the basic school at Quantico, he has risen through the ranks performing his duties in an outstanding capacity in every assignment he held. Throughout his career, he has not only led his fellow marines, but he has taught them how to lead themselves. I believe that this tremendous example will continue. General Gray will, thus, be responsible for the future, as well as the present excellence of the U.S. Marine Corps.

In its 211-year history, the U.S. Marine Corps has had a highly impressive record. I am proud to be a marine, and to have served in the Pacific in World War II. I use the present tense here because, as they say, "Once a marine, always a marine." Such is the dedication that the Marine Corps instills in its personnel.

Lately, however, the corps has suffered a few blemishes. Marine Sgt. Clayton Lonetree, who was a Marine security guard at the U.S. Embassy in Moscow was convicted of espionage. Recently, Marine S. Sgt. Robert Stufflebaum, also stationed at the U.S. Embassy in Moscow, was convicted of two counts of dereliction of duty, the least serious charges lodged against him. Significantly, Sergeant Stufflebaum was cleared of the serious charges against him.

The reaction of the corps to information indicating that Marine personnel were suspected of espionage was shock and disbelief. Every marine has been hurt and embarrassed by the events of the last few months. We are a proud corps—proud of our service to the American people for over 211 years, proud of our fellow marines who have given so unselfishly of themselves so that our democracy might flourish, and proud of our battle record in defense of this Nation. These allegations and the conviction of spying have been like a knife in the heart.

Though the Marine Corps has suffered some embarrassment in the last few months, and the American people have every right to also be shocked and alarmed, I ask them not to judge this unique institution by the acts of a few, but, rather, by the patriotism and exemplary conduct which have been—

and will always remain—the Marines' basic heritage. At this moment, there are almost 200,000 marines on active duty around the world. As a group, they are the finest I have ever known. Likewise, they find the conviction of a fellow marine for treason to be reprehensible. Like their forebearers, they are still willing to lay down their lives in the defense of our country and the principles upon which the corps stand.

As a matter of highest priority, the Marines are working to determine the facts regarding these events so as to take appropriate corrective action. One thing is certain, They will leave no stone unturned.

Our young marines are as capable as anyone of resisting the insidious KGB threat. If we provide them the proper training, screen them even more thoroughly than in the past, and, most importantly, provide them the proper leadership both on the part of the Marine Corps and the State Department, I am certain that there will be no future cases such as this past one. The Marine Corps remains as solid as the Rock of Gibraltar. For over 200 years, it has answered each and every call in defense of our country with courage, selfless dedication, and honor.

The first marines were assigned to overseas diplomatic posts beginning in January of 1949. Since then, over 15,000 marines have performed such duties. With the exception of this recent episode, they have served with honor and distinction. Many of the cartoons appearing around the country have seriously attacked the tradition of the entire corps—not just the individuals who committed these acts. In my judgment, this is unfair.

Guarding American Embassies is a tough, thankless, sometimes lonely job. That is why it was given to marines in the first place. In the past 211 years, tens of thousands of marines have made the supreme sacrifice for freedom. To desecrate their memory because of the acts of two or three is not only ludicrous, it is an outrage. In their 38 years of service with the State Department, these so-called young marines have displayed countless acts of exemplary courage. They have saved lives, have put out dozens of Embassy fires, have administered life-saving first-aid, while others remain frozen in fear. They have even sacrificed their lives so their civilian charges might survive.

I believe that we should take every effort to recognize the outstanding efforts of the Marine Corps and of the marines assigned to Embassies throughout the world. By and large, Embassy marines are not recognized for their service and duty. I think it is shameful that they are now being attacked for the actions of one or two.

Over the last several years, a strong spontaneous support for the corps has developed among marines, both active and inactive. This support has been more and more apparent in recent months as the U.S. Marine Corps has been so unfairly attacked. As we were taught in basic training, when under attack or siege, we are to rally together and fight like mad. Over a period of time, a great tradition has been developed which, I believe, is representative of the loyalty, the rallying support, and the undying allegiance of marines to their corps. This support by all marines is especially moving whenever "The Marine's Hymn" is played. The minute any marine hears the opening bars of "The Marine Hymn," he stands at rigid attention, holding that stance until the final note. I believe that this shows the great respect that all marines—active and inactive—hold for the corps.

I believe that this custom should be encouraged. I might add that when the last note is played, all marines further signify their loyalty and dedication by proclaiming Semper Fidelis—always faithful. Indeed, despite the unwarranted attacks, despite the hurtful cartoons, and jokes which have been directed toward the Marine Corps, marines will be always faithful to their corps, and the corps will be forever faithful to the United States of America, and to our Nation's Constitution.

Thank you Mr. President.

The PRESIDING OFFICER. The Senator from Idaho.

## THE NOMINATION OF JUDGE BORK

Mr. McCLURE. Madam President, even as I speak I understand that Judge Bork has been in conference with the President, now, for some several minutes—perhaps since 2 o'clock—to try to determine whether or not he should ask the President to withdraw his name as a nominee for Justice to the Supreme Court and I am informed that he may, indeed, be available to the press himself within just a few minutes.

Perhaps it is particularly appropriate, then, that at this particular time I try to bring some attention to a statement made by the Vice President on Tuesday of this week, because it has had very little attention in the press.

I mention that because I realize that a Vice President's support for a nomination made by the President is not necessarily great news. But I do believe that what he said and the way he said it has some relevance to the public discussion of the issues that are before the country and the nomination and the Senate's consideration of that nomination. I am going to take the time to read into the RECORD the entire statement that was released by the Office of the Vice President on Tuesday, October 6.

President Reagan made clear again today that he would not withdraw his nomination of Judge Robert Bork to the Supreme Court. Judge Bork said that he would not withdraw his own name. That is very good news to me.

The fight is not over. President Reagan has refused to be buffaloed, Judge Bork has refused to be buffaloed, and I refuse to be buffaloed. I am going to fight for Judge Bork's nomination, here in Washington and wherever I travel. I want it to go to the floor of the Senate, where America can hear the debate and where we can see how each and every Senator votes.

Judge Bork is an outstanding choice for the job. People around here have been talking about how politics always influences the choice of Supreme Court Justices, and it's true that no President is likely to nominate someone whose views repel him. But there must be limits to the politics. The nominee must be excellent. Judge Bork certainly is that.

He is not only an eminent legal scholar, but one whose ideals have helped shape debate in several areas of law. He served his country with honor as Solicitor General. His record in his present job, on the Court of Appeals, is first-rate. We're talking here about a man with a powerful, flexible mind and true character. Even on the Supreme Court, people like Judge Bork don't come along very often.

That is why Supreme Court Justice John Paul Stevens, Justice Byron White, former Chief Justice Warren Burger, and President Carter's Attorney General Griffin Bell have taken the unusual step of endorsing Judge Bork's candidacy.

But something else makes the issue of Judge Bork's nomination important. From the moment his name was announced, he was under an unprecedented kind of attack. I've been in Washington a long time and I don't get horrified at the sight of political bloodshed, but I've never seen anything like the bitterness of this assault. Judge Bork has been called everything from racist and sexist to an oppressor of the poor and a threat to the privacy of every American.

Judge Bork's opponents don't seem to want a real debate on these issues. They've been trying to create a political steamroller. They've put terrible pressure on vulnerable Senators to announce their opposition to Judge Bork, and they're trying to use these announcements to make the pro-Bork forces think that the fight is over and they should give up. The tactics of these opponents are simply destroying our ability to pick good federal judges.

I am going to continue to call on fellow Republicans and Democrats as well—even Democrats and Republicans who have announced their intention to vote against Judge Bork—to vote in his favor. Until the final vote, it is not too late for any Senator to change his mind. Their final decisions should be made free from political pressure and threats.

Judge Bork is superbly well qualified, but more than just his candidacy is at stake. We are facing a threat to the entire process of choosing an independent judiciary.

If this nomination goes down, the message will go out to the most brilliant legal minds: "Don't write, don't speak out, never be willing to alter a previously held view." Should that happen, the Federal Bench, and certainly the Supreme Court, will be the loser.

That is the end of the Vice President's statement delivered on Tuesday,

October 6, and I think it is relevant as to where we are today.

Mr. President, I ask unanimous consent that an article by Andrew Sullivan appearing in the New Republic, entitled "End of the World, Part III: The Bork Screw," be printed in the RECORD.

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

END OF THE WORLD, PART III: THE BORK SCREW

"In my defensive research of Bork I have discovered a compulsive insistence on the letter of the law. * * *"—Robert Rauschenberg, artist, September 22, 1987

As anti-Bork hysteria goes, Rauschenberg's was moderate. Apart from the Supreme Court nominee's worrying legalism, Rauschenberg's only other concern was the fate of human civilization: "The Supreme Court is a final discriminating force to guide us into the future of global concerns." What he failed to mention, of course, were the fetus funerals. According to Planned Parenthood's media package, if Judge Bork is nominated, there'll be no end to the little coffins. People for the American Way restricted itself to the slightly worrying chance that the day after Bork gets on the Court, mass sterilizations could be imposed. Their ads begin: "The nomination of Robert Bork * * * has caused a lot of controversy. And has a lot of people worried. With good reason." (Note the crescendo.) "But don't take our word for it. You be the judge * * * sterilizing workers * * * billing consumers for power they never got * * * no privacy * * * turn the clock back on civil rights? * * * no day in court * * *" In a complex summary of the constitutional arguments behind the carefully selected cases, the ad's climax hardly leaves the reader dangling in philosophic midair: "Judge Bork has consistently ruled against the interests of people." Anyone for animal rights?

There is serious case to be made against Bork, but so far in the media blitz, you're not likely to have heard it. This time round, the liberals get the prize for hype, even if it's only because the conservatives gave themselves the ridiculous handicap of defending an innocuous moderate. If you'd naively planned on a sex life after Bork, Planned Parenthood had news for you: "Robert Bork's Position on Reproductive Rights? You don't have any." In another flyer, they added: "State-controlled pregnancy? It's not as farfetched as it sounds." Carrying Bork's position to its logical end, "states could * * * impose family quotas for population purposes, make abortion a crime, or sterilize anyone they choose." And senators wonder why the polls show a drift away from the Bork nomination. It's the genital gap.

The disingenuousness of the Bork-hate campaign has been sustained by a variety of tactics. Some have relied on good old-fashioned lying. The National Women's Law Center, followed swiftly by the Feminist Men's Alliance, claimed that Bork testified before Congress in favor of the Human Life Act, when in fact he did the opposite. There were leaks of FBI records detailing Bork's two 1983 emergency room admissions after minor accidents with relatively high levels of alcohol in his blood. Americans United for the Separation of Church and State began their direct mail with the line: "Frankly, I'm scared." The Leadership Conference on Civil Rights sent out an emergency alert flyer. Ralph Nader's personal letters predicted a "plague on the next generation." NOW's president-elect restricted herself to calling Bork a "neanderthal."

There's a quick and easy way to manipulate a Bork case. Take the National Women's Law Center's citing of *Vinson* v. *Taylor*. A sexual harassment suit, it's useful for implying that Bork is sexist, against civil rights, and out of line with the rest of the Supreme Court, because it involved legal questions about the role of "voluntariness" in a defendant's giving in to sexual advances. In fact Bork was not involved in the original case at all, but in a third rehearing over whether there were unresolved questions of law that demanded another rehearing. His dissent was in favor of a rehearing, an opinion upheld by the Supreme Court when they decided to judge the case themselves. But this is both boring and accurate, and too laborious for TV.

Statistics also come in handy for Bork-baiting. A numbers game is central to the Public Citizen Litigation Committee's report. The approach is simple: focus on results and ignore the judicial process. This makes for a damning list of accusations: "Judge Bork's performance on the D.C. Circuit is not explained by * * * judicial restraint; in split cases, one can predict his vote with almost complete accuracy simply by identifying the parties in the case * * *. [He] voted against consumers * * * almost 100 percent of the time and for business in every case."

The real crunch is in the small print. By only considering split cases, the report rules out most of the cases in which Bork played a part and the vast majority of his opinions. More important, split cases don't necessarily mean much. They needn't turn on important legal principles, and can often rest on the random composition of panels, or an abstruse legal technicality. But you wouldn't guess it from the report, which implies that every anti-labor ruling is ipso facto proof that Bork ideologically favors big business. In fact, as the right-wing Center for Judicial Studies pointed out, if you count all the cases, Bork voted seven times in favor of the employee and seven times against. But that doesn't prove anything either. You just can't tell what's really at stake without a blow-by-blow account of the opinions. And no one can stay awake that long.

Bork's nerdy instincts make the whole process even more excruciating. In a typically pedantic Bork labor law ruling, the case rested on whether a structure on a building site should be termed a 'runway" or a "platform," hardly a decision requiring great ideological fervor. Still, People for the American Way was able to run the split-decision statistics as if they applied to every case Bork considered. The heading was: "big business is always right." All that was needed was a hypothetical case where fetus coffin-makers screwed over some single mother on a "runway" who couldn't make it to court. You can usually work in Bork somewhere.

Then again, if you're Bob Rauschenberg, you don't even have to do that. The ultimate anti-Bork tactic is irrelevance: "Democracy is not the product of law," Rauschenberg revealed, "democracy is the need of people to be free in dreams and reality." Dreams and reality? Wait, there's more: "Socrates and Plato, as seen on TV yesterday, are an 'in accord' [sic] disagreement for their time, but are no more than history." How's that again? "If this country is to remain the enviable land of growth and promise, that is what has to be gardened. Jurisdictional responsibilities begin before law." As Senator Edward Kennedy put it: "I have had the opportunity to read your testimony. It is just superb."

And he should know. His public statements have revealed a staggering desire to avoid legal or judicial philosophy, as well as a penchant for hype:

"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."

He opened his questioning on the subject of compulsory abortions, greeting Bork's occasional attempts to raise particular cases with a constant: "I was basically interested, rather than getting into the cases, just to get at the rationale * * *" In one of the more rambling passages of the hearings, in a reference to "other civilizations," he spent four minutes talking about book burnings without any reference to Bork's First Amendment decisions, or any other decisions for that matter: "The first book-burnings was [sic] the Bible I understand * * *" Throughout the hearings, he went for the Phil Donahue profundity "What I hear you saying is * * *," paraphrasing a parody of Bork's apparent views, regardless of Bork's testimony, just for the camera. Ollie North would have been proud of him.

At one point in the increasingly irrelevant hearings, the novelist William Styron reflected on what he called a "fantasy scenario" in which philistinism could be foisted upon the American people by a radical justice. One less than fantasy scenario is that the Bork nomination will be defeated not on the merits of the case, nor on the debate in the Senate, but by special interest-group hysteria. The only nominee who in the future will be able to survive the demagoguery will be someone who can respond in kind. Some of Bork's opponents may soon run the risk of getting the Supreme Court justice they deserve.—ANDREW SULLIVAN.

Mr. McCLURE. Mr. President, that indicates some tactics of the opponents in their opposition, sometimes their mindless and sometimes overstated opposition, to Judge Bork. I think it makes excellent reading for those who are called upon to review and to think in their own minds the qualifications of this nominee.

I yield the floor.

The PRESIDING OFFICER (Mr. ROCKEFELLER). The Senator from Oklahoma.

Mr. NICKLES. Mr. President, I ask unanimous consent to proceed as in morning business for 10 minutes.

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

## NOMINATION OF JUDGE ROBERT BORK

Mr. NICKLES. Mr. President, today I rise in support of Judge Robert Bork for U.S. Supreme Court. Mr. President, at the outset let me state my strong distaste and displeasure for the conduct of some of my colleagues and many groups for the quite evident distortions and misinformation concern-

ing Judge Bork's nomination. These same groups possibly were just warming up when we went through the confirmation process for Chief Justice Rehnquist. In my opinion, Justice Rehnquist has been an outstanding jurist and is doing an outstanding job as Chief Justice. Certainly the assault made on him was not only unnecessary, but also an embarrassment to the Senate, in this Senator's opinion.

Likewise, the attacks on Judge Bork have been unprecedented. In fact, we have had national TV ads and full-page newspaper ads completely distorting Judge Bork's outstanding record. I believe this is very unfortunate and sad for the Senate and for our country because seldom have we had such a qualified nominee for the U.S. Supreme Court.

Judge Bork was confirmed in 1982 for the U.S. court of appeals. During the confirmation process Judge Bork received the highest rating possible from the ABA, a unanimous rating which stated he was "exceptionally well qualified." Judge Bork was unanimously confirmed by the Senate, and since his appointment to the U.S. court of appeals he has been involved in over 400 majority opinions and he wrote the majority opinion in well over 100 of those decisions, none of which has been overturned by the U.S. Supreme Court. Judge Bork has dissented in 20 cases, 6 of which were reviewed by the Supreme Court and all of which were upheld by the U.S. Supreme Court.

His record since his appointment to the U.S. court of appeals has been outstanding by almost any standard. Is there anything that would cause any Senator during the period since he was appointed to the court of appeals to change his opinion in 1987 from what it was in 1982? I should think not.

Yet we have heard colleagues; we have heard various organizations state that Judge Bork is a radical. That he is to the far right, that he has extreme views. Former Chief Justice Burger in testifying before the Judiciary Committee stated, "It would astonish me to think that he is an extremist any more than I'm an extremist." He went on the say concerning the question of whether black citizens, minorities, or women should fear Judge Bork, "If they need to fear him, they should have been fearful of me. I can see nothing in his record that would suggest that or support it."

Is Robert Bork a radical? If he is a radical, he has only one vote and certainly would be in the minority of the U.S. Supreme Court. Would he swing the Court? Would his vote be the pivotal vote? If that is the case, there must be at least four others on the Supreme Court who would agree with his opinion. Do we have other radicals on the Supreme Court? How many of my colleagues want to state that Chief Justice Rehnquist, Judge Scalia, or Judge O'Connor would qualify under such a definition? I think not.

Again we have had personal attacks in the last several months that just flatly are contradicted by the facts. Judge Bork is not a radical. His decisions have been in the majority in most of the cases, and all have been upheld by the Supreme Court, in no way whatsoever should be viewed by this body or the American people as radical. Some have said that his votes might infringe upon the civil rights of Americans. In checking his record, he voted seven out of eight times for the claimant in civil rights cases before his court.

The real issue boils down to judicial restraint versus judicial activism. Many of my colleagues and many of the groups throughout the country are very supportive of judicial activism. I would suggest they reread the Constitution, which we have all revered so strongly this year during its 200th anniversary. It states in article I, section I that "all legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of the Senate and the House of Representatives." The Constitution also states in the 10th amendment that "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. Judge Bork stated it very well during his confirmation hearings when he stated:

> My philosophy of 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 legislatures, and executives of the 50 States, and to the American people.

I could not agree more.

I am angered when I see the Supreme Court legislating. It is common knowledge that in 1973 the Supreme Court in Roe versus Wade legalized abortion. Regardless of what your opinion is on abortion, Members of Congress and the American people should be bothered by the fact that the courts legalized abortion. If Congress wants to legalize abortion, then let Congress enact a statute legalizing abortion.

Let us bring it up for a vote in Congress. Let us pass it, yeas and nays, because article I of the Constitution says that Congress shall pass all laws, not the Supreme Court.

Again, in reading article I it says, "All legislative powers shall be vested in Congress." It did not say shall be vested in the Supreme Court. I think our forefathers had good common sense in doing so, knowing that the people have a call on the elected officials and if they don't like the laws that we pass then they can change the makeup of Congress. We don't have that option with the Supreme Court.

The courts are protected, but the courts are supposed to interpret the Constitution; they are not supposed to rewrite the Constitution. The courts are supposed to interpret the laws, not to legislate, not to pass laws.

I am angered when I see a court mandate the number of square feet that need to be in a prison cell or the size and shape of a prison or when we see the courts throw out evidence used in criminal cases that allow criminals to walk free or courts that give more protection to criminals than to the victims of crime.

I am aggravated as an elected official when I see the Court reorder and revamp the entire communications system instead of elected officials making those decisions.

Again, a lot of this issue boils down to whether or not we are going to have judicial activism or judicial restraint. I fall on the same side of the issue as Judge Bork in saying that the Court should interpret the Constitution, should interpret the laws as written and allow elected officials, whether it be the Congress or the State legislatures, to make the laws. That is the proper check and balance system established in the Constitution.

Seldom do we have a nominee come before Congress and share his thoughts and his past decisions in such depth and detail as did Judge Bork. Most will claim that such questions may come before the Court in the future and therefore they will respectfully decline to answer. I am sure that I probably would not agree with every decision that Judge Bork has made or that he will make. But I do not believe that the Senate has ever had a nominee state in such detail his thoughts and opinions on issues before the Court.

I am afraid the real losers in this nomination process will be the Senate and the American people because in the future the nominees will say, "Senator, I would like to answer that question but that is an issue that may well come before the Court and therefore I respectfully decline." And so we will be confirming judges in the future that will not be as open as Judge Bork and we really will not know how they will be coming down on a lot of critical issues.

I think the real losers in that process are the Senate and the American people.

Mr. President, in conclusion I wish to compliment Judge Bork for his performance before the Judiciary Committee and also to compliment him for the outstanding work that he has done on the U.S. Court of Appeals.

Mr. President, I apologize to Judge Bork and to his family for the misinformation and the abuse to which

they have been subjected during this confirmation process. I am confident that Judge Bork will continue to serve this country very ably, very well, whether it be as a judge on the U.S. Court of Appeals or a Justice on the Supreme Court. I hope that it will be on the Supreme Court. If not, I think not only has Judge Bork lost a confirmation battle and the administration suffered a defeat, but I believe the real losers are the Senate, the confirmation process, and the American people. We will have denied the American people the opportunity of one of its brightest minds, keenest intellects; the most qualified nominees to serve on the U.S. Supreme Court.

Mr. President, I urge my colleagues to support and confirm the nomination of Judge Robert Bork to the U.S. Supreme Court.

I yield the floor.

The PRESIDING OFFICER. The Republican leader is recognized.

Mr. DOLE. Mr. President, are we in morning business?

The PRESIDING OFFICER. If the Republican leader wishes to speak in morning business he should so request.

Mr. DOLE. I ask unanimous consent I may do so for not to exceed 5 minutes.

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

## JUDGE BORK'S FIGHT

Mr. DOLE. Mr. President, first I wish to thank the distinguished Senator from Oklahoma for a very fine statement on Judge Bork. My primary reason for coming to the floor at this time is to take my hat off to Judge Bork, who is not going to give up the fight. He has just announced on television that he wants a vote. He is entitled to a vote. He is entitled to have some reasonable debate on this Senate floor by those who oppose and those who support his nomination; reasonable debate, not personal attacks and innuendo or slick advertising slogans.

He had two choices. One was to tuck his tail under his legs and run, because enough of the mighty Senators have announced against him. But he chose not to do that, which I think is a rather courageous thing to do. He is not going to change the vote, I do not believe, unless something happens that I do not expect. I assume there are more than 50 votes against Judge Bork. Maybe some will say, "It is foolish. What does he gain from it?"

Well, maybe it will keep his reputation intact. Maybe people will understand how the process should work. Maybe other good people, men and women, Democrats and Republicans, 5 or 10 years from now will not shy away from Government service because of the treatment Judge Bork received. Maybe by his example of courage it will mean we will have better people, men and women in Government.

But, I suppose in the final analysis, meeting with the President as he has earlier today, Judge Bork decided to stand and fight even though it was probably a lost cause. I certainly cannot fault anyone for that. That is what America is all about—fight against the odds. And the odds in this case are probably unbeatable—probably. There is always some hope that those who rush to judgment without much thought will become involved in the debate. Maybe we can depoliticize the Bork nomination. Maybe we can wring 1988 out of the Bork nomination. Maybe we can do a lot of things just suggested by both Senators McCLURE and NICKLES and take a look at what a judge's role should be.

So I want to commend not only Judge Bork, but his wife Mary Ellen and his children because this, as I understand, was a family decision. I would hope that when Judge Bork left the meeting with about 16 or 18 of us on Wednesday he understood that he had all kinds of friends in this body. And some who may not vote for him are his friends. They are not enemies of Judge Bork. But I believe he left here on Wednesday knowing for the first time that there was a strong and a good number of Senators who were willing to stand up and make the fight with him, Senators who are willing to demonstrate to the American people that you cannot be run out of this town without a lot of good debate, without a chance for the American people to know what has happened. The people do not read the cases. They cannot tell you what happened in all these cases about which people are raising questions. Judge Bork was responding. And as he indicated on television, he was somewhat restricted in what he could say within the bounds of propriety and the fact that he is a circuit court judge. Those asking the questions could say anything.

So hopefully on this Senate floor sometime soon, maybe in a couple weeks, we will have a good debate about the process, about the system and about the importance of the judiciary as we celebrate the 200th anniversary of the Constitution. Are we going to tear it up because somebody does not like Judge Bork, because they can raise millions of dollars to lobby against Judge Bork, who happens to be a conservative? Maybe next time the nominee will be a liberal and they will raise millions of dollars to, in effect, to tear up the Constitution when it comes to the Supreme Court of the United States. So I salute Judge Bork. His announcement 10 minutes ago, a year from now, or 5 years from now or 10 years from now, will earn him a profile in courage.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. McCLURE. Mr. President, I ask unanimous consent to proceed as if in morning business for not to exceed 5 minutes.

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

## JUDGE BORK

Mr. McCLURE. Mr. President, I commend the distinguished Republican leader for the statement he just made with respect to Judge Bork's decision. As I said a few minutes ago, it was particularly appropriate perhaps to take the floor and say something about the judge's positions, the support that he had from the Vice President both for himself and for the process, and to illustrate some of the tactics by the opposition as illustrated in the article I quoted from New Republic, which was placed in the RECORD.

Now that the judge has made his decision, I too want to join the distinguished Senator from Kansas, our Republican leader in the Senate in saluting the judge's courage because I do believe the judge was exactly correct when he said that if it were just Bob Bork, he would ask his name to be withdrawn.

That is a human reaction and I think every one of us can sympathize with and can understand if that had been his decision. But at the same time I also have to agree with Judge Bork in the statement that he made a few minutes ago in which he said but there is more to this than just Bob Bork, for the issue is not Judge Bork. It is a larger issue. And indeed this Senate, after due deliberation and the opportunity perhaps to look more fully at the facts and not propaganda, may find it in our collective will and wisdom to confirm that nomination, and we may perhaps not do so. But if he is turned down, I hope that the President of the United States will promptly submit to this Senate a judge, a nominee for the office of Justice of the Supreme Court of the United States, a man who would have equally firm principles and conservative positions with respect to the Constitution and the role of the judiciary in making the laws, and reviewing the laws of the United States.

If indeed that is the course of events, that Judge Bork should be denied the opportunity to serve based upon action in this body, and the President does make another nomination of a man of similar legal opinions, then indeed you will find that Judge Bork is not the issue, that it is a larger and a different issue, we will find out perhaps, and the American public may find out what the real agenda was

among those groups who has so vilified a man of such obvious ability.

I think the Senator from Oklahoma said it very well a moment ago when he said what is there to fear in the intellect of one man and his opinions if indeed he is one vote out of nine on the Supreme Court? Because even if he were, as some have suggested, out of the mainstream of thinking, as some have suggested and not as I do, out of the mainstream of thinking, he certainly could not hold sway in the Court based upon his own opinion alone. He would become an effective change in the Court's direction only if four other Justices agreed with the position that he took.

I do not see the danger to the Republic in that position. But I see a great danger to the Republic when what we do is politicize the choice based upon the political philosophy, not upon the qualifications or the ability of the nominee, and that I think is exactly what we have seen in the unprecedented attack upon Judge Bork and his nomination.

I thank the Chair. I yield the floor.

Mr. BUMPERS addressed the Chair.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. BUMPERS. Mr. President, I heard the President of the United States 2 days ago refer to the action in the Senate on Judge Bork as a lynch mob. I take exception to that from anybody, but from the President of the United States I find that offensive. I find a lot of things that have been said recently about his Bork nomination not only offensive, but apparently when people are losing, the winning side becomes a lynch mob. It is as though some kind of a cosmic event has descended on the Senate, and they have taken leave of their senses; or they have all succumbed to some gigantic multimillion dollar public relations scheme. Right now there are 32 U.S. Senators who have come out for Judge Bork, and there are 53 who have come out against him. And there will be more.

Now, who is to suggest—talk about arrogance—that 53 Senators paid no attention to the hearings and paid no attention to the writings of Judge Bork or to any of his speeches. Somehow or other they were influenced by this arcane, so far as I am concerned unseen, public relations campaign. The mail in my office started out 4 to 1 in favor of Judge Bork. It is about even now.

I can tell you before Judge Bork testified, he would have been confirmed in the Senate. I can tell you based on conversations I have listened to in this Cloakroom by Senators who were genuinely concerned about doing their duty as the Constitution demands they do, that they read, they listened, they studied, and they came to what they thought was a sensible principled decision. This has nothing to do with Judge Bork's integrity. It has nothing to do with his intellect. What it has to do with is an awesome responsibility on Judge Bork's part that 53 Senators have found they do not believe that he would do what they think ought to be done in interpreting the Constitution. It is just that simple.

I am one of them. I had absolutely nothing against Judge Bork, and I might also say the only thing I have seen in the way of a public relations campaign is four-page ads in the Washington Post, in the Washington Times, in USA Today. I have yet to see a full-page ad of that multimillion-dollar public relations campaign I keep hearing about.

Here is one Senator that takes the advise and consent role very seriously. I am not one of those people who thinks just because the President nominates somebody the Senate is supposed to roll over and play dead. I am not one that is going to be intimidated by people talking about a lynch mob. When did you ever see 53 Senators go against their constituents?

You look at the polls in this country and see where Judge Bork is. See what the American people think about him, the people who did not hear his testimony, the people who have not read his opinions, read his speeches, or read his law review articles. I think it is really sad that we cannot stand here and debate Judge Bork's philosophy so far as interpreting the Constitution is concerned, concerning how he feels about the ninth amendment, how he feels about free speech, and how he feels about the American people's right of privacy. No, all you hear is that somehow or other everybody here is distorting Judge Bork's record, and distorting what Judge Bork said.

I can tell you it is a curious thing to me that when you win around here it is a great victory for the American people, and when you lose it is a lynch mob mentality.

You know the Founding Fathers almost did not even give the President the right to nominate the Supreme Court Justices. They wanted to do it right here in the U.S. Senate. They voted four times on the nomination issue, and the President's right to nominate Supreme Court Justices was soundly defeated all four times. Finally, just before the constitutional convention ended they tried one more time. Somebody said, OK, we will give him the right to nominate, but the Senate has to approve that nomination because, "It would be much easier for him to intrigue with the President than it would with all the Members of the Senate."

Does that sound like the President has some kind of an exclusive God-given power to decide who ought to be on the Supreme Court? I am always reluctant to mention a speech made by a Senator that is not on the floor, but the Senator from Idaho a moment ago said in quoting the Senator from Oklahoma that Judge Bork would be just one of nine. It is not the end of the world. He is just one of nine Justices. There are a lot of people around here concerned about one of nine. A lot of decisions are made in the Supreme Court by a 5-to-4 vote. That one person is very important to the liberties and the freedoms of the people of this country. There are 100 Senators, 11 times more Senators than there are Supreme Court Justices, and who in this body has ever gone to the electorate in his home State and said, "I am running for the Senate. It really isn't important. I would be just one of a hundred"? Did you ever hear anybody run for the Senate that way, Senator? Of course, you have not, and you never will.

Being a U.S. Senator is a very important position. People who come here ought to understand the history of this country. They ought to understand the Constitution, who framed it, what was said, how they reached those decisions, and understand the awesome responsibilities of one Supreme Court Justice. One Supreme Court Justice can change the tide of history.

So I listened very carefully. I am not one of those people who made up his mind 10 minutes after the President nominated Judge Bork. I was concerned about the "Saturday night massacre." I was concerned about his so-called doctrine of original intent theory. I was concerned about some things he did in the past that he now rejects. I was concerned about the fact that he has shifted political philosophies three or four times.

As I said in my formal statement the other day, it made me ask, "Who is the real Robert Bork?"

So if there is some kind of scheme developing here to convince the American people that suddenly 53 Senators have taken leave of their senses because they oppose Judge Bork, that is not going to work. These Senators are living, breathing human beings, with just as much intellect and understanding of some of these issues as those who are for him.

I do not criticize, condemn, demean, or denigrate any of the 32 people who have come out for Judge Bork. They see it differently from the way I do. But that is not to impugn their integrity or suggest that they have somehow succumbed to idiocy because the Moon was full last night.

I have absolutely no quarrel with Judge Bork staying in this thing and refusing to withdraw his nomination before it goes to the Senate floor. I think it might be healthy for the country to hear for the first time in detail a full-blown, honest-to-God

debate on national television about a Supreme Court nominee.

I never was a constitutional scholar and never professed to be. I studied constitutional law in law school, just as anybody else. I probably learned more about the Constitution since Judge Bork's nomination than I knew before, and from that standpoint it is healthy. It would be healthy for the American people to get involved in what these issues are and put that lynch mob junk aside, that PR campaign stuff aside, have an honest-to-God debate, and stop the namecalling. I have never seen that solve anything.

The people did not send me from Arkansas to the U.S. Senate to say, every time somebody disagreed with me, that he is un-American or there is a Communist hiding under his desk.

I was disturbed the other day when the President said—and I paraphrase this—that there was a time when Congress had committees that investigated even their own Members when they were suspected of Communist leanings. I am not sure of this, but I can only believe that the President was alluding to the House Un-American Activities Committee, which was created during a fairly shameful time in the history of this country, and a lot of innocent people got tarred with that brush.

I could not believe the President had said that. He is the President; he has a right to say anything he wants to. As a matter of fact, he is a free citizen, President or not, and he has a right to say that; and as long as I am in the U.S. Senate, he will retain that right.

I do not want to fall in the trap of one of the Presidential candidates, but I think it was Jean Cocteau—and I will defer to my distinguished colleague from New York, who would know.

Mr. MOYNIHAN. I believe it was Voltaire.

Mr. BUMPERS. Voltaire. He is absolutely right. I would never argue with a scholarly gentleman such as my colleague.

Voltaire said, "I disagree with what you are saying, but I will fight to the death your right to say it."

That is what has made this country great, and that is what will keep us great. The thing that will take us down to the dirt and mire, until people are confused and do not know what to think, is namecalling. So I hope it will stop very shortly.

I yield the floor, Mr. President.

The PRESIDING OFFICER. Who seeks recognition?

Does the Senator from Arkansas wish to suggest the absence of a quorum?

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

## THE 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 understandings 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 immune defenses, 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 gratifications 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 of 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 schools of the District of Columbia.

We have said goodby to all that. And without regret. Not long ago Bayard Rustin died in New York City. He who organized that 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.

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## NOMINATION OF JUDGE BORK

Mr. MELCHER. I am not critical of President Reagan for nominating Judge Robert Bork for the Supreme Court. Criticism directed at the President by those who are alarmed that Judge Bork would make the fifth swing vote in favor of conservatives should be weighed against the historic practice of previous Presidents, such as President Franklin D. Roosevelt's nomination to the bench of those attuned with the more liberal policies supported by that President.

Nor can I accept that a vote in the Senate for or against Judge Bork should be cast for the purpose of political gain. Our responsibility as Senators is to determine if Judge Bork's qualifications are exemplary and if his judicial understanding of the Constitution is worthy of the trust of the people.

I find Judge Bork's qualifications to be exemplary. But on the second point, I have concerns and doubts on Judge Bork's judicial interpretation of the Constitution, and I do not believe he merits the trust of the people to interpret the Constitution to protect their rights, their freedom and their accessibility to the Federal courts as arbiters to determine when Congress has enacted statutes or the executive branch has taken actions that violate the Constitution.

The people's trust in the checks and balances of the Constitution has been well nurtured by the Court's decisions over the 200 years since the Constitution's adoption. Those checks and balances have been defined by the decisions of the Court. Without access to the courts in the past, when the people sought to have the Constitution interpreted by the courts, the peoples' constitutional rights would have been denied. And, in the future, if the access to bring a case before the Federal courts is denied, the people's rights may be denied for lack of the Court's interpretation. I believe Judge Bork's history on the Appellate Court here in the District of Columbia and his decisions from 1982, when he was appointed, until 1985 demonstrated that he was in the mainstream on decisions of both the appellate court on which he serves and the Supreme Court. However, he shifted in 1985 in his dissenting opinion in Barnes versus Kline to recant some of his previous

views and to make it much more difficult for some to gain standing to bring about a determination by the courts on consitutional matters. Judge Bork set himself apart from the rest of the appellate court in that dissenting opinon and I believe his shift to a narrower view was a radical shift and a dangerous shift that requires the Senate to reject his nomination to the Supreme Court.

It is not easy to exercise that right of bringing a case before the Federal courts to determine the constitutionality of Government action or to determine if an act of Congress is constitutional. The Federal courts determine the conditions of determining under what conditions "standing" is allowed so that a case will be heard. First, the governmental action claimed to be unconstitutional has to cause or result in injury to the party asserting that the governmental action is unconstitutional. Second, the Court must decide if the injury is a specific injury to the individual or organization rather than just a general type injury that is shared by all the people. Third, there has to be some convincing demonstration that the complaint and injury can be remedied.

Well, that is all tough enough to meet, to get a suit before the Court and have it heard.

The Federal court determines if the individual citizen or organization making the claim on the constitutionality of a Government action has demonstrated that injury has specifically occurred to them, and that a remedy for the injury can be applied. If those conditions are satisfied, then the case has standing and the Federal court will hear the case.

If a suit cannot be brought before the Federal courts, citizens or organizations can be denied the determination if governmental actions are constitutional. Only the Court can make that determination.

The great bulk of the discussion on Judge Bork's appointment to the Supreme Court has dwelled on other issues, but none of these is as fundamental as the question of "standing" to bring suit on the constitutionality of a governmental action. That is fundamental to a citizen's rights under the Constitution.

I shall vote against and shall vigorously oppose his appointment to the Supreme Court because Judge Bork in his opinion to restrict standing demonstrates that he would refuse to have political actions of Government reviewed for constitutionality. That is a dangerous position that dilutes constitutional protection that would be damaging to my constituents and all citizens whose rights we seek to uphold and protect.

Judge Bork's views and decisions on the appellate court regarding the standing of Members of Congress to bring suit in Federal court for constitutional interpretation are contrary to my own, are contrary to his own appellate court, and are contrary to what I believe is in the best interests of representative Government under the Constitution.

Judge Bork's decision regarding "standing" in the appellate court in the District of Columbia is only the view of an appellate judge. His decision on "standing" to have a case heard to determine if an act of Congress or an action of the executive branch is constitutional is not the opinion of the majority of the judges on the appellate court on which he sits. Therefore, he is overruled by his peers.

Judge Bork asserted that Members of Congress should not have "standing" in Federal courts writing his dissenting opinion in 1985 in Barnes versus Kline. He went not just to "standing" for Members of Congress, but also directly and indirectly to the question of "standing" for States to bring a suit and constitutionality for interpretation of the courts. His interpretation of Supreme Court decisions on this matter strayed from his appellate court colleagues.

In this particular case, Judge Bork wrote the dissenting opinion and the two other appellate judges held differently. Judge Bork's strong view opposing "standing" of Members of Congress before the Federal judiciary is not the prevailing view in that appellate court jurisdiction which must either agree or disagree with the decisions of the three-judge tribunals set to decide cases on appeal. His dissent is buried and, at present, is of no effect because his appellate court colleagues overrule his opinion. However, if he were on the Supreme Court and one of only nine Supreme Court Justices, his views would take on more weight and, for that reason, I believe he should stay at the appellate level.

In short, if Judge Bork's dissent on "standing" became the law of the land, it would nullify part of the constitutional review, and the fate of the Constitution would be unknown. It has been necessary since Marbury versus Madison to have judicial interpretation of the Court. Without that, the Constitution would not protect us, the Government would evolve differently, and individual and collective rights of the people would be in jeopardy.

I shall vote "no" on his nomination.

Mr. President, for more than 30 years I have held elective offices on the city council and as mayor of my town, Forsyth, located on the Yellowstone River in Montana, and have held offices both in the House and Senate in the Montana Legislature, and also in the U.S. House of Representatives, the seat of our Federal Government. Since 1977 I have been here in the Senate.

I have seen the effects of law on peoples' lives. I have observed the interlocking of city ordinances, State statutes, and Federal laws. And all those are based on the restraints of the U.S. Constitution.

The law at times seems harsh and demanding, but on balance individual freedoms, the peoples' rights, have been protected by the Constitution. Fundamental to that right is the right of correction of the excesses of those who, from time to time, have exceeded or infringed on the Constitution, and that right of correction is basic to the peoples' trust in our Government.

They rely upon Congress, upon the President, and upon the courts through the checks and balances embodied in the Constitution to protect and to preserve their rights.

Today is part of that checks and balances. Today, as part of that responsibility given to us here in the Senate to protect and to preserve the peoples' rights, I say no to the nomination of Judge Bork to the Supreme Court.

Mr. President, I yield the floor and 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. MELCHER. 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. MELCHER. Mr. President, I ask unanimous consent that the Senator from California [Mr. WILSON] be recognized to proceed as in morning business.

The PRESIDING OFFICER. The Senator from California.

Mr. WILSON. I thank the Chair and I thank my friend from Montana.

## THE DEATH OF CLARE BOOTH LUCE

Mr. WILSON. Mr. President, the 20th century has lost one of its formidable citizens, one of the most colorful, most charming figures to cross the stage of this century, a woman of formidable intellect and formidable charm. The stage has lost one of its most creative talents. In the world of politics, it has lost one of its most eloquent and thoughtful apostles in human freedom.

Clare Booth Luce is dead and it is not just Broadway whose lights will dim. The glow of Mrs. Luce's extraordinary life has brightened decades of American life. Her story is a fabulous one of precedents broken and obstacles demolished, a woman clearly ahead of her time.

She was a woman who shaped her time and the future, and she was,

ans—and they have retained the name, American Indians.

So on Monday, let us remember this great man. If he had not reached America of course, someone else would have, in time, but he not only discovered a new world, but he gave the human spirit a new vision. In 1492, people of the Old World probably felt they did not have much to look forward to. But 30 or 40 years later, after Columbus had made his four voyages, what a new world, and what a renewal of the human spirit.

Mr. President, I close with a fitting verse written by Joaquin Miller—"Columbus."

Behind him lay the gray Azores,
Behind the Gates of Hercules;
Before him not the ghost of shores
Before him only shoreless seas.
The good mate said: "Now must we pray,
For lo! the very stars are gone.
Brave Admiral, speak, what shall I say?"
"Why, say 'Sail on! sail on! and on!
"My men grow mutinous day by day;
My men grow ghastly wan and weak."
The stout mate thought of home; a spray
Of salt wave washed his swarthy cheek.
"What shall I say, brave Admiral, say,
If we sight naught but seas at dawn?"
"Why, you shall say at break of day,
'Sail on! sail on! sail on! and on!' "
The sailed and sailed, as winds might blow,
Until at last the blanched mate said:
"Why, now not even God would know
Should I and all my men fall dead.
These very winds forget their way,
For God from these dread seas is gone.
Now speak, brave Admiral, speak and say"—
He said: "Sail on! sail on! and on!"
They sailed. They sailed. Then spake the mate:
"This mad sea shows his teeth to-night.
He curls his lip, he lies in wait,
With lifted teeth, as if to bite!
Brave Admiral, say but one good word:
What shall we do when hope is gone?"
The words leapt like a leaping sword:
"Sail on! sail on! sail on! and on!"
Then, pale and worn, he kept his deck,
And peered through darkness. Ah, that night
Of all dark nights! And then a speck—
A light! a light! a light! a light!
It grew, a starlit flag unfurled!
It grew to be Time's burst of dawn.
He gained a world; he gave that world
Its grandest lesson: "On! sail on!"

Mr. President, I will be happy to yield the floor to any Senator who wishes to speak. I had indicated to the distinguished Republican leader that it was my intent to lay before the Senate at the close of today, the catastrophic illness legislation, and inasmuch as he knew I was going to do that—and I have been authorized to do so after notification to the Republican leader—I shall do so at this time. There will be no action taken on the legislation today.

## MEDICARE CATASTROPHIC ILLNESS COVERAGE ACT

Mr. BYRD. I ask, Mr. President, that morning business be closed and that the Chair lay before the Senate S. 1127.

The PRESIDING OFFICER. Morning business is closed. The clerk will report.

The legislative clerk read as follows:

A bill (S. 1127), to provide for Medicare catastrophic illness coverage, and for other purposes.

## PROGRAM

Mr. BYRD. Mr. President, when the Senate completes its business today, it will adjourn over until Tuesday. The vote will occur on the motion to invoke cloture on the Verity nomination at 10 o'clock. And that will be a rollcall vote, being the first rollcall of the day, and it will be a 30-minute rollcall.

There is an order which Mr. REID wished me to enter for him, a 15-minute order, and I will do that. I could have the Senate come in at 8:45 or 8:30, but if it would be agreeable with all Senators for us to simply agree that the vote on cloture would begin at 10 o'clock, so that the Senate would not have to come in an hour earlier under the rule, I would be happy to enter that order. Otherwise, I will just have to let the rule be self-operating.

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

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

## JUDGE BORK'S COURAGE

Mr. HELMS. Mr. President, the announcement by Judge Bork today that he is remaining in the fight for his nomination until the final outcome is a decision that will delight and encourage his millions of supporters all over this country.

The nomination of Robert Bork has become a symbol. He has become a symbol giving us a choice of direction for this Nation. Those who want this country to go in one direction are opposed to Robert Bork; those who want this country to maintain its traditions of decency, rule of law, and respect for tradition want very much for Robert Bork to be confirmed.

But behind the symbol, Robert Bork, there is the man, Robert Bork. It is the man, Robert Bork, whom we have seen today in making his decision, a decision to continue in the confirmation fight to clear his name, to depend upon a full Senate debate to establish the facts and to delineate for the country the choice of direction that lies ahead, and this decision by Judge Bork reveals a depth of courage seldom encountered in public life today.

Even if Robert Bork should not be confirmed, he will be long remembered by the American people. He will be remembered not just for his great intellectual honesty and his gifted legal mind. He will be remembered as a man who stands and fights when the going gets tough.

As I told him when he and I talked just after he left the White House, I am very proud of him. He is a great American.

Speaking of great Americans, my father was one of the greatest Americans in the eyes of this son of his. My father was not famous, he was not rich, but he, too, had great integrity which he often expressed in sayings to me that conveyed great wisdom.

One of these I will never forget. He said to me one day, "Son, the Lord does not require you to win. He just expects you to try."

And that is precisely the lesson which Judge Bork has given us today. It is in the trying, the struggle against even impossible odds, that real character is revealed.

The odds for this Nation are so great, the outcome of this struggle is so important that it is essential for the sake of history that the outcome be clearly defined. Those who have been involved in the assault on Judge Bork must not be allowed to escape behind that same veil of so-called privacy which they assert gives women the right to kill their unborn babies. It is necessary, in a democratic nation, for the names of the proponents and the opponents of Judge Bork to have their names writ large on the documents of history.

It may well be true that a majority of Senators have publicly announced that they oppose the Bork nomination. But I yet have the hope that enough of my colleagues will reconsider their decision. After all, some who now say they oppose Robert Bork originally said that they would approve him. Indeed, most have already approved him twice for high office. I have enough faith in the integrity of my colleagues to believe, and certainly hope, that a fair and open debate in the Senate may sway some minds. If they have changed their minds once, who knows, they might change them twice.

In any case, Mr. President, the decision of Robert Bork makes it clear that the nomination debate will not be a debate between right and left. It will be a debate between right and wrong, between a man of character and those who seem not to recognize the need for character in public life.

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

fullest possible consideration of the details of the sale.

Sincerely,

CHARLES W. BROWN,
*Director.*

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[Transmittal No. 88-AD]

ADVANCE NOTIFICATION OF POSSIBLE SECTION 36(b)(1) STATEMENTS, FOREIGN MILITARY SALES

(a) Prospective purchaser: Saudi Arabia.

(b) Description and Quantity or quantities of articles or services under consideration for purchase: One hundred fifty conversion kits to modify 150 M60A1 tanks to the M60A3 Tank Thermal Sight configuration and contractor services to install the kits in Saudi Arabia.

(c) Estimated value(s) of this case: $120 million.

(d) Description of total program of which this case is a part: Same as (b) above.

(e) Estimated value of total program of which this case is a part: Same as (c) above.

(f) Prior related case, if any:

FMS case USK—$123.4 million—June 1976.

FMS case UZI—$42.4 million—September 1979.

FMS case VFS—$175.9 million—December 1983.

(g) Military department: Army [VIX].

(h) Estimated date letter of offer/acceptance [LOA] ready for formal notification to Congress: October 1987.

(i) Date advance notification delivered to Congress: October 8, 1987.

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POLICY JUSTIFICATION

SAUDI ARABIA—TANK CONVERSION KITS

The Government of Saudi Arabia has requested the purchase of 150 coversion kits to midify 150 M60A1 tanks to the M60A3 Tank Thermal Sight configuration and contractor services to install the kits in Saudi Arabia. The estimated cost is $120 million.

This sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country which has been and continues to be an important force for economic progress in the Middle East.

Saudi Arabia needs these tank conversion kits to standardize its U.S. origin armor force which currently includes M60 tanks in both the A1 and A3 configurations. The lack of standardization causes training and logistical problems which conversion will help to alleviate. Saudi Arabia will have no difficulty absorbing these tank conversion kits into its armed forces.

The sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Generral Dynamics Services Company of Sterling Heights, Michigan.

Implementation of this sale will not require the assignment of any additional U.S. Government personnel: however, 27 contractor representatives will be required in Saudi Arabia for two years.

There will be no adverse impact on U.S. defense readiness as a result of this sale.

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## JUDGE ROBERT BORK

Mr. COHEN. Mr. President, the nomination of Judge Robert Bork to the Supreme Court has set off frenzied attacks and endorsements that are unprecedented during my service in the Congress for the past 15 years. His approval or rejection, while important, is not an imperative of fatal consequence to the Court. If approved, he would not lead the Court off over the edge of the right wing world. If rejected, the Court will continue to function with an excellence that has not been impaired by his absence.

But the manner in which the Senate goes about deciding his future and fate will have profound consequences for the country and for this institution.

I have spent the past few weeks reviewing articles and opinions written by Judge Bork as well as his testimony before the Senate Judiciary Committee. I have been asked to express support or opposition even before the Judiciary Committee voted on his nomination just 2 days ago. Apparently, we have reached the point in our political process where we insist upon a wonderland mandate of "verdict now, evidence later."

Frankly, I have been appalled by some of the pettiness and invective leveled against Judge Bork, just as I have been struck by some of the moral pieties of some of his supporters.

While I do not support much of the President's social agenda, the fact remains that the President is entitled to nominate individuals to the Supreme Court that he believes view the world through the same philosophical prism as he does. And it is my belief that the Senate, as an institution, must be convinced that his choice is so lacking in intelligence, personal or professional integrity, or judicial competence that the nominee's confirmation would result in a disservice to the Court and to the country.

While I do not share the restrictive interpretation of the Constitution that Judge Bork has articulated, I am not persuaded that his views are so extreme as to place him beyond the pale of judicial acceptability.

Judge Bork's past essays are valid objects of examination as they are key to understanding his deductive abilities and philosophical convictions. But his writings as a professor should not be viewed in isolation or without regard to his service as Solicitor General or on the Circuit Court of Appeals for the District of Columbia.

It is argued that he must be held to his words even though his views may have evolved. That is a standard to which we would not hold ourselves.

A number of Senators from the South, for example, resisted the coming of civil rights in the 1960's and the early 1970's and are now strong advocates of enforcing and, indeed, even enlarging those civil rights.

Justice Thurgood Marshall recently observed that President Johnson had the best record of any President on civil rights. As a President, perhaps; as a Senator, hardly. Were President Johnson's—and those of his Senate colleagues—change of views the result of pragmatic expediency or rather that of an evolving enlightenment? Few of us are able to look behind the words into the hearts of those that express them.

I don't know whether Judge Bork has changed his views in a calculated and cynical effort to appease his opponents or whether his expressions consist of a heartfelt admission that the Constitution was not etched in stone and handed down from Mount Sinai and that while the vessel that embodies our political and social values must be firm, it must also be flexible. I cannot make an absolute determination any more than I could pass judgment on the changing views of my distinguished colleagues. But I do know that Judge Bork is capable of change—from one who embraced socialism, then libertarianism, and now conservatism. I view that capacity for change as a positive element in his character.

Ironically, his capacity for change is now held against him. Predictability is the touchstone by which we shall pass judgment on his worthiness for the bench.

It is interesting to note that Judge Bork's opponents and supporters both subscribe to this view. Opponents view expression of doubt or change as craven expediency. His supporters fear the same. Ideologues, liberal or conservative, tend to view doubt or deviation from their totem pole of tests as unacceptable apostasy.

But Presidents have learned that party labels and prior philosophic views of nominees have not proven a reliable index to their future behavior. Were Oliver Wendell Holmes, Jr., Hugo Black, Earl Warren, and Lewis Powell known quantities before they went on the bench or did they shift into the unknown, the unpredictable, only after confirmation?

I am certain that Judge Bork does not share my views on a number of key issues. But if I were to apply the test of my views to those of past nominees, I would not have voted for Justices Black, Powell, O'Connor, Rehnquist, or Scalia.

Some have suggested that Judge Bork should be confirmed because his successor would be far worse. That is an idle threat because I would have no hesitancy to vote against any one I believe to be unqualified to sit on that august bench.

A more plausible argument is that if Judge Bork is defeated or withdraws, his replacement is likely to be more conveniently predictable, more mainstream, less provocative, and perhaps even rather mediocre by comparison.

I believe that if Judge Bork is confirmed, there are three results that could follow:

First. He, by the sheer force of his intellect, would pull the Court toward

right wing radicalism—which I think is unlikely;

Second. His extremism would drive even the conservative members of the Court to the philosophical center—which is possible;

Third. He will evolve into the same kind of conservative centrist as the man that he is replacing—a result I regard as quite probable.

Late last night, I reread the papers of Justice Felix Frankfurter—"Of Law, Life and Other Things That Matter."

Upon his retirement, his fellow Justices wrote Frankfurter a wonderfully sensitive and touching letter. It was signed by Earl Warren, Hugo Black, William Douglas, Tom Clark, John Harlan, William Brennan, Jr., Potter Stewart, and Byron White. Justice Frankfurter responded in kind. In his letter "To his brethren," he left us with some characteristically important words:

The nature of the issues which are involved in the legal controversies that are inevitable under our constitutional system does not warrant the nation to expect identity of views among the members of the Court regarding such issues, nor even agreement on the roots of thought by which decisions are reached. The nation is merely warranted and expecting harmony of aims among those who have been called to the Court. This means pertinacious pursuit of the processes of reason and the disposition of controversies that come before the Court. This presupposes intellectual disinterestedness in the analysis of the factors involved in the issues that call for decision. And this in turn requires rigorous self-scrutiny to discover with a view to curbing, every influence that may deflect from such disinterestedness.

Mr. President, I believe that Judge Bork is capable of measuring up to the intellectual vigor and moral responsibilities required by service on our Highest Court.

I yield back the balance of my time.

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## FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1988

(Yesterday, October 8, 1987, the Senate passed H.R. 1777, as amended by the Senate. The text of the bill as passed follows:)

H.R. 1777

*Resolved*, That the bill from the House of Representatives (H.R. 1777) entitled "An Act to authorize appropriations for fiscal years 1988 and 1989 for the Department of State, the United States Information Agency, the Voice of America, the Board for International Broadcasting, and for other purposes", do pass with the following amendment:

Strike out all after the enacting clause and insert:

*SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.*

*(a) SHORT TITLE.—This Act may be cited as the "Foreign Relations Authorization Act, Fiscal Year 1988".*

*(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:*

*TABLE OF CONTENTS*

UNITED STATES OF AMERICA

# Congressional Record

PROCEEDINGS AND DEBATES OF THE 100th CONGRESS

FIRST SESSION

## VOLUME 133—PART 20

OCTOBER 13, 1987 TO OCTOBER 21, 1987

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## RESERVATION OF REPUBLICAN LEADER'S TIME

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the Republican leader be reserved during the day.

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

## RECOGNITION OF SENATOR PROXMIRE

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Wisconsin is recognized for not to exceed 5 minutes.

Mr. PROXMIRE. Mr. President, this has been a doubleheader day. We had two fine prayers this morning, one by the Chaplain and one by the majority leader. They are both a great inspiration. I am glad I was on the floor to hear both of them.

## THE MERGER MANIA HITS WISCONSIN AND THE NATION HARD

Mr. PROXMIRE. Mr. President, any Senator who believes that the so-called merger mania is just rhetoric should consider what has happened to the firms in his State. My State of Wisconsin is, in many ways, typical. With 50 States in the Union, the average State has about 2 percent of the population. Wisconsin has just that: about 2 percent of the population. Per capita income in Wisconsin is very close to the national average. Our State is slightly stronger in both manufacturing and agriculture than the typical American State and slightly less strong in services. But the difference is only slight. Unemployment and inflation in Wisconsin have been consistently close to the national median. Wisconsin does have fewer of the very rich and fewer of the very poor than would be its average share. For that reason it has more of the economic middle class.

The year 1987 has been like no other year in our State's economic history in one major respect. We have lost ownership of more of our largest and most profitable and efficient firms to out-of-country and out-of-State buyouts than ever before. Four of Wisconsin's twelve biggest firms, measured by sales were taken over, all by out-of-State groups in the first 9 months of 1987. The third and fourth biggest firms in Wisconsin were bought out by foreign firms. Were these firms taken over because they were lazy, incompetently run, unprofitable firms that were not rewarding their stockholders with an adequate return on their investment? No way. Three of the four firms reported extraordinary returns on their equity in 1986. The returns for the fourth were not publicly available.

Consider: the State's third biggest firm and the largest firm that was bought out was the Heileman Brewing Co. of La Crosse, WI. Was it profitable? Heileman enjoyed a return on equity of 15.2 percent, an excellent return under any circumstances and at anytime. The second largest firm taken over was Manpower, Inc. Was Manpower, Inc. of Glendale, WI, an unprofitable business? Mr. President, in 1986 Manpower earned a sensational return on equity of 30.4 percent. It was one of the real stars of the New York Stock Exchange. Each of these companies enjoyed sales of more than a billion dollars in 1986. Now who bought these two extraordinarily profitable and efficiently managed Wisconsin firms? Both were bought by takeover specialists from foreign countries. Heileman was bought by an Australian corporation: Bond Corp. Holdings. Manpower was bought by a United Kingdom firm, England's Blue Arrow. Both of these large and highly successful Wisconsin firms were taken over after a bitter struggle. In the Heileman case, the Wisconsin State Legislature was able to pass defensive legislation which enabled Heileman to negotiate a settlement that both rewarded the Heileman stockholders and saved the jobs, the excellent Heileman management and a big part of the economic base of the Wisconsin community where Heileman is located.

The third largest Wisconsin firm hit by a takeover raid, Rexnord of Brookfield, WI, did not issue publicly available statistics on growth and profits. But this Senator remembers a much more human element of that fine company. Beginning in 1952, 36 years ago, when I started running for Governor of Wisconsin, I used to stand at the Nordberg factors gates shaking hands with workers and managers as they went to work beginning at about 6:30 a.m. and right on until 7:30 a.m. There was a fine management-worker relationship at that firm and great pride by its workers in Milwaukee and Wisconsin.

The fourth largest Wisconsin firm taken over last year was the Godfrey Co. of Waukesha, WI. How about Godfrey's competence and efficiency? Was this firm that had $664 million in sales in 1986 inefficient, unprofitable, a poorly run operation? Take a look at the record. In 1986 Godfrey's return to its stockholders was a sensational 22.5 percent on equity. And this was a pattern that Godfrey had established over the years. Between 1981 and 1986 Godfrey averaged an astonishing 24.7 percent return. Was Godfrey growing? Between 1985 and 1986 its profits grew by more than 52 percent.

Mr. President, the takeover of this country's most highly efficient and profitable firms represents a serious threat to our economic competitiveness. Time and time again these takeovers are paid for by massive increases in corporation debt that forces cash flow into paying interest on that debt and away from research and development, manpower training and buying more efficient equipment. Takeovers, especially hostile takeovers pour millions of dollars into the pockets of a few investment bankers, lawyers, and stock manipulators. But they are bad economic news for our State and for our country.

This is why a bill that would deal with this situation reported out by the Senate Banking Committee on September 30 by a 14 to 6 vote and now on the calendar is so critical for our country's economic future.

Mr. President, I yield the floor.

## RECOGNITION OF SENATOR REID

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Nevada is recognized for not to exceed 15 minutes.

Mr. REID. Thank you, Mr. President.

## CORPORATE TAKEOVERS

Mr. REID. We have heard a statement by the Senator from Wisconsin about his pleasure of being here this morning. I feel the same. The prayer of the Chaplain and of course the recitation by the majority leader were moving. But I state to the Senator from Wisconsin I am happy to be here to hear his statement and to tell him how much I appreciate the work he has done in this very vital area.

As the Senator from Wisconsin knows, I spent a great deal of time on the floor 2 weeks ago relating to a problem in Nevada. It is interesting in this country today; companies that are sound and fiscally doing well are punished by corporate takeovers. So I commend and applaud the Senator for the work his committee has done and the leadership that the Senator from Wisconsin has shown in this very vital area to this country. Over 80,000 jobs have been lost as a result of corporate takeovers, jobs in States like Wisconsin, Nevada, and North Carolina. So the Senate and the country, I am sure, join me in applauding the leadership of the Senator from Wisconsin.

## NOMINATION OF JUDGE ROBERT BORK

Mr. REID. Mr. President, over the past weeks, this body has faced one of its most important duties. We must

review the qualifications of a man nominated by the President for the highest Court in the land. As the process began, I set out to build a logical basis for voting to confirm Judge Robert Bork, the President's nominee.

It seemed an easy task, because it was my solemn belief that if the President nominated someone who was qualified for the job then that person should be confirmed. We all have our own personal agenda, issues which mean a great deal to us based on our own moral commitments such as the right of the unborn, freedom of religion, equal protection and privacy. I did not, however, feel that those questions of particular votes in particular cases should be applied in confirming a justice, and accordingly though I preferred a judge who interpreted the law, not a judge who legislated the law—a practitioner of judicial restraint, I believed the Senate's role to be quite limited.

The Constitution, after all, does not provide that we nominate, instead we advise and consent. Accordingly, I accepted the common wisdom of the past decade that the Senate reviewed a nominee for honesty, intellect, and morality, and ignored his judicial philosophy. Whether a nominee was a liberal or conservative, an activist or a believer in judicial restraint, was it seemed to me a question for the President.

As with all decisions of magnitude where there is time for study, I began my analysis of the Bork nomination with a review of history. That reading was enlightening to say the least. It led me to the conclusion that the phrase "advice and consent" was intended by the Founding Fathers, and certainly demonstrated by American history to include much more than passive review of a President's nominee.

Having reached the conclusion that a Supreme Court nomination merited more than just a determination that a nominee met minimal qualifications, I began with my staff an indepth review of Judge Bork. His writing, his decisions, his testimony, and the testimony and analysis of others were closely scrutinized. Staff attorneys were assigned to debate his qualifications, and analyze the meaning and impact of Judge Bork's positions.

I must admit I entered the process with a bias. I wanted a conservative Justice to fill that vacant seat. It has long been my belief that in some areas the Court has gone much too far in its judicial activism, and I hoped to see a restraining brake applied. Try as I might, however, I could not conclude that Robert Bork is qualified to sit on the Supreme Court of the United States. Raw intellect alone is not enough; there are other compelling considerations.

For me, it was in the final analysis the question of Judge Bork's lack of consistency which led me to the decision that he is simply not qualified.

Our system of law is based upon a central foundation; every action we take which affects another should cause a result predictable by application of established principles of law. The importance of that concept to the efficient ordering of our society cannot be overstated.

At other times or in other places than this, the law has been a mystery to those whose lives it governed. The actions which would lead one man to the executioner's block would have no effect on another. The only difference between them was often an accident of birth.

It was against that unpredictability that our forefathers revolted in 1776. They recognized that the law must be a code of conduct which applied one standard to all.

As a former prosecutor and defense attorney, I have often stressed the need for certainty in the criminal law. It is not as important that punishment be severe, as that it be swift, sure and certain.

As a practicing attorney and small businessman, I came to recognize that the need for certainty in day-to-day affairs was equally necessary. Everyone needs to know that their actions will have certain legal effects, and that they can presume that they have rights which are created based on a code of law which remains constant from day to day.

It is because of that need for certainty that I have repeatedly expressed my desire for the appointment to the Supreme Court of conservative justices who believe in judicial restraint. Certainly, the law is a living thing, and certain it is that the Court has reinterpreted the Constitution to recognize the changes which must occur when a set of fixed principles is applied to an ever evolving society.

I believe, however, that the Founding Fathers in their divinely inspired wisdom designed the Court to act as a brake on the whims of that society, just as this body was designed to cool the passions of the House of Representatives. A judge who sprints to the forefront of novel concepts may not be wicked or unintelligent, but he is certainly someone who should not sit on the judicial body which interprets the highest law of our land.

It is upon that need for certainty that I have based my decision on Judge Robert Bork, because the only consistent thing about his life has been his continuing pattern of inconsistency. As others have pointed out on this floor, his wild swings in philosophy—from flirtation with the fanatical, even to socialism, to libertarianism, to conservatism, to his most recent swerve back to the middle of the road, smacks of intellectual extremism.

His most recent change in philosophy, the so-called "confirmation conversion," coming as it did on the heels of his nomination, and apparently based on a White House decision to portray him as a moderate, has also given me considerable pause. I am not alone in that scepticism.

Bruce Fine of the very conservative and respected Heritage Foundation said he thought it was a shame that Judge Bork was "bending his views to improve his confirmation chances." Mr. Fine concluded that Judge Bork's "ambition perhaps exceeds his intellectual devotion."

Similarly, Senator SANFORD, whose academic credentials include being the president of Duke University, reached his conclusion that Judge Bork lacked academic and intellectual honesty and true scholarship because of his wide swings from one opposing position to another.

We have heard repeatedly from some during these hearings that consistency is the hobgoblin of little minds. In this day of accuracy in quotations, I would remind my friends that what Emerson actually said is that "a foolish consistency is the hobgoblin of little minds."

There is as I have pointed out a great deal to be said for a wise, and conscious, and reasoned consistency in the application of the law to the affairs of men. It is that lack of consistency in Judge Bork's writings, opinions, and statements that sorely troubles me.

Robert Bork has endorsed the right of States to impose poll taxes and literacy tests. Anyone who would endorse that concept in the abstract without recognizing the fact that such laws were designed to prevent average people with common sense from voting because of their race or social condition, is disconnected from reality.

The fact is, that if the law was what Bork said it was, my mother and father, and many, many other Americans below the poverty level or without an education could have been disqualified from voting.

Robert Bork has opposed the concept of one man one vote, saying he cannot find it in the Constitution. Anyone who takes that position in the abstract without recognizing the fact that millions of Americans had been disenfranchised under prior gerrymandered systems, is out of touch with reality.

The fact is, that if the law was what Judge Bork said it was, Barbara Jordan would have never begun a political career, and this Nation would have been denied her eloquent and forceful voice for equality. There are those who serve in the U.S. Senate, both Democrats and Republicans, who

got their start in the House of Representatives based on one man one vote, reapportionment.

Robert Bork has written that laws which prevent hotels and motels from discriminating against customers because of their race were based on "a principle of unsurpassed ugliness." Anyone who would endorse that concept in the abstract without recognizing the fact that it denies many, many Americans the right to travel freely in interstate commerce is disconnected from reality.

The fact is that if the law was what Judge Bork said it was many could not travel in our Nation where and when they chose for no reason other than their race.

The respected National Catholic Register is dubious about Robert Bork's view of the rights of the unborn. This publication reminds us that Judge Bork testified against the Helms human life bill. He said it would infringe upon the Courts role to enunciate fetal personhood.

Even this publication is concerned that he could be far more dedicated to limiting peoples' rights than he would be in promoting the unborn's right to enter this world alive.

John Wilke, president of the National Right to Life Committee says "we're not sure Bork is against abortion. In our circles there is substantial doubt that he is."

Bork's preconfirmation stance was clearly in disagreement with Roe versus Wade. During confirmation he changed and said there may be some basis for the decision.

I have a 100-percent prolife voting record. I find it difficult to comprehend that any of Judge Bork's support comes from the prolife community. There simply is no logical basis for predicting his decisions in this vital area.

The fact is that if the law was what Judge Bork said it is or was it would be even more uncertain than it now is.

Although he told the Judiciary Committee that he believes in judicial restraint, Robert Bork has stated that Congress is institutionally incapable of fashioning antitrust policy. Anyone who believes that in the abstract without recognizing the fact that the legislature has a role in the national government is out of touch with the reality of any concept of congressional intent.

The fact is, that if the law was what Judge Bork said it was, the octopus of the trusts would still grip this Nation in its tentacles as it did in the era of the robber barons. It was Congress which fashioned the policy which broke that grip.

Robert Bork has supported the right of individuals to enter into restrictive covenants to prevent someone from buying a house because of their race or religion. Anyone who would endorse that concept in the abstract without recognizing the fact that it is a pernicious contradiction to what America means is disconnected from reality.

The fact is, that if the law was what Judge Bork said it was, my wife, and many, many other Americans of Jewish birth could not live where they chose.

Robert Bork has espoused a philosophy of Madisonian majoritarianism which could allow a majority of Americans to deny to a minority the free exercise of their religion. Anyone who endorses that concept without recognizing the fact that it could deny to Jews, Mormons, Mennonites, and many others the fundamental rights of religious freedom is disconnected from reality.

The fact is, if the law was what Judge Bork said it was, our Nation could lose the most important guarantee of our Constitution—the guarantee that my family and your family, and everyone else's family may worship God in the way that we choose without fear of interference.

Judge Bork says his views have changed. I do not believe him. His statements, his testimony, his writings are those of an activist, and as Senator HEFLIN, formerly of the Alabama Supreme Court, has pointed out an activist from the right is just as bad as one from the left.

It is that lack of conviction, that inconsistency, those wild swings in philosophy, which doom the Bork nomination. He will not lose the upcoming vote because of partisanship, or some flexing of congressional muscle in a contest with the President. Rather, Robert Bork does not possess the qualifications to be a Supreme Court Justice. He simply lacks the intellectual and moral foundation of a John Marshall, an Oliver Wendell Holmes, a Felix Frankfurter, a Hugo Black, a Byron White, or an Antonin Scalia. That lack of calm and reasoned temperament was further demonstrated by his recent pronouncements on his determination to keep vacant a seat on the Court as long as possible, without regard to the needs of the Nation or his duty to a system of law which has conferred upon him so many benefits.

I believe that our Constitution was divinely inspired. It was created only because of the faith and prayer of our Founding Fathers. It was not a perfect document, but it was the best there could be, and it represented a great compromise and a magnificent beginning. That Constitution mandates the separation of powers and provides the obligation of this body to participate as a coequal partner with the Executive in the selection of members of the third branch, the Supreme Court.

Based on that responsibility. I will without hesitation vote no on the Bork nomination. My affirmative vote will be reserved for the future for a truly qualified, conservative nominee who believes in judicial restraint.

## MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of morning business, for not to exceed 5 minutes, with Senators permitted to speak therein for 1 minute each.

## ALF LANDON—1887-1987: A CENTURY OF ACHIEVEMENT—OCTOBER 13, 1987

Mr. DOLE. Mr. President, one of the giants of American politics—Alf Landon—passed away yesterday in Topeka—and today Kansas is mourning.

I am proud to say that Alf Landon was a friend of mine. He was also a mentor. When it came to running for office in my State, Alf Landon was the role model. He earned the respect of Kansans and the rest of America—Republicans, Democrats, and independents—with a career whose hallmark was integrity: He taught generations of politicians what common sense and leadership were all about.

### A CENTURY OF ACHIEVEMENT

He was called the "grand old man of the Grand Old Party," but it was not just because he lived to be 100 years old—it was because his life was a solid century of achievement.

Alf Landon was an outstanding two-term Governor, a visionary Presidential candidate, and a wellspring of wisdom for politicians who recognized that the "sage of Topeka" was always way ahead of his times.

### THE LANDON LEGACY LIVES ON

Mr. President, we are honored to have the proud legacy of Alf Landon continue on in this Chamber in the person of our exceptional colleague, Senator NANCY LANDON KASSEBAUM. It is a personal honor for me to represent Kansas with her in the U.S. Senate. I know my colleagues join me today in extending our sympathies and prayers to Senator KASSEBAUM and the rest of the Landon family.

It was only a few weeks ago that President and Mrs. Reagan traveled to Topeka to help the Governor celebrate his 100th birthday. Today I choose to remember that happy occasion, a celebration of a man whose remarkable life guarantees him a place in the history of this great land.

Mr. President, I ask unanimous consent to have printed in the RECORD a New York Times and a Washington Times article on Alf Landon.

Mr. BYRD. Mr. President, I ask unanimous consent that the vote on the nomination of Mr. Verity occur today at 4 p.m., provided that Mr. HELMS has 30 minutes, Mr. D'AMATO 15 minutes, Mr. DANFORTH 10 minutes, Mr. HOLLINGS 15 minutes, Mr. THURMOND 5 minutes, Mr. ARMSTRONG 10 minutes, and that the remainder of the time be equally divided and under the control of Mr. HOLLINGS and Mr. DOLE or his designee.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

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## NOMINATION OF JUDGE BORK

Mr. BYRD. Mr. President, I will take whatever time is necessary out of my time under the rule, anent the nomination of Mr. Bork.

Mr. LEAHY. May we have order, Mr. President, so that we can hear the majority leader?

The PRESIDING OFFICER. The Senate will be in order.

Mr. BYRD. I thank the Senator from Vermont, and I thank the Chair.

The President has urged that there be a quick vote on the Bork nomination. I may not be using precisely the same words the President has used, but Mr. Bork, himself, has asked for a vote on his nomination. I think Mr. Bork is entitled to that vote on the nomination. I do not believe, however, that the debate ought to be prolonged in reaching that vote.

The distinguished Republican leader has indicated, I believe, on Sunday, on television, that he would be agreeable to a reasonably quick vote. The report has not been filed, but the nomination can be called up by unanimous consent prior to the filing of the report. In addition, the two leaders may, between themselves, agree to waive the 2-day rule on the filing of the report or on the availability of the report.

The President, in today's New York Times, says he favors a vote on Mr. Bork this week.

Mr. President, we need not walt to begin that debate beyond this afternoon, if it is agreeable with the distinguished Republican leader. We an waive the availability of that report, and we certainly do not need to string this debate out the rest of the week. I think the important thing is to give Mr. Bork the vote he has asked for, let the Senate work its will, let the Senate take its position, let the Senate speak as a body, with a reasonable amount of debate before that decision by the Senate.

The Judiciary Committee conducted thorough hearings, very ably and fairly chaired by the distinguished Senator from Delaware [Mr. BIDEN]; and the fact that he did conduct himself with preeminent fairness was attested to by members on both sides of the committee, Democrats and Republicans.

I think that the sooner the Senate speaks, the better—the better for Mr. Bork, the better for the Court, the better for the Senate, and the country. The administration will need to send another nomination up, in the event that the Senate rejects this nominee, and every indication is to that end.

Therefore, it would seem to be the wise approach for the nominee to be voted on very soon, that the administration send up the name of another nominee, and that the Judiciary Committee in the Senate then begin at the earliest reasonable date to examine the qualifications of that nominee.

Having said that, and I just discussed this in a very cursory way with the Republican leader a moment ago, I ask unanimous consent that the Senate proceed, following the vote on the nomination of Mr. Verity, to the nomination of Judge Bork, that the availability of the committee report be waived together with the hearings, and that a vote occur on the Bork nomination no later than tomorrow afternoon at 6 p.m., with the time to be equally divided between the chairman and the ranking member of the Judiciary Committee.

The PRESIDING OFFICER. Is there objection?

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The Republican leader.

Mr. DOLE. Mr. President, reserving the right to object, and if I could just be heard briefly on the reservation——

Mr. BYRD. Yes.

Mr. DOLE. I say first of all we did have a discussion in our policy luncheon about disposition of the Bork nomination. And I did have a unanimous-consent request which I read to the membership which would dispose of the nomination after 2½ or 3 days of discussion. But I have not had a chance to go all around because all the Members were not at the luncheon. Different Members have different ideas on how lengthy the debate should be. But I think as a general consensus on this side that it should not be 3 days. But I must say until I do that, I would be constrained to object.

I think we should keep in mind just the perspective that it was 72 days between the nomination and the hearings; 12 days of hearings; 120 witnesses. And even though the outcome may be a foregone conclusion, I read in the Boston Globe, for example, this weekend how there was great planning on how to stall the nomination so that the opposition could gear up. That is how the 72-day delay came about.

There are other things that I think ought to be discussed in any debate on the nomination insofar as the process is concerned because there will be another nomination, if the Bork nomination is not confirmed.

Let me at least hope that there will be some Members, after hearing hopefully a high level and reasonable debate, who will feel compelled to change their position. It would not take very many days to confirm Judge Bork, but I do believe that the proposal of the distinguished majority leader would not provide adequate time to the proponents or the opponents. It would be only 1 day, and it would be about 7 or 8 hours of debate.

It is not the nomination of Judge Bork that is very important. Judge Bork decided he wanted a vote up or down. I think the majority leader is right. He deserves that. I think he also deserves an opportunity to have the record set straight in many areas, where he feels that it is distorted.

I hope it is not an acrimonious debate. This Senator does not intend to engage in that kind of debate. But I do believe it would take additional time.

I had a chance to visit with the distinguished ranking Republican on the Judiciary Committee, Senator THURMOND. What we want to do is to get together this afternoon. Maybe I could come back and visit privately with the majority leader.

In the meantime, I am constrained to object.

The PRESIDING OFFICER. Objection is heard.

Mr. BYRD. Mr. President, let it be said that the 72 days, I think, in this particular instance can be explained in large part by the fact that there was the August recess which by law consumed 30 or 31 or 32 days of that 72 days.

Additionally, I think a great deal of time was required to prepare for these hearings. After all, Judge Bork had a good many lectures, writings, statements, and speeches, and whatnot that needed to be researched. The administration could have saved itself a great deal of time, trouble, and grief, it could have saved Judge Bork a great deal of grief and traumatic experience if it had listened to the advice that was given; namely, that if Judge Bork's name was sent to the Senate there would be a difficult fight on that nomination for the very reasons that we have seen. And that advice fell upon deaf ears.

As a matter of fact, I was shown a list of names, 10, 12, or 14 on 1 day. I only recognized Judge Bork's name on the list as I recall. There might have been one other name that I recognized. But the very next day Judge Bork's name was sent up to the Senate which indicated to me that minds were made up and closed downtown before I was shown the list of names.

I am not so presumptuous as to say that the President has to name some-

one that suits me. I indicated that at that time I might vote for Judge Bork, or I might vote against him. It was my judgment at that time that he probably would be confirmed. But there would be a very, very difficult fight, and it would need a lightning rod because of his statements and viewpoints that had been expressed in the classrooms and on the bench that would certainly have to be gone into quite carefully and thoroughly. So much for that.

I think it is important that the administration listen and counsel with some of the people in this body, at least on the other side of the aisle, before it sends up another nomination. And it will be conducive to a reasonably—I hate to use the word "expedited," but for now I will use that word. Let me put it this way: It would be conducive to the action by the Senate within a reasonable time on the next nomination if the administration does seek some advice within the Senate before sending up another name.

Moreover, may I say to my colleagues that it will be conducive to the Senate's acting within a reasonable time on the next nomination if we keep our voices lowered here in connection with the upcoming debate on the Bork nomination.

Mr. JOHNSTON. Mr. President, would the Senator yield?

Mr. BYRD. If I may just continue, and I will be happy to yield. I will be brief.

Mr. President, if this deteriorates into a contentious, devisive, and bitter debate on the Bork nomination or in relation to the Bork nomination, it will not be helpful in the action that will be taken on the next nomination. In the first place, we do not have a lot of time. We will take whatever time is necessary but I think most Members have reached a judgment on the Bork nomination. It should not take long.

I have heard that the debate will be on the "process." Well, we can debate that process. But I just hope that Senators would restrain themselves, use a little judicial restraint, restrain themselves and their comments, recognize that the Senate is going to vote on the nomination one way or the other, and that in the interest of getting on with our work, filling the vacancy on the Court, and speeding up in a reasonable way the logical and methodical way the action on the next nominee, we keep our tempers lowered and do not allow ourselves to get carried away with our own rhetoric.

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

Mr. BYRD. Yes, I yield.

Mr. JOHNSTON. I thank the Senator for yielding.

I would simply point out that in my judgment asking for 3 legislative days to deal with the Bork nomination is vastly excessive. My bill on energy and water appropriations has been on this calendar now for over a month waiting for time. There are less than 30 legislative days between now and the scheduled recess date. To take over 10 percent of that when we have not dealt with the appropriation bills—and we have a filibuster to overcome on that energy-water; no way to avoid that.

We have a filibuster to overcome on defense appropriations once it gets here. We have all the taxation matters. We have an impending sequestration coming up. And with all that, to take 3 legislative days, I just think is excessive, and I hope that the majority leader will not accede to that request unless we put it after all the other legislative business.

In other words, in my view, unless we can get a prompt disposal of a matter that is already decided—let us face it, there is no longer an issue on this. It is just a question of debate, to be charitable; I hope we will not take over 10 percent of the remaining part of the year and fritter in away on an issue already decided.

Mr. BYRD. Mr. President, the Senator from Louisiana made a good point. I share that hope, I also hope that we will do what we can to depoliticize this nomination. I hope that we do not gin up the policitization of the next nominee. So the less rhetoric, it would seem to me, the better. The shorter the time, the better.

Mr. BIDEN. Mr. President, if the Senator will yield for just a moment.

Mr. BYRD. Yes.

Mr. BIDEN. The President of the United States indicates he wants a vote this week. Everyone knows what the outcome of this vote is likely to be. Over half of our colleagues—as a matter of fact all but 7 of our colleagues have publicly spoken for or against Judge Bork thus far out of 100 of our colleagues.

To delay another week, to go to the 22d before we vote, consuming the time in the meantime, I am quite frankly worried that I know what will happen. The President hopefully will promptly send us another nominee. The entire Senate is going to look to the Judiciary Committee and say, "Now, we want you to hold hearings promptly. We'd like you to have the hearings completed. And we'd like you to have this back before the recess on the 21st and we'd like to vote on the 21st or before then."

The fact of the matter is, Mr. President, it takes the FBI weeks to do their background checks before they even send us a nominee. I hope the administration has that underway. Some of the nominees, potential nominees who have been mentioned, are a total blank slate to me and I suspect to 95 percent of the Members of the U.S. Senate and of the committee.

For us to waste a week when the President says he wants a vote now seems to me to, in a sense, cast the die on the probability of the Judiciary Committee being able to get their work done and report back to the Senate before we recess.

I will respond to the will of the body in how they want me to proceed and chair the committee. But, quite frankly, if those who wish to speak to the process—and I think that is their right to speak to the process. Why do we not vote and speak to the process every morning in morning business? Why do we not vote tomorrow and while the other nominee is underway and we are doing our work, let all those who wish to speak to the process come and vilify the chairman of the committee and anyone else they would like to go after, and so be it? But let them do it while we have the committee hearings, while I can be preparing in my committee the hearings for the next nominee.

Quite frankly, I would just suggest, as my colleagues talk about the process, unless they have changed their minds, I believe all but one of my colleagues on the Judiciary Committee went out of the way, while the hearings were going on and before they were concluded, to talk about what exemplary hearings they were and how fairly they were conducted. Now, if they want to talk about changing their minds about them now being unfair, that is their right. But why do we not do that during morning business and at the press conferences and let us get on with the business of confirming or rejecting Judge Bork?

As I said, the President wants it. I am ready. The committee report will be finished tonight. Obviously, you have to waive the 2-day rule, but it will be finished tonight. We are ready to go. But to take another 7 days before we vote on this, it seems to me to be making it convincingly more difficult to get to the point where we are going to have a nominee before this body that can be confirmed by the time we leave here.

Mr. BYRD. Mr. President, we have a request for 1 hour 25 minutes of time. I ask unanimous consent that the vote on the nomination occur at 4:15 p.m. today rather than 4 o'clock.

Mr. SIMPSON. Mr. President, do you have the floor, Mr. Leader?

Mr. BYRD. I yield the floor.

The PRESIDING OFFICER. Is there objection to the request?

Mr. DANFORTH. Reserving the right to object. I take it, Mr. Leader, you are talking about the Verity nomination?

Mr. BYRD. Yes, I am trying to accommodate Mr. DOLE and some of the other Members on that side of the aisle.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The Senator from Wyoming.

Mr. SIMPSON. Mr. President, I want to say just a few brief remarks with regard to the Bork situation. First, let me pay my respects to the Senator from Delaware, who conducted a very fair hearing. There is not any question about that. I do not think anybody is going to get up and say that the chairman of the Judiciary Committee did not. I know no one on our side is going to say it was not fair. I think it was very fair. We surely all would have liked a little more time. We started with a half hour and there was no way to accommodate everyone. Then we came to 10 minutes, then we came to 5. Then we all used our 5 for a quick statement because we did not want to allow the witnesses any time to answer or it would have used up all our time. But it was done very fairly, and I have no problem with that at all.

But what I would share in just a brief time is that only 14 of us participated—there were 14 of us there—and there are 86 of you that did not. There are 86 of our colleagues that did not see or hear or stick with the 32 hours of testimony of Judge Bork or hear the witnesses. It is all there. There is a record.

I think all I want to express to my colleagues is that this is a situation where our function here is not to make a contribution through public statements or keeping score as to who is for or who is against. Our function under the Constitution is called advice and consent. And the only way you have advice and consent is to have a debate. And the only way to have a debate is to have it on the floor of the U.S. Senate. And that is what I am saying, that, you know, this is a very poor way to do the business of advice and consent.

We heard a lot about the Constitution in these last days with Judge Bork. But the great threat to this body is in not doing our job and the job to be done right here on the floor of the U.S. Senate.

I have no desire to take it for 2 weeks. I think we could reach a time certain for next week; have it 5 o'clock Thursday, if we are to start Friday; a time certain to vote. I see no need to stretch that on into any great period of time.

But there is a very definite need here for those who do support Judge Bork. Not to get into terrible things, not to get into bitterness and some of the phrases that the majority leader uses. That is not what we are intending to do, I can assure the majority leader.

What we do intend to do is to be able to present a case like the American Cyanamid case in more than 5 minutes. So that the people of America can know that it was not a pleasant experience for Judge Bork to give a determination that women had the option of voluntarily sterilizing themselves. That case needs to be described. That is what came up in the television ads, that this was a man who seemed to get some kind of—I do not know how to describe it—that he did not seem to mind that women had the choice of voluntary sterilization. It does not take a half hour to describe the American Cyanamid case. You describe it as the OSHA board of review saying that had to be done or they would shut down the plant.

Then that it was the unanimous decision of that court; and people can see that the three judges were unanimous; and one can see that the full court chose to do nothing with it. The Supreme Court chose not to hear it. The reason was because it was a tough and hidious decision to make and some women chose that voluntary sterilization and, somehow all that has been placed upon Judge Bork.

I think that is unfair. That needs a little bit of explanation.

The other one, and there are several: the poll tax. The poll tax was used in the exact phrase as equated with racism. Yet Hugo Black, in the case 2 years before, said this issue of the poll tax has nothing to do with discrimination.

Those are the things we need to present. That, and the fact that somehow this man was the central sinister cog at Watergate and flog that old dog again—as we did in the hearings—and that somehow, Bork is the center of all that. And all of it (Watergate) got resolved just the way the American people wanted it.

And we should review the true issue of fact as to his being hostile to women, that he discriminated against women in discrimination based upon gender. Every one of you that voted to exempt women from the draft discriminated against women on the basis of their gender. Those are those flash words that were used. They were not used by the chairman. They were used by the opponents.

When you here voted in this body to exempt women from the draft, you were discriminating against women on the basis of their gender alone. Those are the things that popped up. They need a little bit of explanation. They do not need a lot, but they need some thoroughness and those are the things that we will be presenting.

Even a smattering of anti-Semitism came up in the hearings. So we want to present those things. We can set a time. It is nothing more than what I would express as something that I think we all deeply understand here. It is called fairness. That is what I hope we can do and do it in a timely manner and have the other 86 of you present to do it.

You must know, too, please, and I will conclude, that a great part of the impetus of this comes from the three children of Judge Bork and his wife who would like it to be expressed that their husband and father was not the person portrayed in the hearing process and that he is simply not any of these things that have been discussed. That is something that I think should enter the fray in our busy lives.

We get carried away with the process. We get carried away with a lot of things in this remarkable arena. But we forget the human dimension, and there is a human dimension here and it may not take 3 days to resolve it and move on.

I assure you that I will assist the majority leader in doing that.

Mr. HOLLINGS. Mr. President, I believe now we are under the unanimous-consent and controlled time. I remind you of the particular nomination. I will conserve that amount of time so we can fit in the 30 minutes for Senator HELMS, the 15 minutes for Senator D'AMATO, the 10 minutes for Senator DANFORTH, the 5 for Senator THURMOND and the 10 for Senator ARMSTRONG.

Perhaps they can conserve a little time, too, so we can make sure we can all fit in.

The PRESIDING OFFICER. Who yields time?

The Senator from Missouri?

Mr. DANFORTH. Mr. President, it is with genuine enthusiasm that I endorse the nomination of Bill Verity to be the next Secretary of Commerce. I commend the President for sending us a man of such considerable accomplishment and substance.

I was both a friend and a fan of Mac Baldrige. He helped put the Commerce Department back on the map in Washington. He not only knew about business—both domestic and international—but also he knew how to run one. He took a "hands-on" approach to everything he did, and he was a good listener. He actively sought advice from the Hill, and elther incorporated that advice in his actions or told us why he wouldn't. He was a pragmatist on international trade who played a very constructive role in promoting fairness and understanding in international economic matters. His counsel and his voice are missed.

I, for one, doubted that we would be able to replace Mac Baldrige with someone of comparable ability, experience, and temperament. Now I believe I was wrong. Bill Verity strikes me as an ideal successor to Mac Baldrige.

Bill was in the steel business for more than 40 years. What better training ground to learn about the rise and fall and rise again of U.S. heavy industry. What better vantage point for watching the erosion of the U.S. competitive edge in international business,

NOMINATION OF JUDGE BORK

Mr. BYRD. Mr. President, I inquire of the distinguished Republican leader as to whether or not he has been able to ascertain, through his conversations, the possibility of our getting an agreement to begin forthwith on the Bork nomination and complete action thereon tomorrow at 6 o'clock.

Mr. DOLE. Mr. President, if the majority leader will yield, we have made a number of inquiries on this side, and we are still in that process.

The distinguished ranking member of the Judiciary Committee, Senator THURMOND, I think, is agreeable to a vote this week. It is a matter that I will take up when we have about 40 Senators together in one place later this afternoon. It is pretty hard to track them down. I hope to be able to give the majority leader some definitive word tomorrow morning, either way.

I understand that the majority leader does not want it to be pending several days. I wonder whether, as an alternative, if we cannot agree to take it up this week, we could agree to take it up, say, next Tuesday morning and vote Wednesday evening.

Mr. BYRD. Mr. President, the report will be filed tonight and will be printed and available tomorrow. Under the rules, the distinguished Republican leader and I can take it upon ourselves and jointly waive the 2-day rule. I am not only ready but eager to do that.

I hope that if we cannot get consent today to waive the report and get to the nomination this evening, the distinguished Republican leader and I can join tomorrow morning to waive the 2-day rule and get the nomination up.

The President says he wants to vote this week. Let us give Mr. Bork a vote, not only this week but earlier than the end of the week, so that we can do some other things.

We have appropriation bills. We have the War Powers amendment around. We have catastrophic illness legislation. We have the Labor-HHS appropriation bill. That has been called up. Hopefully, we can get action on those before the week is out, also.

So I cannot do more than urge or request unanimous consent to take up the nomination today. I am helpless to take it up, under the rules, as I have already indicated. Except by unanimous consent, the 2-day rule cannot be waived. The report is going to be filed. The one alternative is that the two leaders waive it. There is nothing I can do today to get it up.

Tomorrow morning, I will revisit this matter with the distinguished Republican leader, and I hope at that time we can join in waiving this requirement for the report, get on the nomination, have a good, long day of debate tomorrow thereon, and vote Thursday afternoon at 3 o'clock or 4 o'clock. In that way, we could easily get 15 hours of debate on the nomination, by 4 o'clock on Thursday.

Mr. DOLE. Mr. President, will the majority leader yield?

Mr. BYRD. I am glad to yield.

Mr. DOLE. Let me discuss that again with my colleagues, and let me get back to the majority leader in the morning. I think there are some on this side who just do not want to vote this week. We will discuss it this afternoon, and I will be back to the majority leader.

Mr. BYRD. I thank the minority leader.

## 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.

## SCHEDULE

Mr. BYRD. Mr. President, there will not be any more rollcall votes today.

The matters that may be discussed this afternoon are the War Powers Resolution, the Labor-HHS appropriation bill, catastrophic illness. Not on either of the latter two can action be taken, because a number of Senators on both sides are trying to work out an amendment on catastrophic illness. On the Labor-HHS appropriation bill, we cannot finish that this evening because some of the Senators will not be here. They will be leaving. I do not think we are ready to get an agreement on the War Powers matter.

## MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that there be morning business for not to exceed 1 hour and that Senators may speak therein for not to exceed 10 minutes each.

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

Mr. BYRD. I thank the Republican leader and all Senators.

## PRESIDENT ARIAS RECEIVES NOBEL PRIZE

Mr. HARKIN. Mr. President, the Nobel Committee has just awarded this year's peace prize to Oscar Arias Sanchez, President of Costa Rica.

The selection of President Arias is in keeping with the tradition of leaders given this award, such as Lech Walesa of Solidarity, Bishop Desmond Tutu of South Africa, Andrei Sakharov of the Soviet Union, and Martin Luther King of the United States, to name just a few of the recipients of this award. All would be proud to have Oscar Arias join them on the roster of promoters of peace.

For the work he has done in promoting peace in Central America, President Arias richly deserves this reward. Back in February, President Arias first announced his proposal to bring peace with democracy to Central America. This proposal, which marked the first time the Central Americans themselves stepped forward to control their own political destiny, at first was given little chance of success. However, we did not realize then that President Arias' initiative would crystallize the longstanding desire of the Central Americans to put an end to the civil wars that had caused so much death and so much destruction for so long to their respective countries. It was this desire, plus the personal intervention of President Arias, that led to the signing of the peace accord by the five Central American Presidents on August 7.

This plan, in my estimation, is a masterful work of diplomacy. It does not rely on the good faith of the Sandinistas or the good faith of the government of Napoleon Duarte or the intentions of the President of Guatemala, President Cerezo; nor does it place blind trust in their desire to institute, on their own, democratic reforms. Rather, the Arias plan is designed as a process—with each step taken toward a democratic opening, leading to another irreversible step in the process. In short, it is visionary yet realistic, and offers all of us, in the United States and Central America, a way out of the cycle of violence that has gripped Central America for the past decade.

And by most accounts the process is working. Reconciliation commissions have been created in El Salvador, Guatemala, and Nicaragua. Peace talks between guerrillas and government representatives for El Salvador and Guatemala have begun.

In Nicaragua, censorship has been lifted both for the radio stations and for the newspapers. La Prensa and Radio Catolica can now operate free of any interference or prior censorship. Dialog has resumed between the government and the internal political opposition.

So, Mr. President, a lasting peace may be some way off in Central America but the process has taken a giant leap forward.

The Arias plan has also had an irreversible impact on the policy debate in the United States. For the past 7 years, the domestic political debate in Congress has centered on the question, "Do you support aid to the Contras?"

plan that is the best opportunity for peace that Central America has seen for years. Many of us in the Congress have strongly supported President Arias and the Central American peace plan based on his original proposal. On his recent visit to this country, I took the opportunity to personally tell him of my gratitude for his dedication to peace.

The momentum toward peace that is now taking place in Central America because of the work of President Arias is a credit to this man of deep conviction. Who would have believed that with their seemingly intransigent positions, the Government of El Salvador and the FMLN/FDR armed opposition would be holding peace talks? Who would have believed that the Government of Guatemala and the leaders of the guerrilla insurgency would be meeting for the first time in over two decades? Who would have believed that the Sandinista government in Nicaragua would be taking major steps toward national reconciliation so that Nicaraguans of all political persuasions could participate in their nation's political life? It was a dream to many of us but to President Oscar Arias it was a vision that could become a reality.

The international acclaim embodied by the Nobel Prize for Peace for President Arias is recognition by the entire world that the long-suffering people of Central America deserve the peace that this man envisioned. It is incumbent upon all peace-loving people of the world to continue their support for President Arias and to help him in the task of bringing a real and lasting peace to the region. Congratulations to President Oscar Arias and to the people of Costa Rica.

Mr. BIDEN. Mr. President, today it was announced that President Oscar Arias of Costa Rica will be the recipient of this year's Nobel Peace Prize.

I would like to extend congratulations to President Arias and to applaud the wisdom of those who selected him to be the recipient of the prestigious award.

The Arias plan is the most significant step toward peace in Central America in memory. It is an historic initiative, born of the dreams of a man who believed that the solution to the problems of his region could be found through diplomacy rather than gunfire. Such dreams are what the Nobel Peace Prize is all about.

President Arias and our other allies in Central America are painfully aware that the agreement they signed in Guatemala City with the Sandinistas is only the first step down a long and bumpy road. There is an enormous amount of work to be done in the days and weeks ahead, and it will require determination, perseverance, and above all, patience.

In honoring President Arias today, I urge my colleagues and President Reagan to honor not just the letter but the spirit of the Arias plan. This is the time for the United States to demonstrate its full commitment to a negotiated solution to the problems of Central America. We must become a positive participant in the regional peace effort—not an obstacle to its progress. In so doing, we will enter a new era in our long partnership with Central America: an era of peace, prosperity, and democracy.

The PRESIDING OFFICER. The Senator from Colorado.

## THE NOMINATION OF JUDGE BORK

Mr. ARMSTRONG. Mr. President, Judge Robert Bork, who has been nominated by President Reagan to be a member of the U.S. Supreme Court, has been subjected to a bitter, personal, vindictive, savage personal attack over the last several months. Now that the Judiciary Committee has had its turn at bat and the interest groups have had their chance to express their opinion, I think it is about time that some of the rest of us who are not members of the Judiciary Committee but who have watched the proceedings before that body, and, what is worse, the campaign of political terrorism throughout the country conducted in the newspapers and on the television stations of this country, I think it is about time that some of the rest of us, who have been indirectly involved, now step forward, as the debate begins in this Chamber, to express our concern and indignation over the way that this matter has been handled.

Mr. President, from the very day that the news was announced that Judge Bork was President Reagan's choice for the Supreme Court, Mr. Bork has been the target of the most extraordinary and unfounded accusations that I can recall. Now, my experience here goes back about 15 years, and I suppose that in some decades past that there may be some historic parallel. But the better traditions of the Senate are that, in considering matters of serious import, particularly the nomination by a President of the United States to the Supreme Court, Senators and commentators in the media and interest groups have been far more restrained and far more truthful than has been the case in the Bork nomination.

I started to make the point that even before the nomination was officially before the Senate, they started unlimbering a barrage of charges which have been repeated endlessly; charges which, if true, would disqualify Judge Bork from consideration by the Senate and confirmation. But these charges are not true.

In fact, they are exactly what Washington Post Columnist Edwin Yoder wrote a couple of months ago. And I quote: "This twaddle"—and, by the way, Mr. President, that is a word that one does not often hear, but I think it accurately sums up some of the discussion about Judge Bork. But, to return to quoting Mr. Yoder: "This twaddle is what Adlai Stevenson used to call 'white collar McCarthyism.'"

Mr. President, that is exactly what it is. It is a technique which McCarthy used and others over the years have used from time to time of repeating endlessly, in variation, over and over again, in a coordinated, concerted attack, untruthful statements and telling them so often that they begin to assume a life of their own and, pretty soon, people begin to believe what they hear.

When interest groups take out ads and Senators make statements and Congressmen make statements over and over again, it is only natural that thoughtful people, whose day-to-day attention is not focused on the matter, begin to believe what is being said.

Most people, at least the ones I talk to at home, are not thinking about the Supreme Court every day. They are not thinking about the Senate every day. They are preoccupied with the more ordinary concerns of making a living and raising their families and making ends meet. And so, when they hear endlessly repeated statements of an extreme nature about a person who has been nominated for the U.S. Supreme Court, it is only natural that concerns arise.

Mr. President, it is not my purpose today to deal with all of these or to try to put the entire matter into perspective. But I want to start that process today and, over the next few days prior to the time that we come to a vote on the Bork nomination later this week or next week, I hope to comment on several aspects of it.

But the beginning of it is to say a word about the nature of the campaign, a political campaign against Judge Bork. Now, there is nothing wrong with a political campaign. Every Senator here got here as a result of a political effort.

But to politicize the selection and confirmation of members of the judiciary in the way that has been the case in this instance, I think is not only unfortunate—indeed, it may well be tragic for Judge Bork and those who are close to him, and I do not happen to be; he is an acquaintance of mine, a person whom I have admired. But there is an element of personal tragedy for him. That is not my primary concern.

My concern is when ads, such as this one which appeared in the New York Times a few days ago, start to show up around the country making charges

which are not substantiated, which are not factual, and which, in fact, are misleading and untruthful, it pollutes the process. And, indeed, even if the charges which were raised here were entirely true—and they are not; they are completely off the mark, let me say—there is a serious doubt in my mind that the public interest is well served by politicizing the process. And those are the two issues which I would like to address briefly today.

Mr. President, this particular, advertisement, which did appear in the New York Times on September 15, has a headline which says: "Robert Bork Versus the People." It goes on to make these observations, among others: "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."

Now that is brief—the ad goes on at some length—is the kind of thing which Mr. Yoder correctly called "twaddle" and which the Chicago Tribune summed up in these words, not referring to this particular article or to this particular ad, but to the general campaign against Mr. Bork which has so often emphasized this question of whether or not he is a legal extremist or whether he is in the mainstream. The Chicago Tribune wrote the following:

The American Civil Liberties Union has become the latest lobby group to condemn the nomination of Robert Bork to the Supreme Court, accusing him of being a "radical." In the words of the ACLU's executive director, "He thinks the highest right in this society is the right of local majorities to make law and to impose their morality on the rest of society."

Allowing for the gross exaggeration that has come to be the rule in attacks on Judge Bork, the ACLU's complaint is that Judge Bork has a bias in favor of democratic government. In this respect he is a radical like Thomas Jefferson.

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.

I am not going to read the entire editorial, but I do ask unanimous consent that it be printed in the RECORD.

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

THE DISFIGURED DEBATE OVER BORK

The American Civil Liberties Union has become the latest lobby to condemn the nomination of Robert Bork to the Supreme Court, accusing him of being a "radical." In the words of the ACLU's executive director, "He thinks the highest right in this society is the right of local majorities to make law and to impose their morality on the rest of society."

Allowing for the gross exaggeration that has come to be the rule in attacks on Judge Bork, the ACLU's complaint is that Judge Bork has a bias in favor of democratic government. In this respect he is a radical like Thomas Jefferson.

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.

Judge Bork has been accused in the New York Review of Books of being a "constitutional radical who rejects a requirement of the rule of law that all sides * * * had previously accepted" because he regards "central parts of settled constitutional doctrine mistakes now open to repeal." This charge of radicalism is a repeating refrain among his opponents. But if the willingness to reverse mistaken court decisions is radicalism, then so was the first school desegregation case, because it overturned a decision that had sanctioned the racist Jim Crow system.

Beyond trying to make Judge Bork out to be a radical, the critics cannot seem to agree on exactly what is so bad about him. In a letter to the editor in the New York Times, for example, Yale Law School professor accused Judge Bork of "a dogmatic commitment to a comprehensive or general theory . . ." Apparently he had not read the New York Review of Books, which attacked Judge Bork for not having a theory. Or the New Yorker, which derided Judge Bork for being "concerned less with theory than with results."

Judge Bork has been accused by pro-abortion advocates of favoring "compulsory pregnancy." Meanwhile, in the New Republic, Renata Adler insisted that the consequence of his position would permit laws that "impose abortions—on welfare mothers, say, or on single mothers . . ." And the New Yorker went one step further by shrieking that Judge Bork's jurisprudence could countenance a law "requiring everyone of every race to be blond. And nothing—perhaps this is more serious—[would] prevent the State from enforcing a majoritarian preference that all single mothers should be sterilized. Or all women with an I.Q. below 130. Or all mothers under eighteen.

The folks who are writing these wildly overblown things show absolutely no shame. After smearing Judge Bork in wildly inflated terms, they are perfectly capable of turning around, as the New Republic article did, and accusing him of a "relentless habit of extreme overstatement."

And sometimes the case against Judge Bork seems to be a game of "heads I win, tails you lose."

In the New Republic, for example, Judge Bork was accused of arguing in favor of greater 1st Amendment protection in a particular libel suit because he was engaged in a "lobbying effort, through his judicial opinions, for a position on the Court." The charge had a familiar ring. Justice Antonin Scalia, who participated in that same case in the U.S. Court of Appeals, was accused of precisely the same offense. Except he came out exactly opposite from Judge Bork, arguing against more 1st Amendment protection.

University of Chicago law professor Philip Kurland, in an article on the Tribune's oped page, went so far as to include in his list of horrible things Judge Bork has argued over the years several positions that Prof. Kurland himself has shared (including one position Prof. Kurland presented to the Supreme Court). Prof. Kurland apparently won't take yes for an answer, at least when it comes from Judge Bork.

By now Judge Bork must be wondering who this person is that everyone is so upset about, because the grotesque caricatures bear so little resemblance to his real record.

Lloyd Cutler, who served as President Carter's White House counsel and who supports the nomination, got closer to the reality in a piece he wrote for the National Law Journal. Mr. Cutler estimates that on the U.S. Court of Appeals, Judge Bork voted with his liberal colleagues 75 percent of the time. In 10 discrimination cases in which the scope of individual rights was at issue, Mr. Cutler found that he voted in favor of the victim of discrimination seven times. And in two of the three cases in which he voted against the plaintiff, his position was upheld by the Supreme Court. In fact, of 11 cases in which Judge Bork voted with the majority that have been accepted by the Supreme Court for review, not a single one has been reversed. Some wild-eyed radical.

This is not the first time a struggle over confirmation of a judge has sunk to an ugly level. U.S. Court of Appeals Judge Abner Mikva had a hard time with conservatives when he was nominated by President Carter. During that fight, the liberals said the better position. Sen. Kennedy said, "The question is whether [the nominee] is willing and able to interpret the law as we and those before us have written it. The answer does not turn on politics; it turns on ability, sensitivity, and perhaps most importantly, integrity." And Sen. Joseph Biden, the Senate Judiciary Committee chairman, said, "The real issue with a judicial nominee is whether he is capable of objectively reviewing questions of law and fact. He must be able to put aside personal prejudice he might have on matters before him . . . To apply any other standard would be to disquality from the judiciary virtually any public person who has been willing to take positions on judicial issues."

They were right, of course. Judge Mikva deserved to be confirmed because he is smart, thoughtful, skillful in the law, intellectually honest and in the mainstream of legal thinking. If Paul Simon someday becomes president, and nominates his old friend Judge Mikva to be a justice, he will deserve confirmation again, even if it happens to change the balance on the Supreme Court.

The same is true of Robert Bork and for the same reasons. The campaign to smear him has become, quite simply, a d sgrace.

Mr. ARMSTRONG. But I would like to call the attention of my colleagues to the way the Chicago Tribune sums up.

The campaign to smear him has become, quite simply, a disgrace.

I believe that is true. I believe that when over and over again the public is told in various ways things which are simply unsupported, which are unfair characterizations, which are not backed up by facts, that it does disfigure the process and dishonor the confirmation process in this body.

Mr. President, I think that our colleague from Utah, Senator HATCH, did a great service when he came before the Senate recently to comment on the newspaper ad which I mentioned a moment ago, "Bork Versus the People." He put into the RECORD—and I am not going to recap it—but he did put into the RECORD no less than 67 specific points on which this full page

ad was off the mark, either drawing unfair conclusions or stating facts which were unsubstantiated in some way.

The extremist issue is one which Senator HATCH correctly took issue with. I would like to quote briefly our colleague's observations about that, because he nailed it down tight. He said: "Those calling him"—meaning Judge Bork—"an extremist would not know a judicial mainstream from a judicial jetstream."

Now, in fact, people like Justice Warren Burger have explicitly declared that Judge Bork is in the mainstream. The distinguished jurist from our own State, Byron White, who has served so long and with such great distinction on the Supreme Court in one way or another has said more or less the same thing.

But the fact of the matter is that you do not have to take anybody's opinion—not ORRIN HATCH's not Warren Burger's, not BILL ARMSTRONG's, not anybody's opinion on the matter. The facts speak for themselves.

Judge Bork has been serving as a member of the Circuit Court of Appeals, one of the most important courts of this land. He was confirmed for that post by the U.S. Senate on a unanimous vote. During the years he has been on that court, he has established a record which any citizen can look to and evaluate and make a determination of whether or not he is a crazy judge, whether he is an extreme judge, whether he is a person that has veered off into the hinterlands and swamps and marshes of judicial thought, or whether or not he is, as Justice Burger said, in the mainstream.

Well, in 5 years on the bench, Judge Bork has joined in 95 majority opinions written by his colleagues. Not one of them has, to date, ever been reversed by the U.S. Supreme Court.

He has been, while a member of the Circuit Court, in the majority in 94 percent of the cases that he has heard. A fair-minded person might well ask, what about the other 6 percent? What about the times when he was not in the majority?

Well, in fact, in a number of cases, Judge Bork has dissented.

The PRESIDING OFFICER. The Senator's 10 minutes have elapsed.

Mr. ARMSTRONG. Mr. President, I would ask unanimous consent to proceed for an additional 5 minutes.

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

Mr. ARMSTRONG. I thank the Chair and I thank my colleagues.

To return to the discussion of the times when he has not been in the majority, in 5 years on the bench, Judge Bork has dissented 25 times, in 25 cases. He has written the dissent in 9 instances and in 7 cases, the partial dissents.

It is instructive to realize that the Supreme Court has granted certiorari and has overruled the majority on the circuit court, siding with Judge Bork, in six of the nine cases.

This hardly describes a judge who is out of the mainstream. And yet day after day there is this drumbeat of criticism implying—and not just implying but in fact stating, in the strongest, indeed in the most exaggerated terms—that Judge Bork is some kind of a legal extremist.

Mr. President, the record shows that he is nothing of the kind. The fear merchants scurry around the country, trying to portray him in those terms and for the time being they may convince a majority of the people of this country. It may be that they will delude some newspaper writers to think that they are correct. And it is possible that they may, even, convince a majority of U.S. Senators that Judge Bork is an extremist.

I do not think that history will make that conclusion because the facts do not bear that out and in a time of less passion, after the newspaper ads and the television commercials have long been forgotten, I think historians, legal scholars will look back and recognize Judge Bork, not as an extremist, indeed as an eminent jurist.

The other matter I wanted to address today in connection with the Bork nomination is this. Even if these charges were truthful instead of spiteful and untruthful, there is a real question in my mind about the process and what we are doing to it when we subject a nominee to this kind of a political test.

I want to say this very clearly. I believe that the majority ought to rule. I think in this country that when there is a majority, the majority is entitled to have its way. In this Chamber, in the other body, in the country at large.

I believe that while the general public will make some mistakes, in the long run, if we do not put our faith in the people, there is no other dependable place where we may repose our trust for the decisions and for the future of this country. But I do not believe, any more than did the founders of this country, that it is wise to simply submit every question and every issue to a popular vote or to a popular referendum; and that there ought to be, as one of the founders said, a time for cooling off.

There are distinct functions of government and it is a unique feature of American Government that we expect the Congress of the United States, particularly the House of Representatives and to a lesser extent the Senate, to be the expression of the popular will at any particular time.

Every 2 years we elect a new U.S. House of Representatives so every 2 years the public could dismiss all or any proportion of the Members of the lower House. In each biennium, one-third of the Members of the Senate are up, so once again the public has a chance to express its opinion. Of course supremely above every thing else, the President of the United States is the embodiment of the popular will because he is the person who is elected by all the people in the country and the only one who is in fact so elected.

I think that is good and we expect both the executive and legislative branch to reflect, if not to mirror at least in broad terms to reflect, the popular sentiment on issues of the day.

The judicial branch has quite a different function. It is, in part, the function of the judiciary to protect the persons and the causes which are not at any moment popular; which do not have a majority. So, to the extent that we subject judicial nominees, whether they are for the Supreme Court, District Court, Circuit Court of Appeals or whatever it is, to a political test, we run the risk of undermining and eroding the very function which is at the heart and soul of the judicial process.

If every judge has to prove himself before the bar of public opinion; has to take a stand on every controversial issue that may come up before his court; the risk is, the danger—and I do want to say this cautiously because in the final analysis the people have their way and are entitled to have their way—but if on every judicial appointment that comes along we face the prospect of a test of popular will and referendum on that person's views, then we do undermine one of the distinct and unique and precious functions of the judiciary. That function is to interpret the Constitution, which is our compact with the past, with those who preceded us and who have a stake, an investment in the decisions made by every court in this land.

We interfere with that contract with the past, just as we do with the contract of those who are our successors, who are the future.

Mr. President, I do not want to overemphasize this theme, though I will come back to it, perhaps, when I have an opportunity to speak again on this matter. But if the political tests applied to Robert Bork were entirely above board, entirely fair, couched in the most dispassionate of political rhetoric, I, for one, would have some reservations about whether it was really appropriate in this case. Because I do not want to put all the Federal judges who come through this body for confirmation through that political test. That is not what the

framers of the Constitution had in mind. It is not consistent with the better traditions of this body.

I would have some doubt and reservations if that were the case. But if the rhetoric is florid, unfair, spiteful, when it is what somebody has called, as I mentioned earlier, white-collar McCarthyism, the big lie technique, then I think it is not only a tragedy for Judge Bork, not merely how the vote turns out, it is a tragedy for the country.

When we begin the formal consideration of this nomination, we are going to render a verdict on Judge Bork. But by the way we handle this matter, by the precedents which we set and by the traditions which we honor, we shall call into question our own competence and our own honor. The people of this country and history will render a verdict on us as well.

Mr. President, I yield the floor.

## EXECUTIVE CALENDAR

Mr. BYRD. Mr. President, I inquire of the distinguished acting Republican leader, Mr. ARMSTRONG, if the following numbers on the Executive Calendar have been cleared on that side of the aisle. Calendar No. 355 through 363?

Mr. ARMSTRONG. Mr. President, if the distinguished leader will yield, in fact these have been cleared on our side and we are ready to go forward.

Mr. BYRD. Mr. President, I thank my friend.

## EXECUTIVE SESSION

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate go into executive session to consider the Calendar Orders No. 355 through 363; that they be considered en bloc, confirmed en bloc, the motion to reconsider en bloc be laid on the table, the President be immediately notified of the confirmation of the nominees and that the Senate return to legislative session.

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

The nominations considered and confirmed en bloc are as follows:

NATIONAL SCIENCE FOUNDATION

Frederick Phillips Brooks, Jr., of North Carolina, to be a member of the National Science Board, National Science Foundation, for a term expiring May 10, 1992.

NATIONAL ADVISORY COUNCIL ON EDUCATION RESEARCH & IMPROVEMENT

Noreen C. Thomas, of Washington, to be a member of the National Advisory Council on Education Research and Improvement for a term expiring September 30, 1988.

NATIONAL ADVISORY COUNCIL ON WOMEN'S EDUCATIONAL PROGRAMS

Moneesa L. Hart, of Virginia, to be a Member of the National Advisory Council on Women's Educational Programs for a term expiring May 8, 1990.

Judith D. Moss, of Ohio, to be a Member of the National Advisory Council on Women's Educational Programs for a term expiring May 8, 1990.

BARRY GOLDWATER SCHOLARSHIP & EXCELLENCE IN EDUCATION FOUNDATION

Lt. Gen. William W. Quinn, U.S. Army, retired, of the District of Columbia, to be a member of the board of trustees of the Barry Goldwater Scholarship and Excellence in Education Foundation for a term of 6 years.

Dean Burch, of Maryland, to be a member of the board of trustees of the Barry Goldwater Scholarship and Excellence in Education Foundation for a term of 6 years.

NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

Jerald Conway Newman, of New York, to be a member of the National Commission on Libraries and Information Science for a term expiring July 19, 1992.

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Aram Bakshian, Jr., of the District of Columbia, to be a member of the National Council on the Humanities for a term expiring January 26, 1992.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Joy Cherian, of Maryland, to be a member of the Equal Employment Opportunity Commission for the remainder of the term expiring July 1, 1988.

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION AUTHORIZATION ACT

Mr. BYRD. Mr. President, I ask the Chair to lay before the Senate a message from the House of Representatives on H.R. 2782.

The PRESIDING OFFICER laid before the Senate the amendment of the House of Representatives to the amendment of the Senate to the bill (H.R. 2782) to authorize appropriations to the National Aeronautics and Space Administration for research and development; space flight, control and data communications; construction of facilities; and research and program management; and for other purposes.

(The amendment of the House is printed in the RECORD of October 8, 1987 beginning at page 26967.

Mr. HOLLINGS. Mr. President, after several months of negotiations with the House, I am pleased to present H.R. 2782, the fiscal year 1988 NASA authorization bill.

Mr. President, I am not going to try to fool anybody. H.R. 2782 is not a panacea; it does not solve the budgetary and policy problems of the National Aeronautics and Space Administration or the Civil Space Program. Compared to the needs of NASA, the authorization of $9,573.8 million is modest. But it is the best that we can do in a period of fiscal constraint—and that has me worried.

In March of this year, the Congressional Budget Office released a staff working paper entitled, "The FY 1988 Budget and the Future of the NASA Program." Let me quote from that report:

Expectations for civil space activities exceed the budget allotted to the current program of the National Aeronautics and Space Administration [NASA]. In considering the NASA budget for fiscal year 1988, the Congress will have to decide how much of the present NASA program can be afforded as it competes with other important spending priorities and as it starts to recover from the Challenger accident and its consequences.

The most immediate consequence has been to increase the cost of all space activity at the very time that NASA was turning to its next major program and budget commitment, a permanently manned space station to be deployed in the mid 1990's. No less significant, but less direct, is a reexamination of major aspects of the currently planned program, including the role of the manned space shuttle versus unmanned rockets, the usefulness of the present space station in relation to large increases in its estimated costs, the role and cost of large space science projects, and their effect on the viability of small, less costly space science projects. In order to continue NASA's agenda at its preaccident level, this analysis estimated that the cost of program additions in space transportation, space science, and the space station would increase the NASA budget by $14.0 billion above the Congressional Budget Office [CBO] baseline for the fiscal years 1988 through 1992.

Mr. President, as somebody recently said, "we have been trying to put 10 pounds of potatoes into a 5-pound bag for too long." The CBO study clearly manifests this syndrome and the fact that our civil space program expectations exceed our available resources. So impressive was this analysis that the Senate Commerce Committee has asked CBO to do a more comprehensive analysis of NASA's future budget requirements and to cost out the long-term goals and objectives of the Paine and Ride reports.

The reason I highlight this CBO report is to put into perspective the budget dilemma that confronts the committees of jurisdiction and the Congress with regard to the civil space program. If the Congress wants a civil space program, it must be willing to provide the necessary resources. To paraphrase the finding of the "Seaman's Committee on the Space Station Report," you cannot develop the civil space program on the cheap.

In light of these realities, H.R. 2782 provides $9,573.8 million for NASA in fiscal year 1988. This is $93.8 million above the President's fiscal year 1988 budget request that did not provide any funding for ELV's or critical wind tunnel rehabilitation and contained inadequate funding for anomaly resolution activities. The latter issue was re-

# SENATE—*Wednesday, October 14, 1987*

*(Legislative day of Tuesday, October 13, 1987)*

The Senate met at 9 a.m., on the expiration of the recess, and was called to order by the Honorable JOHN BREAUX, a Senator from the State of Louisiana.

## PRAYER

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

Let us pray.

*Yea, though I walk through the valley of the shadow of death, I will fear no evil; for Thou art with me * * *. Surely goodness and mercy shall follow me all the days of my life, and I will dwell in the house of the Lord forever.*—Psalm 23:4-6.

*Precious in the sight of the Lord is the death of His saints.*—Psalm 116:15.

"God of all comfort," we pray for Senator KASSEBAUM, her mother, and the family in the loss of her father. May Thy presence and Thy peace fill their hearts with comfort and consolation. We thank Thee for a great American who reached the century mark, having served his country well, for his rich and productive later years, and for the memory and inspiration his life brings to all who knew him. In this large Senate family, Gracious Father, there are others of whom we are unaware who are hurting, because of loss or illness of a loved one, sickness or accident, financial difficulty, loneliness, job uncertainty, and other innumerable reasons. May each experience Your gentle, tender care in the hour of need. We pray in the name of Him whose agenda was love for all who are needy. Amen.

## APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. STENNIS].

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
*Washington, DC, October 14, 1987.*

*To the Senate:*

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable JOHN B. BREAUX, a Senator from the State of Louisiana, to perform the duties of the Chair.

JOHN C. STENNIS,
*President pro tempore.*

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

## RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. Under the standing order, the majority leader is recognized not to exceed 7½ minutes.

## THE BORK NOMINATION

Mr. BYRD. Mr. President, I see the distinguished Republican leader on the floor. I wish to address a question to him.

Is it possible, now that the Bork nomination is on the Executive Calendar, that the two leaders might join in waiving the 2-day rule? I am willing to do so and eager to do so.

I would like to see this Senate get started on the Bork nomination today—today is Wednesday—and vote on the nomination as soon as possible, hopefully today.

Would the distinguished Republican leader indicate whether or not he is willing to join with me in waiving the 2-day rule.

Mr. DOLE. Mr. President, let me indicate to the majority leader that we, as I indicated yesterday afternoon, had a meeting last night. I thank the majority leader for permitting us to do that.

As I understand the rule, the leaders could waive it, but I think right now I am not in position to do that because I have almost unanimous indication from the membership that they prefer I not do it.

But let me also suggest that I think there is a willingness on both sides, and I took the liberty of calling Judge Bork myself last night. It seems to me that no one has any quarrel with what the majority leader said. He deserves a vote. I do not suggest he should dictate to the Senate when that vote should come.

But as I understand it, there are a number of people preparing information that should be used, high-level information, not a personal assault on anybody in the Senate, and that information is not yet available, and so he was hoping that the vote would come next week.

I regret that I am not in a position now to waive the 2-day rule.

I will be glad to check with the majority leader later this morning. We are going to have another meeting.

But if we took it up and we waived the 2-day rule, it might just prolong the debate. We might not save the time.

I know the schedule before us, and I know we do have a number of items cleared on this side, but at this point I cannot join the majority leader in waiving the 2-day rule.

Mr. BYRD. Mr. President, I regret that the distinguished Republican leader is not ready to join with me in waiving this rule. I realize that for him to give consent to proceed to the nomination would require consent from other Members on his side of the aisle but he does not need the consent of other Members on his side of the aisle to waive this rule to join with the majority leader.

I am nonplused. Judge Bork wants a vote on his nomination. We Democrats are ready to vote on the nomination. And as the Republican leader has said, there should not be any hint that Judge Bork is attempting to dictate when this nomination will be voted on.

I think Judge Bork might keep in mind that a motion to table this nomination once it is up could be made and that would stop all debate. I do not want that to happen. I want a vote up or down on the Bork nomination.

What is it the Republicans want? Do they want an issue? Or do they want a judgship?

The longer we delay taking this Bork nomination up, the longer we are going to see delayed the filling of that vacancy on the Supreme Court. That does not help the Senate, that does not help the Court, that does not help the country.

What is it the Republicans want? If they want a vote on the Bork nomination, they can get it. Or do they want to string it out and promote divisiveness, contention, and dissension, which could spill over into the next nomination? And that is what we all ought to want to avoid.

The sooner we get on with the Bork nomination and vote on it, the better. The die is cast on that nomination, and there is no point in dragging it out.

I hope that we could get this nomination up today and I will be back urging the Republican leader to help me to waive this 2-day rule. We have much work to do here.

Can we get an agreement to vote on the Byrd-Warner amendment to the Weicker-Hatfield war powers legislation?

Mr. DOLE. If the majority leader will yield, I did not explore that. I could if the majority leader desires that.

I would just say, if the majority leader will yield further, I do not want to argue with the majority leader, but I find it a little, I guess, unique that, after waiting 72 days to start the hearings on this nomination, having 12 days of hearings, and the report having been filed only last night, suddenly there is this great generosity on the other side that we should have an immediate vote on Judge Bork.

If we were delaying other Senate business, then I think I would be in agreement with the majority leader, but I think, as he knows, and we need to continue to cooperate, we have two or three appropriations bills cleared for action, and I will check on the Byrd-Warner amendment to the War Powers Resolution. And I will again check later in the day to see if we could waive the rule.

But the point I would make to the majority leader, if we did waive the rule today, did agree to take up the Bork nomination today or early tomorrow morning, I would assume there could be several days of debate unless a motion to table was made or unless cloture was invoked. And what I was attempting to do was get some precise time we could have a vote so that the leaders would know what else we could do in the interim.

So I do not want the majority leader to infer that we are trying to frustrate your efforts, because we would like to depart here on November 21. We would like to see another nomination sent up, if that should become necessary, and have that confirmed by that date if possible.

Mr. BYRD. Mr. President, the November 21 date becomes more and more unclear with the passage of every day and with delay on acting on the Bork nomination. I would suggest that Senators be very careful not to stake too much on the November 21 target date. I would like to reach that date, but the Judiciary Committee needs time to prepare for a new nominee, and the administration needs to get a nomination up to the Senate. We need to get by the Bork nomination first.

Now, I am going to be back again and again today asking that we waive this 2-day rule, because nothing could be gained by stretching out this debate. There is only harm that could be done to the next nominee.

Now, what is it the administration wants? Do they want an issue? Do they want a political issue? Do they want to chew on the old bones and drag out the old ashes? Or do they want to get on with resolving a matter that is waiting and crying out to be resolved; namely, the filling of the vacancy on the Supreme Court?

Mr. EVANS. Will the majority leader yield?

Mr. BYRD. Yes, I yield.

Mr. EVANS. Might I say to the majority leader that I am not speaking on behalf of anyone except this Senator in saying that I have been, frankly, dismayed—and I have not even indicated yet my vote on the Bork nomination—but I have been dismayed in the way we have carried out the process. This has little to do with Judge Bork himself, but merely the fact that virtually all Members of the Senate have declared their intentions, most prior to the hearing, many shortly after the hearings, but long before they would have had an opportunity to have the transcripts in hand and an opportunity to read those transcripts.

I have read all 730 pages from beginning to end of the testimony and the questions asked in the Judiciary Committee of Judge Bork. Frankly, Mr. Leader, I would like to read the committee report.

I guess, ultimately, it seems to me, if we are ever going to regain the essence of what this Senate is all about, it ought to be that through a thoughtful process we listen at hearings, read the testimony, read the report of the committee so that we have their wisdom, and then debate on the Senate floor before making final decisions. Now I know that that has not happened in this case. And it is too bad that it has not, because it would be uplifting to the Senate if we would all go through that process on every important issue in front of us; to carefully read, to listen, to take part when we are members of a committee, to have the benefit of the report of a committee when an important issue comes in front of us, to have open and free debate as I thought I understood debate before I ever came to this Senate. And it is too seldom that we ever engage in honest debate here.

I would have hoped that this nomination and another nomination, if it comes forward, and another nomination after that for whatever position exists if they are controversial, if they deserve debate, then they also deserve the thoughtfulness of all Members.

Therefore, I would ask the majority leader, at least for this one Senator, not speaking for the minority leader, not speaking for the Republican Party, not speaking for anybody other than myself, that there be sufficient time in order to read reports, to thoughtfully try to make a decision on an important nomination which will, if adopted or turned down, have an effect on this Nation and its future long after most of us are gone from this Senate. I think a few days to accomplish that would certainly not harm the Senate.

Mr. BYRD. Mr. President, I thank the distinguished Senator.

I think there is plenty on the Bork record. His record is prolific with writings and lectures and statements. There have been exhaustive hearings. What would be uplifting, I think, would be for the Senate to get on with a new nominee who can be confirmed.

Now, I will be glad to keep this Senate open all night for Senators who wish to debate. They want to debate the process, and in doing so, they want to string out the process.

So let it be known and let it be heard by all. The Senators who want to debate this nomination can start today and we can go all night if they want to debate, and the television cameras will be on. But I should think that if they prefer to have a nominee confirmed rather than an issue to drag out into the election, they would stop beating a dead horse and get on with the nomination.

So they will have plenty of time to debate. There is no restriction on the Senate's being open or closed here. If Senators want to stay around and debate, I will be here and we will keep the Senate open as long as they want to debate—into the night. Let us have debate.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The time for the majority leader has expired.

Mr. BYRD. Mr. President, I ask unanimous consent that the Senator from Wisconsin may have 5 minutes which I had promised to yield to him from my time.

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

The Senator from Wisconsin is recognized for 5 minutes.

Mr. PROXMIRE. Mr. President, the majority leader has been more than generous with this Senator—time and time again he has given me his time—and he is generous once again this morning.

## A SUCCESSFUL SDI WOULD BRING A MORE DANGEROUS WORLD

Mr. PROXMIRE. Mr. President, what is the principle argument against the strategic defense initiative? Is it the cost? No. The cost is appalling. It would be $1 trillion. But it would be $1 trillion spent over a number of years. The estimated time for building and deploying SDI fully is about 25 years. The most authoritative, independent study of SDI cost has estimated that in the most demanding 10 years the cost would be less than $50 billion per year. We could raise that $50 billion annually with an 11-percent increase in the personal income tax. That's a painful bite to be sure. But if Americans accepted the notion that the 11-percent income tax hike could protect our country against a Soviet nuclear attack, they would accept it. This Senator is convinced that there is no way SDI could work. I am certain that far less expensive counter measures would

ers of the National Institutes of Health, and leading physicians have spoken clearly about how Americans can avoid transmitting or becoming infected with the AIDS virus. The Federal Government must continue to offer the entire message. Those who will not follow these precepts must know how to prevent or reduce their risk, of acquiring AIDS. The complete message must be offered in many different ways to many different groups in many different versions. If we fail in this task, the result may be catastrophe.

Senator HELMS' simplistic approach offered in this amendment is inadequate to fight a disease which is already advancing rapidly through the population. The war on AIDS is not the time for a debate about homosexuality. The virus is spreading, we need genuine leadership to end the epidemic. Comprehensive AIDS legislation with broad bipartisan support has already been reported by the Senate Labor Committee and is overdue for Senate action. Instead of these piecemeal and irrational exercises, let us move on the real debate.

The PRESIDING OFFICER. The question is on agreeing to the amendment, as modified. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Tennessee [Mr. GORE] and the Senator from Illinois [Mr. SIMON] are necessarily absent.

Mr. SIMPSON. I announce that the Senator from New York [Mr. D'AMATO] is necessarily absent.

I further announce that the Senator from Kansas [Mrs. KASSEBAUM] is absent due to a death in the family.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 94, nays 2, as follows:

[Rollcall Vote No. 323 Leg.]

YEAS—94

| | | |
|---|---|---|
| Adams | Dole | Kennedy |
| Armstrong | Domenici | Kerry |
| Baucus | Durenberger | Lautenberg |
| Bentsen | Evans | Leahy |
| Biden | Exon | Levin |
| Bingaman | Ford | Lugar |
| Bond | Fowler | Matsunaga |
| Boren | Garn | McCain |
| Boschwitz | Glenn | McClure |
| Bradley | Graham | McConnell |
| Breaux | Gramm | Melcher |
| Bumpers | Grassley | Metzenbaum |
| Burdick | Harkin | Mikulski |
| Byrd | Hatch | Mitchell |
| Chafee | Hatfield | Murkowski |
| Chiles | Hecht | Nickles |
| Cochran | Heflin | Nunn |
| Cohen | Heinz | Packwood |
| Conrad | Helms | Pell |
| Cranston | Hollings | Pressler |
| Danforth | Humphrey | Proxmire |
| Daschle | Inouye | Pryor |
| DeConcini | Johnston | Quayle |
| Dixon | Karnes | Reid |
| Dodd | Kasten | Riegle |
| Rockefeller | Simpson | Trible |
| Roth | Specter | Wallop |
| Rudman | Stafford | Warner |
| Sanford | Stennis | Wilson |
| Sarbanes | Stevens | Wirth |
| Sasser | Symms | |
| Shelby | Thurmond | |

NAYS—2

| | |
|---|---|
| Moynihan | Weicker |

NOT VOTING—4

| | |
|---|---|
| D'Amato | Kassebaum |
| Gore | Simon |

So the amendment (No. 963) as modified, was agreed to.

Mr. HELMS. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. CHILES. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Chair recognizes the majority leader.

Mr. BYRD. Mr. President, I will not delay the distinguished majority whip long. I wonder if I might have the attention of the Republican leader.

Mr. STENNIS. Mr. President, may we have quiet?

The PRESIDING OFFICER. The Senate is not in order. The majority leader is recognized, as soon as the Chair obtains order.

The Senate will be in order. The Sergeant at Arms will maintain order in the galleries.

The majority leader.

Mr. BYRD. Mr. President, while the Republican leader is on the floor, I would like to—if we can have order in the Senate.

The PRESIDING OFFICER (Mr. FOWLER). The Senate will be in order. The Senate will be in order. All staff take their seats, Please give your attention to the majority leader.

The majority leader is recognized.

## THE BORK NOMINATION

Mr. BYRD. Mr. President, the distinguished minority leader and I had a discussion this morning with reference to the Bork nomination. The Bork nomination is on the calendar today, and if we cannot get unanimous consent to call up the nomination—and there is no objection on this side—the two leaders can join together to waive the 2-day rule. If that 2-day rule is not waived, I cannot move to take up the nomination without unanimous consent or without the waiver of it until the expiration of the 2 days.

The 2 days begin running when the printed report is available to Senators. That printed report, I am told, will not be available until tomorrow around noon. This means that the 48 hours would not begin running until that time, and would not expire until about the same time on Saturday.

Mr. President, the two leaders can waive that rule and the Senate can go on the Bork nomination today upon the disposition of this bill or, as a matter of fact, right now, or tomorrow.

Now, the President said he wanted to see a vote this week. I understood the distinguished Republican leader to say something of the same order.

I inquire again, as I told the Republican leader I would inquire today repeatedly, if he is ready to join with me in waiving the 2-day rule so that the Senate can begin debate on the Bork nomination. The longer we wait in disposing of this nomination—and Mr. Bork is entitled to a vote—the longer we will be in filling the Court vacancy.

Mr. President, I inquire of the distinguished Republican leader if he is ready to join with me in waiving the 2-day rule.

Mr. DOLE. Mr. President, if the majority leader will yield and permit me to make a brief statement.

Mr. BYRD. Yes.

The PRESIDING OFFICER. The Republican leader is recognized.

Mr. DOLE. Let me say in the first instance, as the majority leader correctly stated, the report will not even be available until tomorrow noon. We could waive that 2-day requirement.

I discussed the matter, I must say, last night with about 25 or 30 of my Republican colleagues. I will say again for the record, when I asked the question, not a single Republican indicated that as the leader they wanted me to agree to that. They felt that way, not because they wanted to be petty or partisan, but because many believed that they had some responsibility, even though most people have announced their position on the Bork nomination, to put together some arguments and to take a look at the record.

Today we have had three or four members of the Judiciary Committee meeting almost all day long trying to construct an appropriate, proper argument to make on the Senate floor—an argument that would not delay the Senate, not frustrate the wishes of the majority in this instance, or the majority leader.

I have just visited with the distinguished Republican whip, Senator SIMPSON of Wyoming. I think they made a lot of progress today. But I am not in a position to join the distinguished majority leader.

Judge Bork said he was under no illusions about changing the vote. But neither should he be shortchanged on the Senate floor as far as appropriate debate. The majority leader himself has indicated that he certainly deserves a vote. And I think by inference, indicated that he deserves to have his nomination discussed in a rational way, in a careful way. And we want to do that.

But I would restate, as I stated this morning, all of a sudden those in the

majority want to rush to judgment. Judgment has already been made in this case. But the person on whom the judgment was made had to wait 72 days for the hearings to start. We had 12 days of hearings and 120 witnesses.

It seems to this Senator that, notwithstanding what the President may have said in response to a question and notwithstanding what the Republican leader may have said in response to a question, we are certainly willing to have the majority leader bring the nomination to a vote and to help dispose of it.

But I just cannot agree to waive that 2-day rule. I wonder if we might—myself, the majority leader, the Democratic and Republican whips—have a private meeting at the call of the majority leader.

Mr. BYRD. I wonder if we might agree to come in Saturday and have a day of debate? If this is what we want?

Mr. DOLE. Or Monday. Start on Monday.

Mr. BYRD. Both? How about Saturday and Monday? Let us have debate if what is wanted here, is debate. It seems to me that the longer we delay action on this nomination, the longer we delay filling the Supreme Court vacancy.

That does not do the Court any good, it does not do the country any good, it does not do the Senate any good.

The Republican leader, I say this with all respect, I know has his difficulties in a situation like this. I also feel he may have some problems at the White House to contend with.

As I asked this morning, if the White House wants an issue and our Republican friends want an issue, then they can have an issue by dragging this out and beating a dead horse. I think the conclusion is foregone and the longer we drag this out, the more difficult it is going to make it for the Senate to begin its work on the subsequent nominee and complete action on that nomination.

So, what is it that the Republicans want? Do they want an issue or do they want a judgeship?

We can come in Monday. I would suggest that all of our friends take home the report. It will be available tomorrow, hopefully afternoon. Take it home over the weekend. Read it. It is 480 pages, I am told. And let us come in Monday and begin to debate this nomination.

Or, if the Republican leader feels that he cannot waive the 2-day rule, could we, in return, have a debate on Saturday, have a debate on Monday and vote no later than 6 o'clock p.m. on Tuesday? That will be 3 full days of debork—of debate—(laughter in galleries)—and we can vote on Tuesday.

Saturday, Monday, Tuesday: 3 days of debate. Vote at 6 o'clock p.m. on Tuesday.

Mr. DOLE. Will the majority leader yield?

Mr. BYRD. Yes.

Mr. DOLE. I think we may be nearing some agreement. I am not certain about Saturday, but I might even be willing to lay it down as the pending business Friday, come in on Monday. Then I do not know about a time agreement to vote. I might even get help on this from the distinguished minority whip. He has been putting together a program so we will know precisely how much time we are going to use. This is not going to be an effort to filibuster. We do not want to just have a turkey shoot in here, where everybody jumps up.

We are trying to construct the debate—make our case.

As far as I know, there will not be any issue. The issue is going to be whether he was fairly heard and whether the confirmation process is still as it should be.

I do not believe the White House or the Republicans are looking for an issue. I think many of us feel that Judge Bork is highly qualified; that he has impeccable credentials; that had his nomination been up here 2 years ago, it would have sailed through just as he did for the circuit judgeship without dissent in the Senate. Nobody even raised his voice when he was nominated for the circuit court. We would like to make that record. I assume some on the other side will disagree, but we hope it is going to be a lofty, high-level discussion and not an effort for us to go after Democrats and Democrats to go after Republicans.

I think, if I misstated that, then the minority whip, Senator SIMPSON, if the majority leader would yield to him——

Mr. SIMPSON. Mr. President, may I ask the majority leader whether he will let me be as candid and brief as I can?

Mr. BYRD. Yes.

Mr. SIMPSON. We are really working here to assure that we do not have a filibuster. There is no need for that.

It is a painful experience. It is painful for Judge Bork. It is painful for Mary Ellen Bork. It is painful for his three children. Painful for the President. It is painful for all of us on both sides.

There is no attempt to stretch anything out or do anything that would lead to a "stretching out". I have been meeting with a group of people who are not on the Judiciary Committee who want to speak. They are here in this Chamber. There are people on both sides of the aisle. Not a great number, but, you know, we have talked about politics and politics and politics. Surely there has been a good deal of that. But right now there is no attempt to do something at the call of the White House or to bow to the will of the White House or to make political capital.

We often speak for everybody else in this Chamber. Let me just speak for AL SIMPSON. All I am doing in this case is done solely at my own stirring. I am not being commanded by anyone, instructed by anyone. I am doing it because I would not want to be a person 65 years old, or 56 years old, who had a remarkable record in my profession and with people that know me and suddenly appear to be some kind of a person I am not, some caricature of myself.

That is the only issue. In the debate are going to be the presentations of Senator DANFORTH, who was his student at Yale; there are going to be discussions of the points that came out, which are the flash points of the issue: sterilization, poll tax, Watergate, antiwomen, antiblack. Those are the things that have commanded the national debate and we are not going to go for hours. We are not going to go for days. But we are ready to lay it down, I think Friday night as the minority leader says, lay it down, come in Monday. I will have people here Monday to do the work. I do not know if that accommodates the chairman of the Judiciary Committee. If he has problems with that, we can have people that will just debate that one side.

Others can come in Tuesday to do the other side; work with any kind of accommodation and work toward a vote next week. That would be our whole hope.

That is the extent of what I am doing. I am not in it for anything else. I remember what the President said and the issue is no one believes in the independence of the legislative and the executive more than the majority leader. Let us have our independence and have it done. I can assure you that we want to give the other 86 who did not participate in the Judiciary Committee activities the opportunity to discuss this and that is what I want to share with the majority leader.

There is no other sinister motive, no desire to be obstructive. But there is a great desire to reconstruct the person of Bob Bork so the people 30 years from now will see that he is not quite as what was portrayed in what was, I think, a fair hearing but there was not enough time for either side.

It is the full Senate that is to do the advice and consent and that is what we should be doing.

Mr. BYRD. Mr. President, let me ask the Republican leaders: Do they intend to let the Senate get to a vote on this Bork nomination before the middle of next week?

Mr. DOLE. If I could respond to the majority leader I would say that the answer is almost an unequivocal yes. The vote would not be at the end of

the week from my standpoint. I hope much earlier than that, and I would be willing to try to get an agreement. I have been resisted by some on this side, but I just had a conversation with two of my colleagues who think we ought to get an agreement to vote on a certain time on Wednesday.

I will be happy to try to do that.

I do not disagree with the majority leader when he says we overdo a lot of things around this place, and we do have a lot of work to do.

My response would be, yes we will try for an agreement. I will have to discuss it with the distinguished Senator from Wyoming, who has sort of taken a leadership role on this. Maybe I can do that privately and after the next vote maybe we can nail that down.

Mr. BYRD. Mr. President, let me just say this. The distinguished Republican whip has said that he is acting in response to his own stirring. Mr. President, this is the President's nomination. It is not mine. This is the administration's nomination. The administration has an opportunity to fill this seat, the vacancy, on the Supreme Court. Who is here trying to fight to help get this seat filled? The majority leader of the U.S. Senate, who belongs to the opposite party. The administration ought to be trying to get that seat filled. We can give Mr. Bork a vote. I hope we will have an up or down vote on Mr. Bork.

But remember this, it could be a tabling motion, which would stop the debate. I do not want to resort to that. I hope I will not have to.

But here I am trying to fight to get this administration to get a nomination up here, get the way cleared, get all the brush and the briars out of the way so the administration can send another nomination up here and get it acted upon before we go out for sine die adjournment.

Who is opposed to this? Mr. President, this does not make sense. Everybody knows what is going to happen on this nomination of Mr. Bork. I think everybody should be apprehensive concerning the kind of debate, the invective, and the contumelious charges that will be made, with a bitterness that can spill over into the next nomination.

I have not asked one Senator how he is going to vote in all of this time. I have not asked one Senator to vote against the Bork nomination. I have not once asked anybody, "What is your vote count?"

I have tried to stay above that as majority leader in this instance. That is no criticism of those who might have done otherwise.

But nobody can charge this Senator with being unfair. Nobody can charge this Senator with trying to stack the deck against Mr. Bork.

I just want to get on with what is my responsibility. That is my stirring, and I want to get on with what I see is the responsibility of this Senate.

It seems to me that if this administration wants something other than an issue, if it really wants to get a judgeship confirmed, then it ought to cut out the temper tantrums and let the dead past bury its dead. Let us have a vote here. There is time to get another nomination to the Senate and to get it confirmed. But each day we dillydally and delay is 1 day later if not more before the Senate can get to another nomination.

We will soon be down to Thanksgiving, and Senators will want to go home for Thanksgiving. Then we get into December and everybody will want to go home for Christmas. Then we have New Year's.

The time is now. I am telling you, time, precious time, is being wasted.

I want the country to know that this Democratic leader wants to get on with the Senate's work. I have not treated anybody unfairly. I have not been charged with treating anybody unfairly. But it seems to me we ought to cut through all this mist and fog and get on with the vote on this nomination. Give this man his vote and give the President a vote this week. He asked for a vote this week. There are very few people around here who are going to take a 400-page report home and really read it, few people. We all know that.

I will say to the distinguished Republican leader I intend to ask unanimous consent—not right now, but before the day is over and again tomorrow if I cannot get it today—that the Senate proceed to the consideration of this nomination by Friday and that we vote, in any event, by 6 o'clock p.m. on Tuesday next. We can come in Saturday and we can stay in as late as Senators want. We can come in Monday and we can stay in as late as Senators want. We can debate this. But we have other work to do and we have a Supreme Court vacancy to fill.

This delay, I can see very clearly, is not working to the good of anyone. It is not going to be helpful to Judge Bork or to his wife and family. It is not going to be helpful to the President of the United States or to the Court, or to the Senate, or to the country.

Mr. President, I yield to the distinguished Senator from Ohio.

Mr. METZENBAUM. I thank the majority leader.

I appreciate what he has been saying in attempting to move the Bork nomination to a vote. I do not want to address myself to that issue. What concerns me as a member of the Judiciary Committee is what happens next. I am concerned that when the next nominee is sent up, suddenly the drumbeats will roll and the bugles will blare and the editorials will be written and the Judiciary Committee will be called upon to move with dispatch and without delay to the confirmation of the second nominee. I think that is an unfair burden to place upon the Judiciary Committee. If we adjourn within 30 days, which is the approximate time we are supposed to adjourn, if we should vote on it next Wednesday, then it is conceivable that we would not be able to get to the confirmation of the next nominee.

Nobody is attempting to do that, but if that is the reality of the situation, that we cannot conduct our hearing, we cannot do the necessary investigation, we cannot do that which we are obligated to do as Members of this body and we are crowded to move more rapidly than makes good sense, then it is we who will carry the burden of blame.

I think the fact that the majority leader is attempting to facilitate and move this matter forward, indicating that as of the first of the week he was ready to schedule the Bork nomination for debate, indicates the fact that there is no desire to come to the situation where we might be adjourning without being able to fulfill the vacancy on the Supreme Court.

That is a possibility. The longer we delay I think the more it makes that possibility into a reality.

Mr. DOLE. Will the majority leader yield?

Mr. BYRD. I yield to the distinguished Republican leader.

Mr. DOLE. I do not disagree with anything anybody has said, I guess. I am not certain. But I do believe that we are not delaying here. I read the Sunday Boston Globe, where it said that "On July 8, KENNEDY met with BIDEN and Senators HOWARD METZENBAUM and ALAN CRANSTON to work on strategy. The first point was to gain time to organize against the nomination. So a decision was reached that there be no hearings until after the August recess.

To me, that was a strategy to delay. There was a meeting. I do not know whether all these people attended but that is what is in the paper. That may not be accurate.

There is not any strategy here to delay. We are talking about debate, if it starts on Monday and ends sometime Wednesday, we are talking about 2½ days to debate this nomination. We are talking about 2½ days to discuss a nominee who waited 72 days—72 days—for a hearing in the Senate Judiciary Committee; 2½ days versus 72 days is quite a difference. I would hope we could just agree on that. I am willing to try to reach a time certain. I think some of my colleagues, though they do not want to carry it on, are fearful they might get down to 6

o'clock Tuesday or whatever and somebody might not have spoken.

But I am willing to try to work out a time agreement with the distinguished majority leader. We do not want to delay. But at the same time, we want to make certain that the nomination has been discussed in a way that we think it should be discussed. I am not singling anybody out on either side. Maybe this nominee is not entitled to that. I think he is. I discussed this with the distinguished Senator from South Carolina, the ranking member on the Judiciary Committee, who is willing to cooperate and I think has expressed some willingness to try to work out a time certain.

So I would just say to the majority leader, knowing the frustrations of leadership, that I think maybe after the next vote, the two of us could perhaps announce some agreement.

Mr. BYRD. Mr. President, I hope we can. I hope it can be by 6 o'clock p.m. Tuesday or no later, no later, may I say to the distinguished Republican leader, than noon, say, on Wednesday.

Mr. BIDEN. Will the Senator yield?

Mr. BYRD. Yes, I yield to the distinguished chairman of the Judiciary Committee.

Mr. BIDEN. Mr. President, I had not intended to speak to the Boston newspaper that was just spoken to. Let the record show that the first person to whom I spoke about a date for scheduling these hearings was none of my Democratic colleagues but the leading Republican, a member of the leadership of the Republican side, the first person with whom I spoke about when to schedule the hearings. Let the record also show that no one seriously entertained the notion of starting the hearings prior to the recess.

Let also the record show the Senator from Delaware was prepared to start the hearings during the recess. And let the record further show that the only debate was whether they should start September 14, 15, or 17, not whether they should start prior to that.

Now, one other point I would like to make. No matter what happens in the outcome of this nomination—obviously, if Judge Bork were to by some change of events be confirmed by the Senate, then the point is moot. But if Judge Bork is not confirmed, as I think most anticipate on both sides of the aisle, then the Senate Judiciary Committee is going to have to start to hold hearings again. Let us leave aside Judge Bork. As to the previous two nominees under Republican leadership, the Republican-controlled Senate, Republican-controlled Judiciary Committee, and the Republican-controlled White House, it took the better part of a month before the hearings were able to begin. There is a simple reason for that. The reason is the FBI clearance, the ABA clearance. I do not know how people compute around here, but we are talking about a highly improbable situation, if you are going to be thorough, without any delay, just using as an example, the previous two Republican nominees under a Republican-controlled Senate, of having the hearings underway and/or concluded prior to Thanksgiving.

Now, maybe we are going to be in here until Christmas. I do not know. I am prepared to come in and hold these hearings whenever they are ready to go, based on the White House and the clearances and our own investigation to prepare for the nomination. But I do not want anybody operating under any illusions—and I would yield at some point, though I do not have the floor, to the ranking member, Senator THURMOND—that from the day the nomination is sent up, whomever it would be, to the time we can complete the hearings will be less than several weeks. It would be unprecedented in recent time.

I do not know how that gets done. Now, obviously, if they send a Senator THURMOND, the whole matter will only take a couple days. If they send us some people in here, we could maybe waive the hearing. But we are likely to be sent someone we do not know a great deal about. I should not say likely. That is possible.

So the idea that we are going to be able at the conclusion of these hearings, assuming the President gives us a name the moment after the vote count is made, to get underway, follow through with and complete the hearings, and vote on the Senate floor prior to the target date for adjournment——

Mr. BYRD. Mr. President, may we have order in the Senate and have someone stand at the door and keep the door closed.

Mr. BIDEN. I assume they are clapping for me. I do not know why for sure. But at any rate, the chairman of the committee has no intention of delaying this. Obviously, we cannot control if our Republican colleagues do not want to vote. I thought it was interesting that the Republican whip, a man for whom I have great affection and complete faith in and take him at his word absolutely, said that "We"—I assume he meant the Republican leadership—"are trying to stop a filibuster." What a bizarre notion, filibustering a Republican nominee sent up by a Republican President to fill a vacancy on the Court when that nominee already has 54 people voting against him. Is the idea to wait? Are they so certain that GEORGE BUSH or BOB DOLE is going to be President they would like to filibuster and have DOLE or BUSH choose the nominee instead of Reagan? I do not quite understand this—to stop a filibuster? This is bizarre. When this all started everybody, my colleagues, left and right, Republican and Democrat, and the press, asked me, "Will you participate in a filibuster?" This was back in July. I said, "No, I will not participate. I do not want to filibuster." Everyone assumed that we Democrats would be talking about a filibuster. And here we have the Republican leadership having to try to stop a filibuster. I assume everyone knows he is not talking about any Democrat talking about filibustering.

I hope the Republican leadership is successful in stopping a Republican filibuster. I hope we can get on with this because, as the distinguished ranking member of the committee and former chairman of the committee, who is on the floor, can tell you, it is virtually impossible to gear up the committee, do the proper investigation, hold proper hearings, write a report, and report back to the Senate as a whole in a matter of a couple weeks. I do not know how that gets done. I have never seen it done in recent times.

So I share the majority leader's frustration. And I understand and share and sympathize with the frustration of the minority whip. But I would hope we could start Saturday, start tomorrow but agree that the vote would take place on Tuesday and give everybody time to make the case, put it in the RECORD.

I thank the leader for yielding.

Mr. SIMPSON. Mr. President, will the majority leader yield?

Mr. BYRD. Yes, I will be glad to yield to the distinguished Senator. While I am yielding, I hope that Senators who have their amendments to the Labor-HHS appropriations bill will come to the floor. Both managers have indicated a willingness to stay until we finish this bill today. So I hope Senators will be ready. I yield to the distinguished Senator.

Mr. SIMPSON. Mr. President, I thank the majority leader. Just quickly, here is where we are. We have a report that will not come out until tomorrow and we are unable to waive the time. So we are ready to go to work Monday. None of us are ready to go to work Saturday. I think there are some very artful Members who would try to say if there was no quorum present we could not do work Saturday. All of us, I think, are ready for the Friday and Monday activity. So that would be difficult. But the point is we are ready to go Monday and will have people here. So I think that shows our good faith.

I respectfully say to the majority leader that I would object to a time

certain to vote at 6 o'clock Tuesday or 6 o'clock Wednesday. I say to the majority leader that there was not a single person involved in these discussions who wanted to go beyond this next week. Nobody wants to go past next week. But I cannot in any good conscience say Tuesday or Wednesday.

But my hunch is that after they express themselves for a couple of hours, and there are several who want to, who feel it is very important to state their case about Judge Bork, then we would be ready to go and very likely get a time certain for Thursday or Friday without question.

The only reason we want to extend that is that those who are opposed to Judge Bork might want to speak, and might want to not yield. That happens. We both know that in our work in the leadership. Those who support the Bork nomination just want to get the full story told. If there were an agreement to vote by a time certain, that might not be the case.

So that is what we are doing. I shall never ever use in an inartful way the word "filibuster" again like that because it really would not be too dazzling to do that kind of filibuster—although it has some charm. The minority and the majority whip talked. I said "What if we were just to filibuster and say 'We are going to filibuster until you accept Judge Bork?' " That would be a bizarre kind of a filibuster. I would not want to be involved in that. But I would not ever use that term. It is a good lesson. But we are not here to delay. I can promise you that. You will see that unfold.

I guess the proof of the pudding will be in the eating, and that is what we have to present. We have some very serious people who want to talk not because of the White House and not because of what may or may not happen, but because of a man's reputation in the United States of America that can be looked at 30 years from now, and be perceived as a rather reasonable human being and not some bizarre extremist.

Mr. BYRD addressed the Chair.

Mr. THURMOND. Will the majority leader yield?

Mr. BYRD. Yes.

Mr. President, I yield to the distinguished Senator. Yes.

Mr. THURMOND. Mr. President, I felt I ought to make a statement in view of what the able chairman of the committee said. I stated after the hearings that the chairman, Senator BIDEN, has conducted the hearings in a very fair and reasonable manner. I will repeat that now. However, I did write him and urge we start the hearings sooner. I am sure he will agree to that.

Mr. BIDEN. That is correct.

Mr. THURMOND. I thought we should have held them in August so we could have gotten through so this man could have been on the Supreme Court, whoever it is going to be for the October session. So I wanted the record to be corrected in that respect.

It is my opinion, and some of my Members on this side are not in accord with it, there are some who do not want any agreement at all to limit the time. But I feel it would certainly suit me if the majority leader sees fit to limit this time, and I would suggest, and I told him this, that if we could set a time by next Wednesday night, vote by Wednesday night, I think that might be a reasonable time to vote.

Mr. BYRD addressed the Chair.

Mr. BIDEN. Will the majority leader yield 30 seconds?

Mr. BYRD. I thank the distinguished Senator. I yield for 30 seconds. I do want to get on with this bill.

Mr. BIDEN. I want to say with regard to the comment that the minority leader had indicated about delaying the hearings that the minority leader was one of the people who introduced Judge Bork. I would like to read from the RECORD the words of Senator DOLE.

Now it has been some time since this nomination was made. I would say at the outset some of us were critical of that. But I would guess in retrospect it may have been taken that much time with the August recess to prepare for these hearings. Let's face it. There is a tremendous interest across the country. Wherever you go—and some of us go a lot of places—this is generally question number one or two at any town meeting in America. So the American people are tuned in. The American people are ready for a fair and impartial and tough hearing.

Again, the only point I am making is no one seriously though we could start before sometime in August. And the ranking member indicated August. But he was one of the lone voices wanting to start in August. I just want the RECORD to show that.

Mr. BYRD addressed the Chair.

Mr. THURMOND. I just want to make it plain that I felt the hearings should start sooner, and the chairman of the committee and I have had good relations as we do now, but he did not see fit to start sooner. And then I told him to set it as soon as he could in September. I preferred to start the 8th of September. He said the 15th. We cooperated with him.

I feel this matter can be handled. It should be handled. There should be no undue delay. I think we ought to go ahead and get it settled. I told the majority leader it was my opinion that we could vote by next Wednesday night.

Mr. BYRD. Mr. President, I hope the distinguished Senator from South Carolina's views will prevail on the other side of the aisle. The distinguished Republican whip has spoken in terms of Thursday or Friday of next week.

Mr. President, if this was January of 1987, it might be all right to talk in those terms. But after next week, if we were to take this Bork nomnination through Thursday and Friday of next week, I cannot for the life of me understand what is to be served by that kind of delay.

The only thing I keep getting out of this as to why we have to spend another 4 or 5 days before we vote on this nomination is for some reason or other, it gets back to Judge Bork and his sensitivities. We have got to do this for his sake, we are told.

I do not know why Judge Bork would want to be put on the rack here with a debate that is strung out. It seems to me that we ought to all send our expressions of goodwill to Judge Bork and get on with filling the Supreme Court vacancy. There are those who keep talking about the need for a long debate because of some arcane esoteric reason that I have been unable to understand thus far except it all gets back to Judge Bork. Everybody admits that Judge Bork's nomination is going down the drain. It is going down, d-o-w-n. Newton's political law of gravity is going to pull that nomination down. It is already on the ground. It is just waiting for the scoreboard.

Why we want to run the Senate through 3, 4, or 5 days for Judge Bork's sake—is Judge Bork more important than the people of this country? Is Judge Bork more important than filling the vacancy on the Supreme Court? It seems to me that we have our values standing on their head.

It is a rather strange phenomenon, I would say, to find the majority leader standing up here urging that we get on with filling this vacancy with another nomination that will be sent up from the White House by a Republican President who loses no opportunity to excoriate the Congress every opportunity he gets. He wants confrontation all the time.

I am saying let us not have confrontation. Let us vote on the Bork nomination, vote on it up or down, and open the way for another nominee to have his qualifications considered by the committee.

The more time we waste—that is what we are doing if we string this out—the less fair it is going to be to the next nominee because his time is being crowded more and more. And the adjournment target date was November 21 that the distinguished Speaker and I, Senator DOLE, and others, had talked about. If we are going to take all of next week on the Bork nomination, that leaves only 4 weeks.

So for those who really want to see this vacancy filled this year, it seems to me it is counterproductive, and it just does not make sense to drag this

matter out day after day after day. Mr. President, I hope that we can agree at the very least to vote on this nomination no later than 12 o'clock noon on Wednesday.

I am happy to leave it at that for the moment. I hope we will get back on the Labor-HHS appropriation bill. The two managers are ready to take up amendments.

Mr. President, I yield the floor.

## ASSASSINATION OF HAITIAN PRESIDENTIAL CANDIDATE YVES VOLEL

Mr. KENNEDY. Mr. President, yesterday morning, a brutal assassination occurred in Haiti of one of that country's presidential candidates, Yves Volel. Over the last months, riots, murders, thefts and violence have become almost commonplace in Haiti. One presidential candidate, Louis Eugene Athis, has been stoned and hacked to death. Gangs of thugs have been terrorizing poor neighborhoods, rounding up and beating scores of innocent civilians and shooting at random into homes. Former Tontons Macoutes and government security personnel have been involved directly in many of these incidents.

The Haitian Interim Government has continued to deny any involvement in these campaigns of terror. When indisputable evidence has surfaced linking its security forces to these atrocities, it has attributed the acts to rogue elements of its security forces. But yesterday's incident shows beyond a doubt the direct involvement of the Haitian security forces in the brutal assassination of one of the opposition's presidential candidates.

I urge my colleagues to open this morning's Washington Post to page A24. On that page is a large picture of Yves Volel speaking peacefully into a microphone moments before he was murdered. He is standing just yards in front of the police department headquarters of Port au Prince—the department's sign is clearly visible in the photograph.

According to eyewitnesses—which included many journalists—Mr. Volel had gone to the police department to protest allegations of torture and detention without trial of a human rights activist, Jean Raymond Louis. He ended his statement saying, "I have the Constitution in my left hand and my robe as a lawyer in my right hand. I am going to go inside and defend this man's constitutional rights." Just as he finished speaking, a group of plainclothes security personnel came out of the police headquarters and started to beat Volel. As he lay on the ground, one of the men pulled out a gun and shot him twice in the back of the head.

The chief of the Haitian police said in a statement shortly after the murder that Mr. Volel had tried to free a prisoner by force and had died in an exchange of gunfire. But the facts and eyewitness accounts are quite different—Yves Volel was murdered by Haitian security forces right in front of the police headquarters.

Since the flight of the Duvalier regime last year, the people of Haiti have been struggling to establish a just and free democracy in their land. Last March, the people approved overwhelmingly a new constitution. They have placed high hopes on the presidential elections scheduled for November 29. But no democratic elections can occur under the current reign of terror, intimidation and blatant rejection of the rule of law.

Last week, I began circulating with Senator GRAHAM of Florida and Congressman FAUNTROY a letter to the head of the interim Government of Haiti, General Henri Namphy. That letter protests the deterioration in the human rights situation in Haiti and reminds General Namphy of the provision in U.S. law which ties continued assistance to progress in respect for human rights. Under the law, we must cut off aid unless the government has made a substantial effort in preventing the involvement of the Haitian armed forces in human rights abuses, ensuring that freedom of speech and assembly are respected, conducting investigations of killings of unarmed civilians and in educating the Haitian armed forces to respect human, civil, and political rights. The Haitian Government flunks each of these tests of democracy.

Let me invite my colleagues to join me in writing to General Namphy. I intend to send the letter this afternoon. The United States must not repeat the mistake it made during the Duvalier era and look the other way on human rights abuses. We will not continue support to a government that violates the rule of law and the human and civil rights of its people.

Under the current chaos, no free and fair elections are possible in Haiti. Unless the Government of Haiti can guarantee the safety, security, and freedom to campaign of its presidential candidates, the elections will be a farce. So long as the murderers of Yves Volel are at large, if his assassins are not brought to swift and certain justice, there is no rule of law in Haiti.

The people of Haiti have suffered too long from the Duvalier excesses and repressions. We must not permit the corrupt crony system left over from that regime to snatch democracy from the Haitian people. The interim Government of Haiti bears a solemn responsibility to ensure the peaceful, just, free and fair transition to a democratic form of government. It has failed miserably in that task to date. Unless it takes dramatic steps to reverse this rapid deterioration into anarchy, it risks losing U.S. economic, military, and political support—as well as the country's chance to join the democratic nations of the world.

I ask unanimous consent that two articles from this morning's papers and an account from the National Coalition for Haitian Refugees relating the details of this murder may be printed in the RECORD, as well as the text of our letter to General Namphy.

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

[From the Washington Post, Oct. 14, 1987]

HAITIAN CANDIDATE KILLED AT POLICE POST—PLAINCLOTHESMEN SHOT PRESIDENTIAL CONTENDER, WITNESSES DECLARE

PORT-AU-PRINCE, Haiti.—Police shot and killed presidential candidate Yves Volel today as he delivered a speech in front of police headquarters to demand the release of a prisoner, witnesses said.

Plainclothesmen beat and shot several times at Volel, who was struck once in the head and died instantly, Radio Metropole reported. A reporter for TeleHaiti corroborated the account.

Police cleared the area of bystanders and reporters and photographers' cameras were confiscated. The body was taken to the State University Hospital morgue.

In a communique from police headquarters, police did not address allegations that they killed Volel. They said he had been armed and that they were looking for "his accomplices."

Businesses in the area near the National Palace shut and barred their doors in apparent anticipation of further violence.

Volel, an attorney, was a minor candidate for president but a persistent critic of the governing junta of Lt. Gen. Henri Namphy. Volel's center-left Christian Democratic Rally, formed last year, is an off-shoot of the larger Christian Democrat Party of Sylvio Claude.

Volel invited reporters to accompany him to the police station, where he demanded the release of Jean Raymond Louis, who allegedly has been held without trial for the past month.

"They arrested Louis without a warrant for political reasons," Volel told Radio Metropole in an interview broadcast yesterday. "The constitution forbids that and says everybody has a right to a lawyer, so I will go at 10 a.m. [Tuesday] to offer him my services."

Volel supported the antigovernment strikes and demonstrations of June and July that shut down Haiti's major cities. He carried a Colt .45-caliber revolver. In July, Volel said he was attacked by armed men who sprayed his jeep with machine-gun fire. He claimed he returned fire.

Volel is the second presidential candidate to be killed this year. Louis Eugene Athis was hacked to death in August on the steps of a church by peasants who accused him of being a communist.

Volel, 54, was one of about 30 candidates who have registered to run for president in the national elections set for Nov. 29.

Mr. HUMPHREY. Mr. President——
Mr. BYRD. Mr. President——
The PRESIDING OFFICER. The majority leader has the floor.
Mr. HUMPHREY. Mr. President, a parliamentary inquiry.
Mr. BYRD. Mr. President, I yield for a parliamentary inquiry, with the understanding that I keep my right to the floor.
The PRESIDING OFFICER. The Senator will state it.
Mr. HUMPHREY. Mr. President, the Senator rose to speak about the unanimous request pending.
The PRESIDING OFFICER. The request was agreed to.
Mr. HUMPHREY. The Senator rose to object, and the Chair disregarded the Senator standing.
Mr. BYRD. Mr. President, the Senator is too late. He slept on his rights. He has been a little hard to get along with today.
The PRESIDING OFFICER. The majority leader is correct.
The majority leader.
Mr. BYRD. Mr. President, I hope that the Senate can complete action on the State, Justice, Commerce appropriation bill today.
The two managers have indicated their willingness and their desire, as a matter of fact, to finish this bill today and to stay into the evening, if necessary.
The Senate has completed action now on six appropriations bills, and there remain on the calendar, I believe, two other appropriations bills, the transportation appropriation bill and the energy-water appropriation bill.
I am told that the Appropriations Committee will report out the military construction bill early next week.
So that will make a total of 10 appropriations bills that the House will have sent over. The Senate has acted on six. The Appropriations Committee has acted on eight. It seems to me that hopefully we could complete action on these other appropriations bills and send them to conference within the next few days.
I hope that the House will appoint conferees on these appropriations bills, the four in conference, and I am made to understand that the House has not yet appointed conferees on these four that the Senate has passed.
Mr. President, I am advised that the House today did appoint conferees on the four appropriations bills.

## THE BORK NOMINATION

Mr. BYRD. Mr. President, I do not want to delay the Senate, but I think we should try to reach some understanding as to when the Senate is going to vote on the Bork nomination if we could do that.
I am planning on coming in on Monday to give the Senate an opportunity to debate the nomination. The report is on the desks of Senators.
I cannot under the rules take that report up without unanimous consent or the waiver of the 2-day rule of the two leaders until the expiration of the 2 days or 48 hours. This would mean that it would be Saturday at around noon before I could move to take up the nomination.
I can move to take up the nomination on Monday if I cannot get the consent today or the distinguished Republican leader cannot join with me in waiving the 2-day rule.
Mr. President, I am advised that the Republican leader is having a press conference. It will be 15 minutes before he can reach the floor.
I ask unanimous consent that I may yield the floor and be recognized again at the hour of 4:30 p.m. today.
The PRESIDING OFFICER. Without objection, it is so ordered.
The Senator from Washington.
Mr. EVANS. I thank the President.
Mr. President, perhaps I will help in my own small way at least to indicate to my colleagues what the final outcome, if there is ever any outcome, of the Bork nomination might be.
I have taken the privilege, which I suspect has not been shared by a good many of my colleagues, at least to read all 730 pages of the testimony of Judge Bork's hearing before the Judiciary Committee. It was an interesting exercise. I must say that without identifying any of my colleagues there were times during that exercise when my eyes got heavy; there were other times during the exercise when my bile raised a little, but I was always brought back to a sense of proportion by running across the comments of the distinguished Senator from Wyoming. Senator SIMPSON, who always in his own way successfully and in language that only a Wyomingite can use, brought us back to that reality.
During the course of the last few months we have had a virtual feeding frenzy of press demanding to know where each Senator stood, that starting virtually with the day the nomination was submitted.
I have had in my office over 15,000 letters which probably, if you measure them by for and against, give me little solace for they are split almost precisely evenly.
What was more distinguished about those letters were that most, an extraordinary high percentage argued either for or against Judge Bork from either distorted or misunderstood concepts.
I had an opportunity just a day or two ago to go back and read a little history, the history of the golden days of the Senate, which the majority leader I am sure has researched well. Three out of the five Members of the Senate who are honored in our reception room all served together during that period of time, Senators Clay, Calhoun, and Webster.
I wonder, Mr. President, whether there was ever a time in the early 1800's when the 1850 version of Sam Donaldson in his stentorian tones would shout at the Members asking where they stood on the Missouri Compromise, long before any speech was given on the floor, long before any debate was entered into, and I can see the news report on television, if it existed then, saying the latest report is that the Senate is divided; there are three who have not yet made up their minds, as if there was something evil about that, and that the bill is dead.
Mr. President, that might very well have been an accurate report if they had known prior to the debate on the Senate floor the persuasions of each Member of the Senate prior to that time, but I suspect they did not.
I suspect that on that occasion and on other occasions in this Senate some minds have been changed, but it is extraordinarily hard, Mr. President, to change a mind once it has been made up whether on accurate and total or inaccurate and incomplete information and the decision has been announced.
Mr. President, the power of the Senate to advise the President about judicial nominations and either consent to or reject them, as many Senators have noted in recent days, is a profound responsibility. By vesting such power in the Senate and, of course, the nominating power in the President, the framers intended that on this one occasion the executive and legislative branches would join together in a limited partnership to appoint members to the third and independent branch of Government.
The President, as we all know, and a majority of Members of the Senate, must all agree before a judicial nomination can be complete. This check by elected representatives is essential if an equilibrium among branches of the Federal Government is to be maintained.
It is, therefore, incumbent, as we all know, on every Senator to evaluate each nominee with care and to seek out such advice and counsel which is necessary to reach a sound principle decision.
Soon, I hope—and I know the majority leader devoutly wishes that—we will vote on the Bork nomination. I assume, Mr. President, at this time that all Senators who have stated publicly their position on this nomination will vote as they have said they will vote, regardless of any debate which exists between now and the moment of that vote. If so, Robert Bork will not become an Associate Justice of the Supreme Court.
From the very beginning, Mr. President, I was inclined to oppose the

Bork nomination. Although I had little personal knowledge of the record of the nominee and had never met him, I had extraordinarily close ties, and have had throughout my public life, to many of the groups who opposed him from the first moment.

As Governor, I have been extraordinarily proud of the work we were able to accomplish on behalf of the expansion of civil rights, the opportunities for minorities in our State to make additional progress. We engaged in one of the very first education for all bills in this entire Nation providing extra resources for the developmentally disabled. We expanded opportunities and began to reach a partnership with tribal members of our Indian nations. We made substantial movement forward in the complete civil rights for women. And I believe took one of the earliest steps as a State to move strongly in the environmental field.

Well, Mr. President, virtually all of the organized groups representing those people have opposed from the beginning Judge Bork's nomination.

But, if I can digress for a moment, Mr. President, I also had the opportunity as Governor to appoint judges. During the 12 years I was Governor, we instituted a new court of appeals and I had the opportunity to appoint 102 judges. I felt very strongly that that was a unique opportunity. Many of those 102 judges are still sitting in the State of Washington. Not one Governor I served with in 1976 is still governing his or her State.

I turned to the Bar Association on many instances to ask their opinions. I remember vividly one particular opportunity where I was recommending a circuit court judge to the Federal district court in Seattle. The Bar Association came back and said that he was unqualified, and in doing so they kept him from advancing to that position. They said he was unqualified because he had not been directly practicing law for the previous 10 years. And that is correct. He had not been. He had been my chief of staff in the Governor's office for the previous 10 years and had spent more time in the real life problems of people than almost any attorney practicing in that area.

I might say that when I had the next opportunity, I appointed him to the supreme court of the State of Washington, where I did not have to listen to the Bar Association. And he, by everyone's determination, has turned out to be absolutely the best justice sitting on the supreme court and one of the finest we have ever had, having just finished his term as chief justice.

So the analysts are not always right. And you cannot always pay attention to even a group as distinguished as the American Bar Association.

And if not, who should we pay attention to? Well, I think it is important for us to pay primary attention to the person who is before us.

The easy course, then, early on, would be to not listen. I do not serve on the Judiciary Committee, so I could have spent time not reading 730 pages—just declare early, add my voice to the chorus which began to call for the rejection of Judge Bork, even before the ink on the nomination papers had dried. But I could not do that.

Mr. President, Edmund Burke said that a "representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion." Of course this does not mean that we are to ignore the views of those we represent. But it does mean that we should not be here if all we expect to do is act as a megaphone for the majority of the moment.

To fulfill what I felt were my obligations, I chose not to amplify the voices of those opposing the nomination but to undertake a study of the nominee. Because I was unable to sit and watch all of the hearings, I had to wait until I could obtain a copy of the hearing record—made available early last week.

It is dog-eared now, but it is still the 730-page document; and, in addition, the recently made available report of the Judiciary Committee.

Mr. President, I know that at times we tend to make comments which are not always accurately reported in the press. And I would say, seeing that the senior Senator from California is in the Chamber, that I was rather downcast in at least reading of his statement regarding those who had not yet made up their minds or who had not yet announced their opinions, when the Senator said "They don't want to walk the plank. They have not been counted publicly. They have not alienated anyone on one side or the other and they would like to keep it that way."

Perhaps, but not this Senator. I have never backed away from a decision. I have never backed away from a tough fight.

And I am amazed, frankly, that we have been driven to this point, that once again we will enter into a debate in this Senate—maybe even a real one this time. And it would be a joy for this Senator to see a real debate instead of a series of speeches to a half-empty Chamber. But what good is a real debate now with almost all Senators already declared?

From the day the Bork nomination was announced, the least responsible opponents have sought to portray him as a neanderthal; someone so hostile to civil liberties that no civilized society could survive the venom of his judicial pen. If the record supported that contention in any way, I would do everything in my power as a U.S. Senator to make certain that he was not confirmed.

It is certainly the case that Judge Bork has been a prolific writer. Therefore, his record is long. But Judge Bork stands mute as Quasimodo when compared with the most tendentious and outspoken advocates and opponents of his nomination. They have churned out a veritable blizzard of analyses—many of them distorted, too few of them of much use.

This is not to deny that there was thoughtful analysis and assessment completed by many on both sides of this issue. In my own State, the organized opposition took pains to advocate their position in an objective way. They went so far as to ask that the inflammatory advertising which has run in many parts of the country not run in the State of Washington.

Mr. President, I saw on a number of occasions the television ads run by the People for the American Way. And while I admire much of what they attempt to do, those television ads were demeaning and misleading, not up to the kind of quality you would expect from the people running that organization.

Unfortunately, the efforts of responsible critics and responsible proponents alike have in many respects gone unrecognized because of the obnoxious few who have sought to turn the nominating process into a pitched and partisan political circus.

For me, the most enlightening information was that presented by Judge Bork himself, in his testimony and writings. Without doubt, the record supports the conclusion that Robert Bork is a profoundly conservative man. It also supports the conclusion that he is a highly intelligent man with superior legal skills. But it does not support the conclusion that he would use those skills to incorporate an unprincipled, results-oriented legal philosophy into the decisions of the Supreme Court.

Judge Bork has criticized several watershed Supreme Court decisions. Most of them were decided by one vote and most dealt with issues which have been exceedingly painful for our society. But my review has turned up no instance in which he criticized the result achieved by the Court in any of those cases. Rather, he found fault with the reasoning used to support the decision. That is a significant distinction.

Mr. President, at this point, let me turn to a mailing I just received. It is the last in a long list of some of the misleading things which have been utilized in this campaign. I was astonished to find that the covering letter was signed by some rather distinguished attorneys in our State; some retired judges in our State. But what was attached to it was a flyer saying:

"Ten Reasons to Block Bork from the United States Supreme Court."

The PRESIDING OFFICER. If the Senator will suspend, under the previous order, the hour of 4:30 having arrived, the majority leader is recognized.

Mr. BYRD. Mr. President, how much time does the Senator——

Mr. EVANS. Five to seven minutes.

Mr. BYRD. Mr. President, I ask unanimous consent that in view of the fact that the distinguished Republican leader is tied up for the moment, the Senator proceed for an additional 5 minutes and then I be recognized.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Senator from Washington.

Mr. EVANS. They should have been ashamed of themselves for adding to the letter the flyer which claims that Judge Bork would let States ban birth control, he would let them ban all abortions, he would support tax dollars to be used to help religious schools, and on and on and on; none of them accurate or complete in telling why of any of those determinations.

Any of us subjected to such a drumbeat of political negative advertising would suffer personally and, I might add, in popularity.

Edna St. Vincent Millay wrote:

Safe upon the solid rock, the ugly houses stand; come and see my shining palace built upon the sand.

Certainly Judge Bork advocates that we build our framework of constitutional law on the bedrock of the Constitution itself. That, to me, is a virtue. Liberals and conservatives alike should be uneasy with decisions which can be grounded only partially on our constitutional foundation. While it may well be the case that insistence on sound reasoning in constitutional cases will not allow us to move toward some goals as quickly as some people might advocate, it is also the case that decisions hewn of constitutional timber will long survive the eroding forces of shifting political winds.

Judge Bork probably has a somewhat narrower view of the Constitution than I do. He has—and will continue—to reach decisions I disagree with. But only if I were the nominee could I ensure that every decision would be made my way.

How Judge Bork has ruled in various cases is instructive. It gives us a sense of how he approaches the decisionmaking process and enlightens our understanding of his judicial philosophy. But, specific rulings in themselves are not determinative unless they show a pattern of decisionmaking wholly at odds with the Constitution or with precedent. The record of this nominee does not show that he is hostile either to the Constitution or to precedent. He is hostile, however, to the concept of a runaway judiciary.

And on this point, Judge Bork and I agree. Nothing will so quickly undermine the public trust in our independent judiciary than judges who seek to impose their own vision of social justice. Imperial Presidents can be voted out after 4 years, imperial Senators after 6, but an imperial judge reigns for life.

Let me refer at this point to a recent order handed down by a U.S. district court judge in Kansas City. It is exemplary of the dangers of a judiciary which exceeds its authority to apply the law to specific facts in a given case by creating new laws of its own choosing. In that order, the judge mandated an increase in property taxes and a surcharge in State income taxes for those living and working within the geographical boundaries of a school district after voters in the school district repeatedly failed to pass a special levy to provide more school funding.

That, it seems to me, Mr. President, is what some in this Chamber would advocate: A judge who expanded liberties for all; who would do good things. Certainly this judge purported to do that. All for the constitutional rights of children; all for good purposes.

How many here in this Chamber are willing to support the action he took to correct that unconstitutional element? Judges should not seek to stand in the shoes of either political executives or legislators. To perform their function properly, judges may require that unconstitutional actions stop or that those who have been harmed by unconstitutional actions be compensated. But only rarely should they substitute their judgment for the judgment of elected officials when fashioning specific remedies.

I reject out of hand the concern expressed by some that Judge Bork's America is a world of poll taxes and segregated inns and that Judge Bork's Constitution has no room for women. I also reject out of hand that Judge Bork "believes the Government has the right to regulate the family life and sex life of every American" or that "the Government can make it a crime for married adults to use birth control." These assertions have absolutely no basis in fact.

Facts are actually something which have become somewhat difficult to discern through the steamy mist generated by the overheated rhetoric of the confirmation campaign. People on both sides have stepped beyond the appropriate limits of debate on a judicial nominee. But I decry particularly those opponents who hypocritically cloak themselves in the mantle of tolerance while at the same time mounting a vicious campaign of intolerance and demagoguery.

Those in this Senate who proclaim Judge Bork to be a radical now bear the burden of explaining why this body voted unanimously to name him to the Federal bench just 5 years ago. They bear the burden of naming for the American people which four other sitting justices would have joined with Judge Bork in promoting a radical agenda on the Court. Would the group include Justice Scalia, who was confirmed unanimously? Would it include Justice O'Connor, who, likewise, was confirmed unanimously? Who else?

Who else on the Court would join in making a majority to create a radical agenda for the United States?

Mr. President, I suggest the answer is there are not any. There is no radical agenda which in this country could be or would be instituted by the Supreme Court of this Nation.

Mr. President, at least in this Senator's view, Mr. Bork is not a radical. He is not an extremist. He is not a coldly rational, intellectual automaton who has no empathy for others.

He is a man who has a more conservative, more restrictive view of the world than I do. He would not have been my nominee for the Court. Yet, the evidence simply does not support the claim that he has views so extreme that he should be disqualified from service on the Court. For these reasons, I will vote to support the Bork nomination.

I yield the floor.

The PRESIDING OFFICER (Mr. SASSER). The majority leader is recognized.

Mr. BYRD. Mr. President, I ask unanimous consent that the two managers may begin their statements and I ask to be recognized within 10 minutes. Hopefully the Republican leader and I can have an exchange with reference to the Bork nomination and other matters in the schedule.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

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## COMMERCE, STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATION, 1988

The Senate continued with the consideration of H.R. 2763.

The PRESIDING OFFICER. The Senator from South Carolina is recognized.

Mr. HOLLINGS. Mr. President, on behalf of the distinguished ranking minority member, the junior Senator from New Hampshire, Senator RUDMAN and myself, I am pleased to present the recommendations of the Committee on Appropriations with respect to the Departments of Commerce, Justice, and State, the Judiciary and 22 related agencies for fiscal 1988. The subcomittee reported the bill on September 25. This has truly been a bipartisan effort as we have worked closely together to develop a balanced bill that is responsive to the

pelled Phillips to process the papers. When Phillips refused on religious grounds, the warden transferred Phillips to a dead-end desk job in Washington. Phillips has noted that other prison employees were put in similarly compromising situations by authorities.

My amendment protecting these employees is modeled after the Church amendment described above. The amendment provides protection in three categories:

First, the Bureau may not discriminate in the employment, promotion, or termination of any person, because the person refused to facilitate an abortion;

Second, the Bureau may not discriminate in the extension of staff or other privileges to any person, because such person refused to facilitate the performance of an abortion; and

Third, the Bureau may not require any person to perform, or facilitate the performance of, any abortion.

The term "facilitate the performance of an abortion" is intended to be construed broadly so as to include any activity related to the abortion, including processing abortion papers, counseling or referral, or escorting inmates to abortion clinics.

Mr. President, this amendment has been accepted and agreed to by both sides. It is a conscience clause amendment to the HUD bill that will provide needed protection to employees of the Bureau of Prisons who for reasons of conscience refuse to assist in providing abortions to inmates.

I want to point out that this is not simply an abstract concern which we seek to address. Indeed, there has already been one case where an assistant warden in the prison at Lexington, KY, was reassigned and sent into a dead-end job because he refused to participate in arrangements which were to provide an abortion for an inmate. There is ample precedent for the amendment which I assume is why it was so readily accepted. There are many State laws, indeed Federal regulations, that apply to private organizations receiving Federal funds that provide for a conscience exception, conscience protection of personnel of those organizations. What we seek to do here is simply extend the logic and fairness and justice of those provisions to a class of employees who have demonstrated a need for it.

I thank the floor managers for accepting the amendment.

The ACTING PRESIDENT pro tempore. Is there further debate on the amendment?

Mr. RUDMAN. Mr. President, we want to say that the committee is certainly in favor of accepting this. The Senator from New Hampshire, my senior colleague, makes the point that regardless of the issue of abortion no one working for the Federal Prison System ought to be forced to participate in the procurement of abortion. The managers agree with that. I believe Senator HOLLINGS agrees with that.

We are going to accept this portion of this amendment.

The ACTING PRESIDENT pro tempore. Is there further debate on the amendment? If not, the question is on agreeing to the amendment of the Senator from New Hampshire [Mr. HUMPHREY].

The amendment (No. 988) was agreed to.

Mr. HUMPHREY. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. HOLLINGS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. HOLLINGS. Mr. President, I yield to our distinguished committee chairman, the Senator from Mississippi.

The ACTING PRESIDENT pro tempore. The Senator from Mississippi is recognized.

Mr. STENNIS. Mr. President, I thank the Senator.

Mr. President, I am very happy that we are here today to present before the Senate the Commerce, Justice, State, Judiciary and related agencies appropriation bill for fiscal year 1988. This bill, which provides a total of approximately $14.2 billion in new budget authority for fiscal year 1988, reflects the diligent care and able effort which our entire committee has rendered. In particular, however, it is evidence of the hard work and excellent leadership of Subcommittee Chairman HOLLINGS and the ranking minority member, Senator RUDMAN. I also wish to compliment the highly skilled work of the staff of their subcommittee: Mr. Warren Kane, Mr. John Shank, Miss Terry Olson, and Mrs. Judee Klepec.

I now wish to briefly highlight a few important items regarding this bill.

First and foremost, I am pleased to report that this bill is below the 302(b) allocation for budget authority and, after a correcting amendment to be offered today, will also be below the 302(b) allocation for outlays. As I have previously indicated, this is essential for all appropriation bills which are to be taken up for consideration on the Senate floor.

Second, the committee's recommended $14.2 billion in budget authority is $600 million below the President's request and is only slightly above the House-passed level of $13.9 billion.

Finally, I would ask my colleagues to resist any further amendments adding additional funds which would violate the bill's spending ceiling set by the subcommittee's 302(b) allocation. Let me also mention that the Senate Rules do not permit legislative amendments on appropriation bills.

Mr. President, splendid work has been done during this session this year on this bill. The contents of it were drawn by our chairman, the Senator from South Carolina and by Senator RUDMAN, each of whom have great capacity for fine work. I am very proud of the quality of their work and their hard work, and of the approval it has had by those who have examined it. That applies also to the work done by their staff members who carried this load.

It is a credit to the Senate. It is a credit to the administration, and to those who contributed directly to it.

In conclusion, I firmly support this bill and ask that it be adopted so that we can proceed to conference with our House counterparts in a timely manner.

Mr. President, I yield the floor.

## RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. Under the previous order, the distinguished majority leader, Mr. BYRD, is recognized.

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

## THE BORK NOMINATION

Mr. BYRD. Mr. President, the distinguished Republican leader and I have been for the last day or so discussing the Bork nomination, and when the vote might be scheduled thereon.

I noted an AP wire earlier today, and I will read therefrom. It has reference to a response by our distinguished junior Senator from North Carolina, Mr. SANFORD, to the President's remarks of yesterday on CNN regarding the Bork nomination.

On Wednesday, Sen. Terry Sanford, D-N.C., said, "We are tired of having our integrity impunged. We are tired of having our sincerity questioned. We are tired of having our intelligence insulted. It is time for that corrosive dialogue to stop."

Reagan, asked by a reporter about Sanford's comments as he met with Republican senators today, said, "Well, there is some debate about what constitutes intelligence."

Mr. President, I suppose that one should not be surprised at that kind of comment coming from a President of the United States who grossly underestimated the intelligence of the American people in the arms-for-hostage deal. I regret it when statements like that are made. I do not think they are helpful. I do not think they are productive. I think they are only counterproductive.

I would hope that the President, in the interest of getting on with filling the vacancy on the Supreme Court, would try to restrain himself from

such wisecracks. They do not add anything of value to the debate.

Mr. President, we Democrats want to vote on this nomination. We want to vote on Tuesday, as I indicated on yesterday. The committee report is on the desk of all Senators. I cannot move to take up that nomination—without getting unanimous consent otherwise, or a waiver of the 2-day rule—until approximately noon on Saturday, if the Senate were to be in session on Saturday.

Mr. President, I do not propose to bring the Senate in on Saturday. I could do so. But I hope we can vote on this nomination of Tuesday next. I could ask the Senate to come in on Monday and we could debate as late into the evening as Senators wish to debate. I would not want to bring the Senate in before 12 o'clock noon or 12:30 on Monday so as to give Senators time to return from far away places, and they could be back in time for a good afternoon discussion. We could go that evening as late as Senators wish, 10 o'clock, 11 o'clock, whatever, come in on Tuesday, and begin early and vote by 6 o'clock. That was my original proposal. I do not see any reason why that would not be a reasonable approach, and under the circumstances, not only logical, but also one that recommends itself. The outcome on this Bork nomination is foreordained. I think that is pretty obvious. Maybe we could get on then with other matters and be ready for the subsequent nomination that will be coming up from the White House, and not string out a debate, which in the final analysis is not going to change anything.

So I ask the distinguished Republican leader if we might agree to vote at no later than 6 p.m. on Tuesday next on the nomination of Mr. Bork.

Mr. DOLE. If the majority leader will yield——

Mr. BYRD. Yes.

Mr. DOLE. As the majority leader knows, we have been making inquiries on this side. I am not in the position to say we could vote by 6 o'clock on Tuesday. I can indicate that, with perhaps one or two exceptions, there is a strong inclination that we could vote perhaps by mid-afternoon on Wednesday. But I am not in a position to get a unanimous consent agreement. I think there are still one or two Members on this side who are not certain that a vote on Tuesday would be enough time.

Some have indicated they believe there should be debate. But those who support the Bork nomination should not be required to stay up until 10, 11, or 12 o'clock at night to make their points. It ought to be done during the regular course of business—say 8 to 8 which is 12 hours. We will get 6 or 7 hours in on Monday, 12 hours on Tuesday, and another 7 hours on Wednesday.

It seems to me that we would cover a lot of ground in that time. I cannot yet tell the majority leader, but I do know that Members are prepared to be here on Monday. The distinguished ranking member of the committee, Senator THURMOND, has indicated he will be here. I have been notified by the Senator from Wyoming, Senator SIMPSON, that there will be people here prepared to talk. So there is not going to be any delay once it starts. That would be Monday and Tuesday, and it would be my hope that sometime mid-afternoon on Wednesday there could be a vote.

Mr. BYRD. Mr. President, as I indicated yesterday, I stand in a rather phenomenal position. I suppose I am entitled to as much credit as anybody in helping the administration pull the nomination of Melissa Wells out of the fire. I certainly did my share in getting the Verity nomination up and getting that acted on. I do not know whether I am entitled to any medals from this administration or not. They were, after all, the administration's nominations, but I feel a responsibility, as the majority leader, to try to move them along.

I thank the distinguished Republican leader for his help. It was not his fault that the Verity nomination was held up so long. In that instance, another Senator presented himself to demonstrate that there was real flesh and blood behind the distinguished Republican leader's objection, of which I did not need living evidence. I knew the Republican leader was being forthright in saying that someone else on that side was objecting.

However, Mr. President, I do not understand the delay on the Bork nomination. Yesterday, it was Thursday or Friday. Perhaps we are making some progress. But I cannot understand the need for delay over until Wednesday.

I noted today in the Washington Times an ad that uses the Bork nomination to raise money. Here it is.

Here is the exciting, little lower right-hand corner. That little box reads as follows: "Congressional Majority Committee, Ralph J. Galliano, Chairman, Washington, D.C."

In a little box in which the reader can check his mark, it says: "I've mailed the coupons"—there are coupons in the ad—"or called my Senators and told them to vote for Judge Bork's confirmation."

Then there is another little box, and it reads as follows:

I'm enclosing my contribution to help CMC support Robert Bork and President Reagan's goals of a healthy, strong, safe, and secure America.

Then there are four little boxes—one in which the contributor can check $15, another in which he can check $25, another in which he can check $50, and another in which he can check $100.

Then he adds his name and his address, city, State, and zip.

Mr. President, I am rather mystified by this ad. In the first place, I think it is misleading because it attempts to mislead the readers and contributors into thinking that the Bork nomination is something that is going to be turned around if they will just contribute.

Mr. President, I hope the American people will not be fooled by this advertisement and will not contribute their hard-earned moneys to this false effort that is going to fail.

A good many Senators here have indicated how they are going to vote. They have indicated their position on the basis of their study of the nominee's record and on the basis of their constituents' concerns, and I do not envision a turning around on this nomination, no matter how much money is contributed to this Congressional Majority Committee.

I understand, also, that NCPAC has been making some fundraising calls around the country today, using the Bork nomination as a gimmick in several States. I would just say that, having had some experience with that outfit in my own State of West Virginia 5 years ago, people ought not waste their money on that gimmick.

I wonder if the delay has anything to do with this fundraising effort. How much money do the NCPAC want? At what point do we get a Tuesday vote? How much money do they have to raise to get a Tuesday vote? How much money do they have to raise to get a Wednesday vote? We have not been assured yet that we will have a Wednesday vote. How much money do they have to raise to get a Thursday vote?

Mr. President, I am not implying anything——

[Laughter.]

Mr. BYRD. Wait until I finish my sentence.

I am not implying anything with reference to the Republican leader. He does not have anything to do with this ad.

I am wondering how the two might tie together. Does this fundraising effort have something to do with the delay?

I wonder, also, if, in the opinion of some, fundraising is more important than getting on with the business of selecting a judge to fill the vacancy on the Supreme Court.

Mr. President, I hope we can vote on Tuesday. I think that we mislead the American people if any of us hold out expectations to the contrary—it has been stated on both sides of the aisle, Republicans and Democrats—everybody agrees to the fact that Judge Bork is going down. He is entitled to a

vote. But there is nothing to be gained by stretching out that vote.

So I want to ask the distinguished Republican leader if he will give us a vote on Tuesday, at 6 o'clock. Let us defeat this fundraising effort, this fundraising gimmick.

I know that he does not approve of this kind of approach. Why do we cloud the Bork nomination with a fundraising gimmick? That should turn the stomachs of all those who have been wanting to wait until Wednesday, Thursday, or Friday for a vote. Let us defeat the motives of those who would mislead the American people into making contributions which are not going to change anything.

Mr. DOLE. Mr. President, will the majority leader yield?

Mr. BYRD. I yield.

Mr. DOLE. I do not disagree with the majority leader. I think that is the problem with this whole nomination. It has been treated as a political campaign. There have been fundraising solicitations. I must say there are far more anti-Bork solicitations.

I noted today in the Wall Street Journal, "Bogeyman Fund-Raising." Maybe the one the majority leader referred to would fit in that category.

It reads:

"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 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."

I think that may be in response to these mailings.

I can only say that this whole thing has gotten out of hand.

Mr. BYRD. May I say to the distinguished Republican leader that that money was not being used to delay a vote. This money is being used to delay a vote and to mislead the American people into thinking that this vote can be turned around somehow if they will only contribute $15, $25, $50, or $100.

Mr. DOLE. I think you can make the same argument. This would make certain there would never be a vote.

[Disturbance in the galleries.]

Mr. BYRD. Mr. President, may we have order?

The ACTING PRESIDENT pro tempore. The Sergeant at Arms will instruct the gallery to refrain from any statements.

Mr. BYRD. Mr. President, who is holding up the vote now? Not this Senator.

Mr. DOLE. Will the majority leader yield?

Mr. BYRD. I yield.

Mr. DOLE. I think we are going to have a good debate on this nomination. And I would say millions of dollars have been spent in an effort to defeat Judge Bork. This is unprecedented, I do not quarrel with the majority leader. Certainly as the majority leader indicated I am not saying when we ought to vote.

But I have to believe that millions of dollars were raised to make certain we would never get a favorable vote if we got a vote at all on Judge Bork.

Now there might be some counterreaction. It comes too late. They are not going to change any votes. The majority leader is right. Unfortunately, the Bork nomination is probably not going to succeed. But whether it is 6 o'clock on Thursday or 3 o'clock Wednesday in my view is not really the issue.

The issue is fairness. We may not be for Judge Bork but most Americans believe in fairness.

All I am going by is the number of my colleagues who are well respected and who have leveled with me from the start. They do not want to filibuster. They do not want to frustrate the majority leader or the majority. They know they are in the minority when it comes to this vote. But, they do want to lay out a program that addresses some of the distortions and questions and/or solicitations, the antisolicitations, about his civil liberties record, the right to privacy, and it is going to take some time.

Maybe we could get consent we would vote no later than a certain time, and I would be happy to discuss that with the majority leader. Maybe it would come on Tuesday, maybe it would come early Wednesday morning.

But I can assure the majority leader of two things. I do not know anything about the ad the majority leader referred to.

Second, it is not going to succeed if somebody out there is saying "Well, if we send enough money we can postpone the vote."

We do not want to postpone the vote for any other purpose than to lay out the Bork record and to make certain the American people will have the facts. It is not going to change any votes that I know of. I wish it would, but I do not believe there will be any changes in votes.

I will continue to work with the majority leader to see if we can set a fixed time. But I think in fairness to those who support Judge Bork, we are going to come to this floor on Monday, prepared to speak, no long gaps, no long quorum calls, no delays, one speaker after another, and that may end well before Wednesday.

Mr. BYRD. Mr. President, in the effort to spare the American people from being bilked of their hard-earned moneys by making these contributions, why not shut off the debate Tuesday, so that they will not continue to have such gimmicks as these on Wednesday and Thursday.

I ask unanimous consent that the Senate vote on—which precludes a tabling motion—on the Bork nomination at no later than 6 o'clock p.m. next Tuesday.

The PRESIDING OFFICER. Is there objection?

Mr. DOLE. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. DECONCINI. Mr. President, will the majority leader yield?

Mr. BYRD. I yield.

Mr. DECONCINI. Mr. President, listening to the debate here or the discussion between the minority and majority leaders, of course, I regret that anybody would give money for or against Bork. I made up my mind, and I am sorry that the People for the American Way or NCPAC or anybody will get any money for this because this is not a profit situation and a business.

This is indeed a decision that has to be made under the Constitution by this body.

What disturbs me today is the NCPAC organization with the introduction of a Member of this Senate is raising money in Arizona to attempt to coordinate an effort to influence Senator DECONCINI to turn his vote around.

This Senator's vote is not going to turn around. I sat through 12 days of hearings. I listened to Judge Bork, and I made a decision. Some may not agree with it, and I respect them. But I would hope that NCPAC and Members of this body who feel differently about the position that I take would not go and make calls in my State trying to raise money to try to influence Senator DECONCINI. I am not for sale and they are going to waste their money, and I hope the good people in Arizona who may disagree with me do not go write checks to the National Conservative Committee, known as NCPAC, because it is a waste of time and quite frankly it is an insult.

I do not do that to other Members, Members who have decided to support Judge Bork. I respect that judgment. You do not see me calling or writing into their State saying, "Gee, why don't you give some money to this organization to try to turn their vote around?"

To me, it is an insult, and I do not know about other Members of the Senate, but I resent it.

Mr. BYRD. Mr. President, I thank the distinguished Senator.

Mr. BIDEN. Mr. President, will the Senator yield a moment?

Mr. BYRD. Yes, I yield.

Mr. BIDEN. Mr. President, it is obvious, at least at this moment, that we are not going to get an agreement as to precisely when to vote.

Just having spoken to a Member from the other side, a comment was made that the thing that is disturbing

some people is that people from the outside, outside this Chamber, have politicized this debate and have engaged in the use of advertising.

As has been mentioned here, and the minority leader acknowledges, that maybe this recent fundraising effort is a response to what was done before.

It is beginning to come clear to this Senator that thus far at least, no one in the Senate has suggested that anyone else in the Senate has misrepresented, intentionally misstated, or unfairly maligned the judge. No one in the committee, Democrat or Republican, in the 12 days, in the 120 witnesses, suggested, to the best of my knowledge, at any time that anything was untoward, unfavorable, not done fairly.

And, folks, I say to my colleagues, it seems what is developing here is we may get ourselves in a fight on this floor about what people beyond any of our control have done outside this Chamber and do it in such a way that scars are left for a while around this body.

We are all grown adults. We are all used to the rough and tumble of politics. We all understand that we are all at risk all the time in this body. But in the past, in the 15 years that I have been here with rare exception have there ever been personal attacks by one Senator upon another. It has happened, but rarely has that occurred.

In the past, we have found that when those rare occurrences come about, they do not fade quickly from the memory of Members. If I can make a homely analogy, it is a little bit like when you get in a fight in the family and you say something in anger that later you wish you had not said but it takes a long time for the family member to forget the hurt that was inflicted.

I say this with all the sincerity in my being. I am truly worried that if we let this go on and we do not hold ourselves in check, some things will be said in this body that no one really means to say in the first instance, or if they mean it they will regret it after having said it and we will find ourselves making it more difficult to do the Nation's business than not when everyone thus far has acknowledged that the thing that makes them the angriest for or against Bork is what someone outside this Chamber has said, what someone who is not a Member of this Chamber has said, what someone who none of us can control.

The Senators on this side of the aisle can no more control the interest groups that are interested in this than the Senators on that side of the aisle can control NCPAC. We all understand that.

There was one Member of this body who walked out on the steps of the U.S. Senate and personally attacked in the most scurrilous way two Members of this body. I could not believe when I heard it. I do not believe he meant it. I believe he was angry and he said it, but I must tell you that two Members of this side are not likely to forget it as much as they want to be good, decent people. These things leave scars.

We have always worked around here on a handshake, we have always worked here in accepting one another's word, and I would hope that unless there is in fact a feeling on the part of those who are supporting Judge Bork that this Senator, the chairman of the Judiciary Committee, or any other Senator, did not give Judge Bork a fair shot when he was before the committee, or that Judge Bork was somehow not given the opportunities to which he was entitled, unless they believe that, and they may, and if they do then fine, then we should debate that. But for Lord's sake let us not get ourselves in the position here where each of us are debating in this body what people outside this body who did not run for office and are not elected to this body have said about a nominee or about any Member of this Chamber.

As one of the former majority leaders used to say, "I hain't got no dog in this fight." It seems to me we are fighting over something that none of us can control. We can control our own votes. We do control our own integrity. We do control what we say on this floor.

And whether it takes a day, or 2 days, or there are some who support Judge Bork want to make it 10 days, it is difficult to control that, but I just make a plea, please let us try to control our tongues as this debate which is rapidly, rapidly devolving into an exchange like none I have seen in a long time around here.

Let us deal with what each of us have said about Judge Bork for and against him, not with what other people have said. And if the purpose of this delay—or let me not be pejorative—if the purpose of this debate that is going to be forthcoming is to debate whether or not Judge Bork was rightly or wrongly treated outside this Chamber, I respectfully suggest there is a lot of time to do that. You can do that every single morning in morning business for the next month, for the next year, and in no way will it impact upon whether or not we are going to be able to begin to fill the vacancy.

I apologize for rising. I had no intention of doing it. But I have been here long enough to know and, to use the vernacular, to smell what direction this is moving in. I do not think anyone really intends it to move in this direction. And, before it gets out of control, please let us all think about it. Debate one another on the merits of Judge Bork being on the Court or not being on the Court, but let us not each hold one another responsible for what people outside this Chamber say unless there is some evidence that we have directed them to say that, in which case then it can be a debatable issue.

I thank the majority leader for allowing me a moment on the floor.

Mr. BYRD. I thank the distinguished Senator.

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

Mr. BYRD. Yes, I yield to the distinguished Senator from Colorado.

Mr. ARMSTRONG. Mr. President, I thank the majority leader for yielding.

I had not expected to say more about the nomination or the process at this time, but I am attracted to do so by the statement of the chairman of the Judiciary Committee. I think there is much in what he has said that we ought to seriously consider.

And if it is his representation that the groups which have spoken in such strident terms in the newspaper and on television are not coordinated with the activities and statements and thoughts and plans and strategies of Senators, then I think that is something which I would like to consider and would like to hear from him on further at the right time. Because, indeed, as a person who is not a member of the Judiciary Committee, who has been going about my business as a member of other committees here and has not watched the hearings on television but has only read about it in the press, that is exactly my impression. And I will at some time bring to the floor, and be glad to go over with the Senator, the news accounts on which I have reached this conclusion.

In fact, it is my recollection that responsible publications indicate that, in fact, Senators and outside persons met together to discuss polling data which formed the basis on which issues were raised in the committee. Now, I do not suggest that that is improper. But, if I understand the Senator's point, he is suggesting that it would thereby be improper for Senators to respond to that. And I think it is of whole cloth, let me say to the Senator, and that is a fact question.

If the Senator is telling us that the news reports, the published accounts of this, are inaccurate, then that is an issue which we will want to explore. And since I was not a party to any of it, I am just basing it on what the published accounts are.

Let me make this second point, however. If the Senator's point is that the outcome of this vote on confirmation of Judge Bork hinges primarily on what has been said and will be said in this Chamber and in committee, then I would submit that the Senator is mistaken. I respectfully disagree with

that. We do not know for sure what the outcome is going to be.

But there is a strong belief in many quarters that many, many votes, perhaps most of the votes, of Senators who have thus far declared against Judge Bork have been influenced not by what was said in committee, not by what has been said on the floor, not by the exchanges privately among Senators in the cloakrooms or the hallways or in offices, but, indeed, by newspaper ads and television commercials and demonstrations and extraordinarily florid rhetoric by outside groups, by what someone has called the fear merchants and by what one writer in the Washington Post termed the sort of "twaddle"—an interesting word, is it not—"the sort of twaddle which Adlai Stevenson used to call McCarthyism." Not my words, not my observations, but that of Edwin Yoder, writing for the Washington Post. And the kind of proceeding the Wall Street Journal headlined as the Frankensteining of Judge Bork and the Colorado Daily Sentinel called the lynching of Judge Bork and the Chicago Tribune called a national disgrace.

Now, I am 1 of the 86 Senators who is not a member of the Judiciary Committee and was not in on all of that. So, for us, the real debate is just beginning now or will begin as soon as the committee report is available and we are ready to sink into it.

Most of us, many of us, at least, have withheld our comments and our discussion until we had a chance to do so in the forum which we think is appropriate, which is this Chamber. But if it is the Senator's representation and point that the outside activities were unrelated or uncoordinated or have had no effect on what is going to happen in this Chamber, then I would just respectfully submit that the Senator is in error.

I would like, before I yield the floor, to make this final point.

Mr. BYRD. Mr. President, I have the floor and I yield to the distinguished Senator further.

Mr. ARMSTRONG. Mr. President, the majority leader is, of course, correct.

On one other matter, I do agree. It would be a great pity if, out of zeal or emotion or anger or pique or for any reason, if Senators let their own emotions get away with them. This is a matter about which feelings run very strong, particularly among those who feel Judge Bork has been done a great injustice and who feel, in addition, that something precious has been compromised in the uncharacteristically rough handling of Judge Bork.

It would be easy on our side to take so much offense that we would lose sight of the traditions of which the Senator has spoken. And I think all of us would be well advised to remember what he has said about that. I wish it had been observed at all times prior to today. But, if that is not the case, and I believe it has not always been the case, it nonetheless is the correct rule, the right tradition, and I think all of us would do well to heed his words in that respect.

I thank the majority leader.

Mr. BIDEN. Will the Senator yield. I will use 2 minutes and I promise I will not take longer.

Mr. BYRD. I yield to the Senator.

Mr. BIDEN. The point I would make is not whether or not anyone spoke with any outside interest or outside group. In every single piece of legislation on every single matter that comes before us, we speak to people who have been lobbying and have an interest.

The point I was making is that none of us control the words that any outside group uses. None of us control what they say. And what seems to be at issue here is what was said by various groups, whether it is the advertisement referred to here today or the advertisement that was referred to earlier prior to the Bork hearing starting.

The second point I was making is that it seems to me that we are really indicting ourselves as a body if, in fact, we conclude that Senators who have spoken at length for and against in detail on the record have done so as a consequence of advertisements that they have read in the newspaper and/or as a consequence of television ads that they have seen. Those are the only two points I make.

Mr. BYRD. Mr. President, I do not want to hold the floor longer. Our two managers are here and ready to proceed.

I think all of this that we hear today simply goes to prove my point that this debate promises to be divisive. It is not going to be helpful. I will be pleasantly surprised if it turns out otherwise. But it seems to me that we ought to start the process of healing instead of the process of etching the wounds deeper.

I told the White House what they could expect if this particular nominee came up here. I said that I might vote for him. I might vote against him. In my opinion, at that time, he would probably be confirmed, but there would be a big fight and I did not think that could be avoided. But the White House did not listen.

There is nobody here to whom I take a back seat in wanting to see a conservative Court. I think a court should be conservative. The legislative branch is the liberal branch.

But be that as it may, we need to get on with the process of voting on the nomination and heeding our responsibilities to consider the qualifications of the subsequent nominee whose name will be sent to the Senate by the White House. We ought to avoid all the divisiveness and charges of McCarthyism and lynching. I want to know what Senators participated in a lynchmob. That is the charge. I would like to know who those Senators are who participated in the lynching.

I have not asked a single Senator: "How are you going to vote?" I have not asked any Senator to vote against Mr. Bork. I have not asked any Senator about nose counts.

That is the responsibility of our respective whips, not mine. I have not asked for a count and nobody has volunteered to show me one.

I have said in my caucus, however, at least twice, beginning when this nomination was first sent to the Senate, that we should avoid making this vote a test of party loyalty; avoid making this the litmus test of party loyalty. "Let us not politicize this nomination," I said. We are not electing a Republican Court. We are not electing a Democratic Court. We are filling a vacancy on the Supreme Court of the United States.

That has been my position.

I think of the Scriptures which say:

> No man, having put his hand to the plough, and looking back, is fit for the kingdom of God.

It is about time we put our hands to the plow and looked ahead and quit looking backward, give Mr. Bork his vote, and get on, before the wounds become deeper, with the next nomination.

After all, I am going to be importuned, beseeched, adjured, and urged to get the next nomination to the floor, get it voted on, and I am going to be urged to support it. Those who advise delay today will then want to rush the next nomination through.

I hope we will look ahead to the time when we will be asked to give our attention to another nominee. Let us act in the interests of the Court and the interests of the country.

Mr. President, I apologize to the two managers. They were making good headway on their bill and I hope that they will be able to continue.

I thank the distinguished Republican leader and I thank all Senators.

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## COMMERCE, STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS, 1988

The Senate continued with the consideration of the bill.

The ACTING PRESIDENT pro tempore. The Senator from South Carolina.

Mr. HOLLINGS. Mr. President, Senator KENNEDY has an amendment that we are prepared to accept. It involves a matter of education under the Immigration and Naturalization Act whereby private organizations and local entities will also be included in the advertising relative to the legalization program and those granted amnesty.

## CLOTURE MOTION

Mr. BYRD. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on the Warner amendment, No. 951, to S.J. Res. 194, a joint resolution to require compliance with the provisions of the War Powers Resolution.

Robert C. Byrd, John Warner, Bob Graham, Sam Nunn, Wyche Fowler, Alan Cranston, John F. Kerry, Dale Bumpers, Tom Harkin, Alan J. Dixon, Dennis DeConcini, Timothy F. Wirth, Terry Sanford, John D. Rockefeller, Barbara A. Mikulski, Spark Matsunaga, John Melcher, and Claiborne Pell.

(Later the following occurred:)

Mr. BYRD. Mr. President, I ask unanimous consent that the cloture motion be corrected so that it will apply to amendment No. 951. This has been cleared on the other side with the Republican leader.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

(The foregoing motion has been corrected to reflect the above order.)

## MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent now that there be a period for morning business not to extend beyond 1 hour and Senators may speak therein not to exceed 10 minutes each.

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

## THE CONFIRMATION OF ROBERT H. BORK TO THE U.S. SUPREME COURT

Mr. HEINZ. Mr. President, on July 1 of this year, President Reagan submitted the nomination of Judge Robert H. Bork for the Supreme Court. The vacancy the President proposes to fill with the advice and consent of the Senate is occasioned by the retirement of Associate Supreme Court Justice Lewis F. Powell, Jr. Judge Bork currently serves as chief judge of the U.S. Circuit Court of Appeals for the District of Columbia.

Judge Bork's nomination has generated intense and at times emotional statements from both his supporters and opponents. While such a strong degree of interest and concern is not unprecedented in the Senate's consideration of earlier court nominees, it is unusual and demands of each of us the highest possible level of scrutiny of the nominee, of our process and our individual decisionmaking.

At the outset of the confirmation process, I began by listening carefully to my constituents' concerns, reviewing all relevant aspects of the hearing record, and studying Judge Bork's prior writings and performance as a jurist, Solicitor General, and academic in order to come to a fair and fully informed conclusion. Further, as I indicated early on, I have endeavored to determine first, whether Judge Bork's qualifications—scholarship, legal acumen, professional achievement, integrity, sound judgment, fidelity to the law, and commitment to uphold the Constitution—are of the highest order, and second, and equally if not more important, whether Judge Bork's judicial philosophies are so unusual or extreme that they may impede, or cloud in any way, an honest interpretation of our constitutional rights and responsibilities. Finally, I met with Judge Bork on two separate occasions, the most recent yesterday, in order to question him on several critical issues and to size up the man.

Because a Supreme Court Justice is appointed for a lifetime on the Court as one of only nine persons, I approach this decision with an especially keen sense of responsibility. For me, as a nonlawyer, this has been a time-consuming, difficult, and challenging process most of all because I owe both my constituents and the nominee, Judge Bork, impartiality and fairness in casting my vote.

To many outside this Chamber, I expect the controversy over Judge Bork's nomination is extremely perplexing. After all, Judge Bork's qualifications and record, on their faces, would seem to preempt any logical challenge to his suitability for the Supreme Court. He had a distinguished career both in private practice at a prominent firm and as a professor of law at a nationally renown university. He was confirmed by this body as Solicitor General in 1973 and as an appellate judge in 1982. His writings and philosophy were well known to this body in both instances, but nevertheless proved no impediment to his confirmation. Indeed, when the full U.S. Senate considered him in 1982, we voted to confirm unanimously.

His record as an appellate judge over the past 5 years is extraordinary. He has written more than 100 majority opinions. He has voted in the majority in hundreds of cases of which only one has attracted sufficient attention at the Supreme Court to warrant further review. In not a single 1 of these over 400 opinions has he ever been reversed. In fact, several of the positions he has taken in dissent have been adopted as law by the Supreme Court.

Given these credentials, I think it fair for a nonlawyer to ask, "What happened?" What has led dozens of law professors and interest groups at both ends of the political spectrum to engage in hand to hand combat? Most importantly, what led Senators whose opinions I hold in the highest regard, including my colleague from Pennsylvania, to conclude that this man should not serve on the High Court?

My own search for answers to these questions has carried me into the unfamiliar territory of constitutional jurisprudence and, in the process, has contributed mightily to the education I receive every day I serve in this body. The debate has, in most respects, been enlightening and even exhilarating.

But some parts of the debate have not been so uplifting. I am referring, of course, to some of the crass personal attacks that have been leveled against Judge Bork. I am aware, of course, of the equally crass attacks against some of Judge Bork's opponents in this body, but I place them in a different category. While such attacks equally lack any redeeming social value, we are elected to office and must, indeed, we have chosen to endure a certain amount of that sort of thing; judicial nominees should be spared that misery or we may find ourselves without qualified men and women willing to put up with it.

The critical questions involving Judge Bork do not appear to be the important but standard qualifications as to legal acumen, scholarly ability, professional achievement, personal character, honesty, or integrity. To the best of my knowledge, and I have reviewed the entire 407-page report of the Judiciary Committee for such commentary, the only serious detrimental allegation made about any aspect of Judge Bork's personal conduct from the time of his enrollment at the University of Pittsburgh in 1945 to the present was his role in the "Saturday Night Massacre," and whether he should have followed President Nixon's direct order to him, as U.S. Solicitor General, to fire Special Prosecutor Archibald Cox. After noting that his actions "remain controversial" and that "evidence and testimony on certain factual questions are contradictory," the committee report concludes that, albeit as a member of the executive branch, Solicitor General Bork gave too great a "degree of deference to Executive authority."

I shall not take the time to debate that issue here, but what is noteworthy is that neither in the committee's report, which is, of course, submitted in opposition to Judge Bork's confirmation, nor in any of the many pages of witnesses' testimony I have personally reviewed, can I find a single challenge to Judge Bork's personal honesty or integrity. Considering that 120 witnesses testified before the committee, this is remarkable in the extreme. Indeed, even Judge Bork's harshest

critics must surely come to the conclusion that Judge Bork has performed his responsibilities as a public servant, teacher, academic, and citizen with exemplary commitment to the standards of honesty and integrity in which we and the American people believe.

I believe the contentious and pivotal issue concerning Judge Bork concerns his judicial philosophy. The questions about his approach to the law are put in several different ways: Doesn't Judge Bork always side with the Government over the individual, or business over labor, or the strong over the weak? Wouldn't a Judge Bork seek to roll back 200 years of constitutional guarantees, ignoring both precedent and the changed and evolving values of our society? Isn't Judge Bork fundamentally against women and minorities, seeking to impose his own views instead of a fair and impartial judgment? In short, isn't Judge Bork some kind of judicial extremist who would be a danger?

Mr. President, irrespective that some, including President Reagan, tell us that we as Senators have no business inquiring beyond intellectual ability into the realm of judicial philosophy, these are the right questions.

My standard has been from the start that if Judge Bork is an extremist or activist, we should reject this nomination. While this is, for me, a fully legitimate test, I must point out that it is a double-edged sword that can and should cut against extremism of both right and left, the nomination of either a conservative activist or a liberal activist. To endorse the principle of "judicial restraint," as have apparently all our Senate colleagues, is to necessarily reject any Supreme Court nominee whose reading of the Constitution is either too expansive or too narrow.

In analyzing Judge Bork's judicial philosophy, I will examine three areas that have given me particular concern: equal protection, privacy, and first amendment free speech rights.

Before discussing these, however, I would like to state for the record that some of the charges made against Judge Bork are, at least in this Senator's judgment, distorted and grossly unfair. In particular, I am concerned that many of my constituents may have received the impression that Judge Bork is a racist or anti civil rights. Insofar as I can tell, this impression springs from a 1963 magazine article, arguing against the coerced desegregation of private establishments where Judge Bork writing as an explorer of the libertarian theory. Judge Bork rejected this view years ago along with his search for a unifying libertarian legal theory. He has testified that he has upheld laws that outlaw racial discrimination, and consistently supported Brown versus Board of Education, calling it "perhaps the greatest moral achievement of our constitutional law." These are not the words of a racist, neither are his deeds.

As Solicitor General, Bork, time after time, argued cases before the Supreme Court on behalf of expanded opportunities for blacks and women. On 17 occasions, Judge Bork argued for a position no less favorable to women and minorities that the Supreme Court ultimately supported. Two cases are especially worth noting:

Runyor versus McCrary, where Judge Bork successfully argued that the civil right laws prohibited private schools from denying admission to children solely because they were black, and General Electric versus Gilbert, where Judge Bork argued that discrimination by employers because of pregnancy was prohibited sex discrimination under title VII of the Civil Rights Act. And, as has been pointed out in the hearings, Judge Bork, on the circuit court was equally consistent, voting, in seven out of eight cases, in favor of minorities and women asserting a substantive civil rights claim. While one can come to unfavorable conclusions about other aspects of Judge Bork's record, there is simply no credible evidence to support the claim that he is some kind of racist or bigot.

Let me turn to what I believe is the central issue. Is Judge Robert Bork a conservative extremist or activist who will seek to overturn the constitutional guarantees we take for granted?

As I read his earlier writings, some even written these last few years, criticizing the reasoning of the Supreme Court in reaching decisions that I, like most Americans, strongly believe in, I too have worried a great deal. For this reason, I have made every effort to examine his analysis of several pivotal issues.

The equal protection clause by judicial tradition and development over the last century has been deemed to protect the rights of individuals against discrimination beyond the core categories of race and ethnicity. The Court has held that other categories of individuals, particularly those most vulnerable to discrimination by virtue of being deprived of political power, do not deserve less protection simply because they do not belong to a group singled out by the reconstruction-era Congress.

The equal protection clause preserves the individual rights of women. It protects illegitimate children. It protects aliens and still other individuals from unfair treatment. I would submit that these protections are legitimate because they are grounded in the fundamental values of this country.

Judge Bork has frequently disputed in his writings and speeches the settled reasoning behind the application of a broader view of the equal protection clause. And that has caused me a great deal of concern.

The danger in democracy is the tyranny of the majority. America is the world's oldest democracy. We have survived as a democracy because our Constitution protects a minority—the smallest majority being a minority of one, the individual—against the tyranny of the full array and power of the state. The equal protection clause, a post-Civil War amendment, was enacted because the tyranny of the majority had enslaved a whole race of individuals. It was a narrow reading of the equal protection clause in Plessy versus Ferguson that allowed the creation of a new form of discrimination—separate but equal. It took many years of divisive struggle across this country before the main institutions spawned by the Plessy doctrine were brought low, and its vestiges remain with us still.

Judge Bork has defended the theory, based on original intent, that the heightened protections of the 14th amendment were intended to apply only to race and ethnicity. While there may have been some validity to arguing this position a century ago, I reject this reading of the 14th amendment. To complicate matters, however, Judge Bork in the course of his testimony before the committee went on to recognize and accept that the modern Supreme Court had expanded its reach beyond those two categories. Most significantly, he expressed his willingness to employ the approach to equal protection—the reasonable basis test—promoted by Justice Stevens. Judge Bork has elaborated on his views on egual protection—and the privacy issue—in his letter to Senator BIDEN dated October 1, 1987. Because of its pertinence, I ask that it be printed at the conclusion of my remarks. Suffice it to say that he makes a strong case that the reasonable basis test which he fully endorses could well be more positive for women and minorities than the strict and intermediate scrutiny test.

Another troubling area is Judge Bork's unyielding criticism of the privacy cases particularly, Griswold versus Connecticut. To be honest, I cannot agree with Judge Bork's conclusion, and I am not alone in my dismay about Judge Bork's position on the right to privacy as created by the Supreme Court in Griswold. But to be fair, it should be clearly noted that two other Supreme Court Justices generally considered liberal or moderate—Hugo Black and Potter Stewart—registered vigorous dissents in the case.

Judge Bork has also been critical of Roe versus Wade because the decision, he says, rests on a right of privacy that is neither expressed nor implied in the Constitution. It is a fair state-

ment that his critics either overlook or ignore mentioning that many other notable constitutional scholars—liberal and conservative—have reached the same conclusion. Archibald Cox has said that Roe was an illegitimate exercise of judicial power. John Hart Ely has said that not only was Roe bad constitutional law, it was not a matter of constitutional law at all. Obviously, Judge Bork does not stand alone in his concern about the legitimacy of the decision.

It is ironic that Judge Bork voiced his criticism of the right to privacy in conjunction with his testimony against—I repeat, against—the so-called human life bill, which proposed to define the word "life" in the due process clause of the 14th amendment as beginning at the moment of conception. Judge Bork's fidelity to the supremacy of the Constitution took precedence over what some apparently assume to be his personal views on the issue of abortion.

Another perplexing aspect of Judge Bork has been his position on freedom of speech.

Judge Bork argued in 1972 that the first amendment should apply only to speech with a political content. The Court however, has gradually increased the types of expression protected by the first amendment to include literature, art, and even commercial advertising. Critics of Judge Bork argue that he cannot be trusted to apply to nonpolitical speech the generous protections to which we have all become accustomed. However, Judge Bork recanted his earlier analysis in 1982, and testified at the hearing that he is now "about where the court is" on this issue.

Similarly, Judge Bork has attacked the Court cases permitting the advocacy of civil disobedience. The history of this disagreement goes all the way back to cases decided early in this century, in which Justices Holmes and Brandeis dissented from several decisions upholding convictions of persons who had advocated overthrowing the U.S. Government. Over time, the dissenters approach, which required a "clear and present danger" to public safety, emerged as the majority position. More recently, the Court reaffirmed the clear-and-present danger test in the context of civil rights leaders and dissidents who had advocated civil disobedience, most notably in Brandenburg versus Ohio (1969).

Because Judge Bork has claimed that the clear-and-present danger test is unwarranted, he is viewed as hostile to freedom of speech. But during the committee's hearings, while Judge Bork noted his continuing trouble with the logical basis for the test, he nevertheless stated that he would treat it as settled law and would not attempt to overturn it.

Mr. President, what are we to make of this complex and sometimes apparently contradictory record? I think there are several pertinent questions.

First, are any of Judge Bork's opinions, irrespective of my disagreement with any one of them, outside the bounds of respectable judicial argument?

This is ultimately a matter of opinion. Although there will be some who disagree, I have difficulty challenging the opinion of former Chief Justice Warren Burger, who testified, "If Judge Bork is not in the mainstream, then neither am I, neither have I been. I simply do not understand the suggestion that he is not in the mainstream of American constitutional doctrine."

Second, does Judge Bork show indications of being an activist judge bent on rewriting critical Supreme Court decisions and precedents to fit a personal ideological agenda? Here the answer is less clear. His record on the circuit court and his answers to the committee respecting his deference to precedent on freedom of speech and equal protection are reassuring if taken at face value. His stance on privacy issues, however, is troubling. Yet, if this is the only issue on which I or others have grave concerns, I would be reluctant to disqualify a man simply on a single issue, especially one where he enjoys distinguished company like Archibald Cox and Justice Hugo Black, both noted for their liberal views. Indeed, if one accepts the sincerity of Judge Bork's views today, one is forced to conclude that he does not have a personal ideological agenda but is a man willing not merely to seek out the original intent of the Constitution and its framers but also to fully respect and follow precedent in critical areas like civil rights, women's rights, voting rights, freedom of speech, and equal protection.

Necessarily, the third question is whether or not one can and should accept the sincerity of Judge Bork's views as he states them today. More accurately, would a Justice Bork respect not just the letter but the spirit of precedent? Or, as the committee report charged is it true that "Judge Bork would simply see future cases through a lens that embodied his own strong views about original intent and would thereby be likely to see the erroneous but settled decisions as inapplicable to new situations?"

This is not an easy conclusion to come to, but it seems to me that one relevant test of any judge's respect for precedent is whether there is any evidence of "trimming"; that is, taking a narrow view of established precedent in deciding whether the facts of a given case fall within "the four corners" of prior case law. As I have read and re-read the committee report, critical as it is of Judge Bork generally, I see no evidence there or in his record on the Circuit Court of Appeals that he has either expanded or attempted to reduce the scope of existing precedent.

In this connection, I find reassurance in Judge Bork's reputation for scholarly excellence, most particularly his searching and sifting through 200 years of constitutional history to define the impulses, past and present, to our rights and responsibilities as Americans. In reviewing the charges of his harshest critics, and in asking him many hard questions myself, I find no fault with the integrity of his scholarly work. This seriously undercuts the arguments of those who believe Judge Bork seeks to bend facts or theory to fit his own personal philosophy.

Mr. President, I want to add a comment about my most recent meeting with Judge Bork, which was for 2 hours yesterday afternoon. I pressed him repeatedly on the question of how he would resolve conflicts between his originalist views and court decisions with which he disagreed. His answers were consistently revealing:

> An originalist has to have a very strong belief in precedent. * * * A judge's function is not to keep tearing up the Nation. * * * Nations and law require stability and continuity. * * * These issues [that he has criticized] have been resolved by society.

These are the words that most of us in this body want to hear. Some have questioned Judge Bork's sincerity or accused him of a confirmation conversion. In the final analysis, we must make a subjective judgment as to a person's credibility. I do not find any lack of sincerity in Judge Bork's comments to the committee or to me.

The critical question that remains is not one of qualifications, integrity, sincerity or the presence of an activist agenda. It is whether a member of the Supreme Court will dispense something other than brilliantly conceived opinions. Simply put, will he dispense justice?

Justice is a quality so indefinable that words like evenhandedness, impartiality, equitableness do not capture the full meaning of justice. But even though the synonyms are inadequate, we all know what we mean by that heightened sense of fairness we term justice. And we know that without a well-developed sense of justice no man or woman should be elevated to the Supreme Court. And this is the most important judgment any of us can make about Judge Bork.

Mr. President, I have come to a conclusion about Judge Bork. A good deal of what has been said about him has been unfair and misrepresented his character and record. He is certainly not a racist or sexist. He has undeniably been a critic of the logic of many important Supreme Court decisons that I and others support. In his role

as critic, he has often failed to offer solutions. Yet he has demonstrated a remarkable record for supporting, as a circuit court judge, the decisions and precedents with which he has found intellectual fault. He has sworn under oath before the Senate and the Judiciary Committee that he fully accepts and supports many landmark decisions which he criticized as an academic.

I find that the mark of a tolerant and fair mind. Therefore, notwithstanding disagreements I may have with some of his conclusions, I shall vote for Judge Bork.

EXHIBIT 1

U.S. COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT,
*Washington, DC, October 1, 1987.*

Hon. JOSEPH R. BIDEN, Jr.,
*Chairman,*
*Committee on the Judiciary,*
*Washington, DC.*

DEAR SENATOR BIDEN: I would like to thank you and the other members of the Committee for your courteous and insightful questions during my appearance before the Committee. They confirmed my belief that discussion and debate are essential to growth and change in the law. In response to several concerns raised by Senator DeConcini, I would also like to take this opportunity to set out at somewhat greater length my views on the issues of gender discrimination under the Equal Protection Clause and privacy rights.

I. EQUAL PROTECTION

On the gender discrimination question, it has been suggested that I previously maintained that women and members of other non-racial groups were not covered by the Equal Protection Clause, but then changed my view in connection with the confirmation hearings. This is simply inaccurate and, I suspect, stems in large part from confusion about the scope and basis of my criticism of modern equal protection analysis.

There are two basic questions presented when reviewing an equal protection challenge to a legislative classification. The first question is whether the individual disadvantaged by the classification is within the *coverage* of the Equal Protection Clause. The second question is what *standard of review* is employed in assessing the validity of the classification.

With respect to the first issue, the scope of coverage under the Fourteenth Amendment, I have always believed that women are subject to the protection of that provision. A judicial "interpretivist" "or intentionalist" like myself always looks first to the language of the constitutional provision to discern its meaning. Any understanding of the Equal Protection Clause as being inapplicable to women would seem to be directly contrary to the plain language of the Amendment, which prohibits denying "*any person*" equal protection under the law. Indeed, in my 1971 Indiana Law Review Article, I criticized Supreme Court equal protection cases such as *Goesaert* v. *Cleary*, 335 U.S. 464 (1964), which upheld discrimination against women bartenders, as "improper and intellectually empty". Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 12 (1971).

The sole focus of my criticism in this area has been the method by which the Supreme Court chooses varying levels of judicial review for different groups in our society—the so-called "tier" or "group" approach.

Under this approach, the Court adjusts the level of judicial review depending upon the Court's perception of the relative political power of the group being disadvantaged. If the Court determines that a particular group is a "discrete and insular minority" or otherwise unlikely to succeed politically, it provides the group with "special protection" under the Equal Protection Clause in the form of heightened judicial scrutiny of any classification affecting that group. Suspect classifications, such as race or ethnicity, are subject to "strict scrutiny" and are invariably impermissible as a result. Various other "groups"—aliens, illegitimate children, women, and so on—are subject to different, more lenient standards of review.

I did not and do not believe that this group-based approach is an appropriate or consistent method of analyzing an equal protection claim. First, determining which groups are entitled to special protection is an inherently subjective process which necessarily involves the judiciary in *ad hoc* intrusions into the democratic process. Judges are forced to pick and choose among various elements of society, favoring some and disfavoring others, without any guidance from the text of the Constitution or any principle that can be neutrally applied in various cases. For this reason I have criticized the "protected groups" theory as propounded by Professor John Ely because it "channels judicial discretion not at all and is subject to abuse by a judge of any political persuasion." Catholic University Speech, March 31, 1982.

There is an additional difficulty with the group approach. Since the Court announced that it was protecting "discrete and insular" minorities there was difficulty in explaining why the clause applied to women, a group that is actually a slight majority of the population. Indeed, under the group approach, it would be difficult to explain why the clause should apply to more than racial minorities since newly freed blacks were the focus of concern when the fourteenth amendment was ratified.

If literally applied, and approach based on special solicitude for "discrete and insular" minorities would not only preclude scrutiny of gender classifications but would lead to other absurd results. For example, convicted murderers would be granted "special protection" since they are a discrete and insular minority and certainly without political influence. Considerations of this sort gave me intellectual difficulty in seeing how a group approach could justify extending the clause beyond race and, perhaps, ethnicity, although I also thought that the gender discrimination involved in *Goesaert* v. *Cleary*, should have been invalidated rather than upheld.

I really did not begin to resolve this difficulty until I became aware of Justice Stevens' suggestion in *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985), that the group approach be dropped and a rational basis test be substituted. As he wrote:

"In my own approach to these cases, I have always asked myself whether I could find a 'rational basis' for the classification at issue. The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always charactrize the performance of the sovereign's duty to govern impartially.

"The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply 'strict scrutiny,' or even 'heightened scrutiny' to decide such cases.

"In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a 'rational basis.' The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, gender, or illegitimacy. But that is not because we apply an 'intermediate standard of review' in these cases; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose that the challenged laws purportedly intended to serve."—*Id.* at 452-454 (footnotes omitted).

This seems to me to provide a much more coherent methodology for application of the Equal Protection Clause than does the group approach. It applies the clause to all persons *as individuals*. Under my view, all persons, including women, illegitimate children, aliens, and others are entitled to protection from classifications which do not rest upon a reasonable basis in fact.

That is, the Equal Protection Clause prohibits unreasonable distinctions among *all* persons; it does not afford special protection to certain groups. In every instance, the question is 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 should be struck down.

It seems to me that this method of equal protection analysis is both more objective and more faithful to the language and 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 core concern of those who drafted the Fourteenth Amendment which is, of course, racial classifications.

The central tenet of the Fourteenth Amendment is that race is an unreasonable basis upon which to judge an individual's worth or status in the community. As Justice Stevens said, 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, a judge must refer to the framer's 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.

For example, in the *Goesaert* case, which I referred to earlier, the Supreme Court upheld a restriction on the opportunity of women to work in bars. Under my analysis, the law would clearly violate the Equal Protection Clause. There is no reasonable basis in fact for distinguishing between men and women in such a situation. The physical differences between men and women have no bearing on their relative abilities in this field. The same is true of virtually every employment situation. One's gender is irrelevant to one's ability as a lawyer, doctor or accountant, and any restriction on women in any of these fields would be as unreasonable as a law which disfavored people with blue eyes.

By focusing on the factual differences between individuals, the reasonable basis test distinguishes between laws which rest on genuine distinctions between persons and those based upon mere stereotypes. A law which limits the combat duties of women in the armed forces may indeed have a reasonable basis. It may be a fact that certain battlefront tasks require a physical strength or speed which very few women possess. Outside of the narrow areas where physical differences between the sexes are relevant, the reasonable basis test would operate to strike down all laws based upon mere habit or assumption. Distinctions based upon outmoded stereotypes can never satisfy a requirement that they have "a reasonable basis in fact" because they are in essence counterfactual, they ignore the factual similarities between persons in favor of unsupported assumptions.

The results in cases like *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), would not change under my reasonable basis analysis. In *Reed*, the Court struck down a provision of the Idaho Probate Code which established an absolute preference for men over women in the appointment of administrators of estates. *Reed* was the first victory for women under the Equal Protection Clause, and the test applied by a unanimous court was remarkably similar to my own. The Court stated:

"A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike,"—*Reed*, 404 U.S. at 76 (citation omitted).

The preference for male administrators in *Reed* was not based on and factual difference between men and women, rather it was the product of an unthinking and *unreasonable* stereotype.

In *Frontiero*, the Supreme Court concluded that an Air Force regulation prohibiting women from claiming their spouses as dependents on the same basis as men offended the concept of equal protection. Four justices would have elevated sex to the category of suspect classifications applying "strict scrutiny." Justices Stewart and Powell, joined by Chief Justice Burger and Justice Blackmun, applied the rational basis test as announced in *Reed*. The result for all eight Justices was the same: the preference for men rested on the outmoded stereotype that men are "breadwinners" and women are dependent upon them. Under my view, the same result would follow. The law had no reasonable basis in fact as applied to servicewomen like Sharron Frontiero, whose husband was a student *dependent on her* for a large part of his support.

There was some suggestion at the hearings that my rejection of a rigid two- or three-tiered approach was a novel or extreme view. Yet both academics and sitting Justices have expressed their problems with this approach. Thus, in 1972, Professor Gerald Gunther wrote in the Harvard Law Review, "There is mounting discontent with the rigid two-tiered formulation of the Warren Court's equal protection doctrine." Gunther, *Supreme Court Foreword: 1971 Term*, 86 Harv. L. Rev. 1, 12 (1972). In *Chicago Police Dep't* v. *Mosley*, 408 U.S. 92 (1972), Justice Marshall criticized "the abstract dichotomy between two different approaches to equal protection that have been utilized by [the] Court." As noted above Justice Stevens has also made his discontent with a group approach crystal clear. See *Cleburne, supra; Craig* v. *Boren*, 429 U.S. 190 (1976) (Stevens, J., concurring).

It has also been suggested that my reasonable basis approach would result in less protection for women, or other nonracial groups that have suffered discrimination, than the current Supreme Court methodology. However, as the discussion above demonstrates, my approach would result in the same or greater protection than that currently afforded women: invalidation of all gender-based distinctions except that narrow category of cases based on genuine biological differences between the sexes. While it is true that the Supreme Court in past eras had upheld gender based discrimination as rational, the same results simply would not obtain today under my analysis.

Under the "three-tier" approach, the rational basis test is the lowest level of scrutiny given to any classification and was often used simply to "rubber-stamp" manifestly irrational distinctions. As previously noted, I *criticized* this toothless and inconsistent "rational basis" analysis, employed in such gender cases as *Goesaert*, as far back as my 1971 Indiana Law Review article. Thus, it is simply inaccurate to compare the "rational basis" analysis employed under the three-tier approach as a device for upholding classifications to the much more searching inquiry I would employ. That is why I prefer to refer to the proper approach as a "reasonable basis" test—to avoid confusing it with the "rational basis" test which has proved wholly unsatisfactory.

Moreover, this comparison fails to recognize that a basic principle of my judicial philosophy is 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," *Ollman* v. *Evans*, 750 F. 2d at 995-996 (Bork, J., concurring). As I have testified, this means that the reasonableness of a gender-based classification will change along with the role of women in modern society. Even if the framers of the Fourteenth Amendment believed that imposing second-class citizenship on women was reasonable in the 19th century given "the world they knew", it is certainly no longer reasonable in light of the economic and independent status of women in the "world we know". Accordingly, the Court's view of reasonableness must evolve along with that of society in order to "insure that the powers and freedoms the framers specified are made effective in today's circumstances." *Ibid.*

Finally, I should note that I have found that male prisoners state a claim of sex discrimination under the Equal Protection Clause, *Cosgrve* v. *Smith*, 697 F.2d 1125 (D.C. Cir. 1983), and that I argued as Solicitor General that single-sex schools were unconstitutional where the all-female school was unequal. *Vorcheimer* v. *School District of Philadelphia*, 430 U.S. 703 (1977). Both of these actions involved applying the Equal Protection Clause to gender classifications.

In sum, I think my approach to the Equal Protection Clause is fully consistent with the text and history of the Fourteenth Amendment. The reasonable basis test will provide *at least* as much protection for women and racial and ethnic minorities as present Supreme Court doctrine. In some areas it will provide more. Under the present "group approach," if a group fails to qualify for "heightened scrutiny" it receives virtually no protection from discriminatory laws. Since under my approach all individuals are protected by the reasonable basis test, members of these groups would be more fully protected from unreasonable and arbitrary laws than they are at present.

II. RIGHT TO PRIVACY

Another area you asked about is the Constitution's protection of individual liberty. As I commented before the Committee, the Constitution protects numerous and important aspects of liberty. For instance, the first amendment protects freedom of speech, press, and religion; the fourth amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures;" and the sixth and seventh amendments protect the right to trial by jury. All of these freedoms and more are fundamental. A judge who fails to give these freedoms their full and fair effect fails in his judicial duty. But to say that a judge must be tireless to protect the liberties guaranteed by the Constitution does not mean that one can find a right to liberty or personal autonomy more expansive than those found in the Constitution. Once a judge moves beyond the constitutional text, history, and the structure the Constitution creates, he has only his own sense of what is important or fundamental to guide his decisionmaking.

More fundamentally, where the constitutional materials do not specify a value to be protected and has thus left implementation of that value to the democratic process, an unelected judge has no legitimate basis for imposing that value over the contrary preferences of elected representatives. When a court does so, it lessens the area for democratic choice and works a significant shift of power from the legislature to the judiciary. While the temptation to do so is strong with respect to a law as "nutty" and obnoxious as that at issue in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), the invention of rights to correct such a wholly, misguided public policy inevitably involves the judiciary in much more difficult policy questions about which reasonable people disagree, such as abortion or homosexual rights. (In saying this, I do not preclude the possibility that some cases I have criticized could be defended on more adequate constitutional grounds than the opinions offered. I think I made that clear at the hearings.)

While a legislator obviously can and should make distinctions between such things as the freedom to have an abortion and the freedom to use contraceptives, a court cannot engage in such *ad hoc* policy making. A court cannot invent rights that apply only in one case and are abandoned tomorrow in a case that cannot fairly be distinguished. The process of inventing such rights is contrary to the basic premises of self-government and inconsistent application denies litigants the fairness and impartiality they are entitled to expect from the judiciary.

This was the basis of my criticism of Justice Douglas' opinion in *Griswold*, the case invalidating Connecticut's statute banning the use of contraceptives. To put the decision in perspective, it is important to note that *Griswold*, even in 1965, was for all practical purposes nothing more than a test case. The case arose as a prosecution of a doctor who sought to test the constitutionality of the statute. There is no recorded case in which this 1879 law was used to prosecute the use of contraceptives by a married couple. The only recorded prosecution was a test case involving two doctors and a nurse, and in that case the state itself moved to dismiss.

This point was made by Justice Frankfurter four years before *Griswold* in *Poe* v. *Ullman*, 367 U.S. 497 (1961), a case rejecting an earlier attempt to have the Connecticut law invalidated. In addition, Justice Frankfurter's opinion took judicial notice of the fact that "contraceptives are commonly and notoriously sold in Connecticut drug stores," and concluded that there had been an "undeviating policy of nullification by Connecticut of its anticontraceptive laws throughout all the long years that they have been on the statute books." *Id.* at 502. Thus, it cannot realistically be said that failure to invalidate the Connecticut law would have had any material effect on the ability of married couples to use contraceptives in the privacy of their homes.

My principal objection to the majority opinion in *Griswold* 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 is found offensive. 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."—381 U.S. at 513.

Of course, had the state 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.

Absent a violation of such a specific, constitutionally granted right of privacy, however, it is difficult to discern the constitutional impediment to the Connecticut law. In my view, Justice Douglas' attempt to do so by creating a free-floating "right to privacy" does not state a principle of constitutional adjudication that was either neutrally derived or which could be neutrally applied in the future.

As I stated in my Indiana Law Review article (page 7):

"If we take the principle of the decision to be a statement that government may not interfere with any acts done in private, we need not even ask about the principle's dubious origin for we know at once that the Court will not apply it neutrally. The Court, we may confidently predict, is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor. We can gain the possibility of neutral application by reframing the principle as a statement that government may not prohibit the use of contraceptives by married couples, but that is not enough. The question of neutral definition arises: Why does the principle extend only to married couples?

"Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? The question of neutral derivation also arises: What justifies any limitation upon legislatures in this area? What is the origin of any principle one may state?"

As I went on to note in the article, the "zones of privacy" discussed by Justice Douglas do not really have anything to do with privacy at all. These zones of privacy, I stated "protect both private and public behavior and so would more properly be labelled 'zones of freedom'. If we follow Justice Douglas' next step, these zones would then add up to an independent right of freedom, which is to say, a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society. . . . We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future."—Indiana Law Review Article at 9.

With all modesty, my suggestions that the right of privacy was not really about "privacy" as such, that this right would not be applied consistently, and that it would lead the Court into much more difficult moral and social issues, have all proved prophetic.

For example, the "privacy" right recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973)—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 in *Roe*, therefore, is whether any provision of the Constitution recognizes an individual right to terminate pregnancy against state intrusion. The Court's opinion in *Roe* 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." *Id.* at 153.

This is my difficulty with the opinion. As Justice White's dissent, joined by Justice Rehnquist, stated, there is "nothing in the language or history of the Constitution to support the Court's judgment," which the dissent termed "an exercise of raw judicial power." The due process clause of the fourteenth amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." If the clause is read as written, then it guarantees that life, liberty, and property will not be taken without the safeguard of fair and adequate legal procedures to challenge the legality of the deprivation. Once such procedures have been given, and the legality of the deprivation established, the due process clause does not establish an independent barrier to the deprivation. If, on the other hand, the clause is read to protect liberty against deprivation regardless of procedures, then the judge must have a theory for deciding which liberties are protected and which are not since no one would suggest that *all* liberty is immune from state regulation.

So far as I can tell, no one has ever been able to explain why some liberties not specified in the Constitution should be protected and others should not. As far as the Constitution is concerned, when it does not speak to the contrary the state is free to regulate. A judge who uses the due process clause to give substantive protection to some liberties but not others has no basis for decision other than his own subjective view of what is good public policy.

Attempts to read substantive protections of liberty into the due process clause have failed in the past precisely because the clause gives no indication of which liberties are to be preferred to others. In the early part of this century, for example, the Supreme Court read the due process clause of the fifth and fourteenth amendments to protect a generalized liberty of contract, and routinely struck down laws that interfered with that liberty. Thus, in *Lochner* v. *New York*, 198 U.S. 45 (1905), the Supreme Court invalidated a New York labor law limiting the hours of bakery employees to 60 hours a week. Similarly, in *Adair* v. *United States*, 208 U.S. 161 (1908), the Court struck down a federal law prohibiting interstate railroads from requiring as a condition of employment that its workers agree not to join labor unions. And in *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), the Court held the District of Columbia's minimum wage law unconstitutional.

As I have said elsewhere, the Supreme Court's modern attempts to use the due process clause as a substantive protection of liberty have also been unconvincing. Although the Court has held in *Roe* that a woman has a constitutional right to receive an abortion, it has more recently held that consenting adults do not have a constitutional right to engage in homosexual sodomy. See *Bowers* v. *Hardwick*, 106 S. Ct. 2841 (1986). Justice White's opinion for the Court in *Bowers* reasoned as follows:

"It is obvious to us that neither ['the concept of ordered liberty' nor the liberties 'deeply rooted in this Nation's history and tradition' formulation] would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots."—*Id.* at 2844.

The difference between these two decisions illustrates my point that it is difficult, if not impossible, to apply the undefined right of privacy in a principled or consistent manner. It is difficult to understand why abortion is a constitutionally protected liberty and homosexual sodomy is not. Neither activity is mentioned in the Constitution, both involve activity between consenting adults, and "[p]roscriptions against [both activities] have ancient roots."

Some have said that the principle may be that individuals have a constitutional right to use their bodies as they wish. Not only is this principle to be found nowhere in the Constitution, but also its application would invalidate laws against prostitution, consensual incest among adults, bestiality, drug

use, and suicide, not to mention draft laws and countless safety measures such as laws requiring the use of seat belts and motorcycle helmets. This principle is thus far too general to support a particular decision without sweeping in these other cases.

As I stated before the Committee, it would be inappropriate for me to give any indication of how I would vote as a member of the Supreme Court should the issue arise again. But suffice it to say that the question would be one of searching for an appropriate constitutional basis and precedent. As I have emphasized not every incorrectly decided constitutional decision should be open to reconsideration.

Although I cannot claim to have exhaustively researched the question, I do not think that the ninth amendment provides any basis for a contrary conclusion. The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The historical meaning of this amendment is revealed by the circumstances of its adoption. As you are certainly aware, the original Constitution did not contain a Bill of Rights. Rather, it established a national government of enumerated powers. But during the ratification debates, calls were made with increasing frequency by the so-called Anti-Federalists for adoption of a Bill of Rights. The Federalists raised two objections to inclusion of a Bill of Rights. First, it was said to be unnecessary because Congress would have no power to abridge fundamental rights of the people as the general government was one of enumerated, and therefore limited, powers. Second, the Bill of Rights was said to be dangerous because the reservation of certain rights might be read to imply that power was given to the federal government to regulate all others.

Once James Madison became convinced of the need for a Bill of Rights, Madison defended his proposal as follows:

"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 arguments I ever heard urged against the admission of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution."—(1 Annals of Congress 456 (J. Gales & W. Seaton ed. 1834)).

The clause to which Madison referred was the provision that would later be adopted in somewhat shorter form as the ninth amendment. Thus, it appears that the amendment's instruction that the enumeration "of certain rights, shall not be construed to deny or disparage others retained by the people" was meant to prevent any implication, as Madison put it, "that those rights which were not singled out, were intended to be assigned into the hands of the General Government."

This means that whenever the Constitution does not grant the *power to regulate* conduct to the federal government, the people have a right to engage in that conduct free from *federal* interference even though the conduct is not specified in the Bill of Rights. It must be emphasized that the "right" protected by the ninth amendment runs against the federal government when it undertakes to regulate individuals through an unwarranted expansion of its powers. For this reason, it makes little sense either textually or historically to speak of ninth amendment rights enforceable against the *states*. As I have said elsewhere, if that were the meaning of the ninth amendment, then surely there would have been heated debate in the state ratifying conventions, and litigants and courts would have invoked the amendment in that capacity. That neither occurred, I think, is strong evidence that the amendment was not intended to create federally enforceable rights against the states.

Moreover, even if one agrees with the recent suggestion that the ninth amendment protects natural rights against state and federal intrusion, the nature and scope of those rights is undefined and virtually limitless. For example, John Locke, a thinker whose writings profoundly influenced the framers' view of "natural rights," regarded property and contract rights as among the most important natural rights of men. Accordingly, if the ninth amendment were to be interpreted as a grant of liberty against government intrusion, it would necessarily include the freedom of contract. Of course, this would lead to invalidation of the worker protection legislation struck down by *Lochner* and its progeny, or any other form of economic regulation that hampers the "right" to contract.

Alternatively, members of the Supreme Court have invoked their own notions of natural law in the past. For example, Justice Bradley's concurrence in *Bradwell* v. *State*, 83 U.S. 130 (1973), upholding a law forbidding women from practicing law, states: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . [The] paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

But those who now urge reliance on the ninth amendment see a different set of natural rights emanating from the ninth amendment. For example, Professor Tribe filed a brief with the Supreme Court in *Bowers* v. *Hardwick* suggesting that one of the rights "retained by the people" under the ninth amendment is the right to engage in homosexual sodomy. Equally plausible are claims that the ninth amendment protects drug use, mountain climbing, and consensual incest among adults. Certainly the text of the amendment makes no distinction among any of these "rights." Therefore, unless the ninth amendment is to be read to invalidate all laws that limit individual freedoms, judges who invoke the clause selectively will be doing nothing more than imposing their subjective morality on society.

Although Justice Goldberg's concurrence in *Griswold* invoked the ninth amendment, the problems just discussed are, I think, the reason why the Supreme Court has *never* rested a decision on the ninth amendment. For instance, even Justice Douglas, the author of the majority opinion in *Griswold*, stated in a concurring opinion in the companion case to *Roe* v. *Wade*, that "The Ninth Amendment obviously does not create federally enforceable rights." *Doe* v. *Bolton*, 410 U.S. 179, 210 (1973) (Douglas, J., concurring). Unless someone can find a way both to read the ninth amendment to apply against the states and to discover which additional rights are retained by the people, I do not see any principled way for a judge to rely on the clause to invalidate state laws.

There is one final matter I wish to mention. There appears to be some confusion concerning my view of, and the Court's decision in, *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). *Skinner* held that a state statute requiring sterilization of recidivist robbers but not embezzlers worked "a clear, pointed, unmistakable discrimination," *id.* at 541, and therefore violated the equal protection clause of the fourteenth amendment. It is important to understand the rationale given by the Court for its decision. The Court did *not* rely on a substantive due process right to privacy. In fact, the Court declined Chief Justice Stone's invitation in a separate concurrence to decide the case under the due process clause. Instead, the Court rested its decision squarely on the equal protection clause: "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Id.*

In my 1971 article, I was critical of what I believed to be the Supreme Court's inconsistent application of the equal protection clause. I cited six cases as examples in which the Court both upheld and invalidated challenged classifications. One of the cases I cited was *Skinner* v. *Oklahoma*. I did not cite *Skinner*, or any other case I listed, for the correctness or incorrectness of its holding. Rather, my point was merely that it appeared that "the differing results cannot be explained on any ground other than the Court's preferences for particular values." Indiana Law Review at 12. This was the sum total of my "criticism" of *Skinner*, and I think it is at best inaccurate to suggest, as some have, that my inclusion of *Skinner* in a string cite means that I disagree with the decision in the case.

As I stated in my testimony before the Committee, the state's decision to sterilize robbers but not embezzlers may have been indicative of racial bias because the statute operated disproportionately against racial minorities and the poor. If that is true, and if robbery and embezzlement are, as the Court said, "intrinsically the same quality of offense," 316 U.S. at 541, then I think it may be fair to say the state engaged in impermissible discrimination. In addition, I note that sterilization of criminals raises serious and independent questions under the eighth amendment's prohibition on cruel and unusual punishment, questions neither I nor the Court addressed.

I hope that these additional comments prove to be of assistance to you.

Sincerely,

ROBERT H. BORK.

## NOW IT'S UP TO THE SANDINISTAS

Mr. DOLE. Mr. President, yesterday afternoon, I and a number of other Senators were briefed by the leaders of the Nicaraguan Democratic Resistance on their plan to return to Managua—and challenge the Sandinistas to make good on their commitment to the Guatemala City peace accord.

What the freedom fighters seek is so simple and fair that it will stand as a clear, clear test of the Sandinistas true intentions. They want to go back to their own country; they are not asking for any amnesty, because they don't believe that wanting their freedom is

And I want to commend the Departments of Defense and State for their steadfast resistance to granting the licenses necessary if we were to export domestic communications satellites. I'm all for as much trade as possible, and the fewer the trade barriers the better. But the idea of licensing the export of our technology so the U.S.S.R. can carry our satellites is just going too far. I stand ready to amend whatever legislative vehicle may be available if DOD and State were to change their present position. We should launch our satellites with American launch vehicles, and strengthen—not weaken—our commercial launch industry.

I yield the floor.

## NOMINATION OF JUDGE ROBERT BORK

Mr. D'AMATO. Mr. President, I have today a statement regarding the nomination of Judge Robert Bork.

Mr. President, I have reviewed the testimony from the confirmation hearings and considered carefully the thoughts of my colleagues.

Let me say that Judge Bork would not have been my personal choice for the Court. I have serious concerns about certain of the statements and positions he has taken both in his writings over the years and in his testimony before the Judiciary Committee. I am particularly troubled by his apparently restrictive view of the application of the 14th amendment to the rights of all of our citizens. At the same time, it is clear to me that the judge's views on these matters have been somewhat misrepresented.

It is worth noting that Judge Bork was unanimously confirmed in 1982 by this body to serve as a judge in the U.S. court of appeals. Seventy-two of my present colleagues were Members of the Senate at that time.

Since that time Judge Bork has participated in over 400 decisions and authored 125 opinions. In 95 percent of those cases, he joined his colleagues in the majority. The Supreme Court reversed none of those decisions.

In each of the six cases in which a matter reached the Supreme Court in which Judge Bork had dissented—every single one—the Supreme Court agreed with Judge Bork and reversed the majority. Every one, Mr. President. That is hardly the record of a judge beyond the mainstream. Judge Bork has instead consistently reflected and been upheld by his colleagues on the court of appeals and the Supreme Court.

Judge Bork is the President's choice. My job as I see it is not to test the adherence of the President's nominee to my particular views. My job, and that of my colleagues is thoughtfully, carefully, and honestly to judge him on his qualifications, experience, integrity, and temperament. Based on those standards, Mr. President, I will vote to confirm Judge Bork, knowing that this nomination will be rejected. Hopefully, the President will quickly nominate someone who will represent the best of the Reagan revolution, and who will be confirmed quickly.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. BYRD. Mr. President, is there time remaining in morning business?

The PRESIDING OFFICER. The time has expired.

## EXTENSION OF MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that the time be extended 20 minutes and that Senators may be permitted to speak therein for not to exceed 10 minutes.

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

Mr. MURKOWSKI. Mr. President, first let me acknowledge and thank our leader for the extended time and the courtesy. I am very appreciative. I know it has been a long day and I will not prolong it other than I think this is an important matter for the body to consider.

(The remarks of Mr. MURKOWSKI relating to legislation are printed under "Statements on Resolutions.")

Mr. MURKOWSKI. I want to again thank the majority leader for his willingness to accommodate me. It is most appreciated. I thank the Chair as well.

Mr. BYRD. Mr. President, the Senator is welcome. He is always most cooperative and courteous and understanding. I am doing the best I can to return that understanding and courtesy.

## THE SPECTER OF SEQUESTER: III

Mr. CHILES. Mr. President, yesterday the Congressional Budget Office released its initial sequester report.

For those who haven't been paying that much attention to the situation, the report may hit them about the same as if somebody dropped a toaster in the bathtub. Unfortunately, a lot of folks haven't taken sequester all that seriously. They seem to think it's a tolerable way to sidestep the choices that deficit-reduction requires.

I have a hard time understanding that kind of approach.

If you've looked at the financial news the last couple of days, it's clear that Rome is on fire again while people are standing around with fiddles on their shoulders.

Wednesday, the stock market dropped a record 95 points. Yesterday, it dropped nearly 58 points. That's more than 150 points in just 2 days.

Chemical Bank, the fourth largest bank in the country, has raised its prime rate from 9.25 to 9.75 percent.

Mr. President, with the market dropping, and our trade deficit continuing at record levels, interest rates are up and climbing.

To keep attracting the foreign funds needed to fuel our borrowing habit, we have to dangle even higher incentives. So the cycle goes on and on and on.

Bigger deficits? More borrowing.

More borrowing? Higher interest rates.

Higher interest rates? A depressed economy.

All those things are staring us right in the face, and we can't find a way to reduce the deficit less than one-half of 1 percent of GNP.

And it's not only a matter of what we won't do. It's also a matter of how this inertia tends to undo programs we've already set in place.

It was just last year, Mr. President, that most everybody in Congress as well as the President of the United States were worried about the terrible drug problem in this country.

We didn't just sit around and assume the problem would take care of itself. We did something. We passed comprehensive antidrug legislation. We faced up to our responsibility.

But right now, with a Presidential sequester hanging over our heads, there are precious few people who seem to care very much. Well, believe me, they ought to care plenty. If sequester goes through, it will go against the grain of the drug legislation we passed less than a year ago.

For one thing, a sequester would mean a cut of $45 million in the Drug Enforcement Administration—the spearhead agency in the fight against drugs. Let me explain what those cutbacks would mean

It would mean an 11-percent furlough of Drug Enforcement personnel. It would mean cutbacks in modernization activities and a freeze on building expansion mandated by the drug bill. Ongoing operations like the Cocaine Investigation Program would be cut back. And the South American drug interdiction effort known as Operation Snowcap would be trimmed

Those are serious cuts. It seems to me that if we're serious about fighting the drug war, we better start getting serious about fighting the sequester war

A sequester would also mean a $90 million cut from the 1987 appropriated level for the U.S. Customs Service. A cut that size converts into a likely av-

Mr. WARNER. Mr. President, I object.

The PRESIDING OFFICER. Is there a sufficient second?

Mr. WARNER. Mr. President, I have a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. WARNER. My understanding is the Senate is operating under a cloture, which has not been invoked and under that procedure the amendments which were filed as of, I think 1 o'clock yesterday, are the only amendments which can be brought to the pending matter. Is that correct?

The PRESIDING OFFICER. Or amendments filed at the desk prior to this morning.

Mr. WARNER. May I inquire of the desk and of the proponent of this amendment, does this amendment meet this criteria?

The PRESIDING OFFICER. The amendment is to the language proposed to be stricken and it is an amendment which was filed prior to the time required. Therefore it does qualify.

Mr. HELMS. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. The question is: Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The Senator from North Carolina has the floor.

AMENDMENT NO. 1022

(Purpose: To authorize the United States Navy to sink any Iranian vessel, destroy any Iranian missile battery, or neutralize any Iranian installation which threatens the safe passage of any American warship or of any other vessel known to have on board any citizen of the United States)

Mr. HELMS. Mr. President, I filed timely, in a timely fashion this morning, a second-degree amendment. I do not have the number but here is a copy of it for the clerk's benefit.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from North Carolina [Mr. HELMS] proposes an amendment No. 1022 to amendment No. 1014.

The amendment is as follows:

Add before the period at the end of unprinted amendment No. 1014 the following; "; *Provided further*, That nothing in this Resolution shall be interpreted or construed in any manner which is inconsistent with the proposition that the United States, as a maritime power, has a preeminent interest in the freedom of the seas and in taking such actions as are necessary to maintain such freedom".

Mr. WARNER. The Senator from Virginia inquires of the Chair, this amendment which has just been read: Does this come within the strictures of the pending cloture order?

The PRESIDING OFFICER. The amendment is germane and the amendment was timely filed.

Mr. WARNER. I have a parliamentary inquiry, Mr. President, with regard to the prior amendment. Did the Chair include in his pronouncements that that amendment was also, not only within the framework of the cloture order, but germane?

The PRESIDING OFFICER. This Chair did not state it at the time, but the Chair will state at this time that the amendment is germane.

Mr. WARNER. Mr. President, I thank the Chair. I had not heard that and I wished to have it clarified for the RECORD.

Mr. WEICKER. Mr. President, parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Connecticut will state his parliamentary inquiry.

Mr. WEICKER. Mr. President, am I to understand that the first amendment submitted by the distinguished Senator from North Carolina was to Senate Joint Resolution 194 and that the second amendment submitted by the distinguished Senator from North Carolina was to what is called the Byrd-Warner amendment? Is that correct?

The PRESIDING OFFICER. No. The Chair will state to the Senator from Connecticut that both of the amendments submitted by the Senator from North Carolina were perfecting amendments to the first-degree amendment, which is the Warner-Byrd amendment No. 951.

Mr. WEICKER. I would again ask the Chair——

The PRESIDING OFFICER. The Chair asks the Senator to withhold for one moment.

The Helms first-degree amendment perfects the underlying resolution.

Mr. WEICKER. Senate Joint Resolution 194, is that correct?

The PRESIDING OFFICER. The second-degree amendment perfects the first-degree amendment.

Mr. WEICKER. Commonly called Byrd-Warner?

The PRESIDING OFFICER. The Helms first-degree amendment.

The Helms first-degree amendment is the amendment to the underlying Warner-Byrd, No. 951. The Helms second-degree is to the first-degree amendment.

Mr. WEICKER. Therefore, again inquiring of the Chair as a matter of parliamentary inquiry, neither of the amendments of the distinguished Senator from North Carolina are to Senate Joint Resolution 194?

The PRESIDING OFFICER. The Chair ask the Senator to suspend for a moment.

The first amendment of the Senator from North Carolina amends Senate Joint Resolution 194. The second amendment amends that first amendment.

Mr. WEICKER. I thank the Chair.

Mr. HELMS. Mr. President, I reserve the balance of my time.

The PRESIDING OFFICER. The Senator from North Carolina reserves the balance of his time. Who seeks recognition?

If there is no further debate, the question is on the amendment. The clerk will call the roll.

Mr. WEICKER addressed the Chair.

The PRESIDING OFFICER. The Senator from Connecticut.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

RECESS UNTIL 2 P.M.

The PRESIDING OFFICER. Under the previous order, the Senate will stand in recess until the hour of 2 p.m.

Thereupon, at 12:45 p.m., the Senate recessed until 2:01 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. DODD).

Mr. HELMS addressed the Chair.

The PRESIDING OFFICER. The Senator from North Carolina.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate stand in recess for 30 minutes and that the time be charged against the 30 hours.

I withdraw that request.

Mr. PRYOR. Mr. President, before the majority leader does make the request for a recess, I wonder if I might be allowed to speak out of order for not to exceed 5 minutes.

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

## NOMINATION OF JUDGE ROBERT BORK

Mr. PRYOR. Mr. President, I am attempting at this moment to notify the Senator from New Hampshire [Mr. HUMPHREY] that the remarks I will make will be associated with his name, and it is my understanding that Senator HUMPHREY has been notified.

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.

Mr. President, I ask unanimous consent to have printed in the RECORD, at this time four affidavits by the affiants as to the representations of this particular telephone message.

Mr. President, I yield the floor.

Mr. HUMPHREY. Mr. President, the Senator from New Hampshire rose to object.

The PRESIDING OFFICER. Is there objection?

Mr. HUMPHREY. Mr. President, reserving the right to object, I wonder if the Senator from Arkansas would permit the Senator to ask a few questions.

Mr. PRYOR. Mr. President, I have yielded the floor.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Arkansas?

Mr. HUMPHREY. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from New Hampshire.

Mr. HUMPHREY. Mr. President, what is the parliamentary situation? Is the Senator from New Hampshire free to speak for a few moments at this point?

The PRESIDING OFFICER. The Senator from Arkansas has yielded the floor. The Senator is operating under cloture. Debate is required to be germane except by unanimous consent.

Mr. HUMPHREY. Mr. President, I ask unanimous consent that I be permitted to respond to the remarks of the Senator from Arkansas in which case I will not object to his inserting material in the RECORD.

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

Mr. HUMPHREY. I so withdraw my objection, Mr. President.

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

[Wake County, North Carolina]

AFFIDAVIT OF JO ANNE ECHOLS

My name is Jo Anne Echols. I reside at 4220 Green Road, Raleigh, Wake County, North Carolina.

Late in the week of October 12, 1987 I received a telephone call and the speaker stated he was Senator Gordon Humphrey. The call seemed to be a recording and the message stated that President Reagan needed help to have Judge Bork confirmed and that I should stay on the phone to hear a message from the President.

The recording asked me to call Senator Sanford and to urge him to vote for Judge Bork.

At the end of the telephone message I was asked to consider making a contribution to the battle for Judge Bork.

Further affiant sayeth not.

JO ANNE ECHOLS

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[Wake County, North Carolina]

AFFIDAVIT OF LUE S. TERRELL

My name is Lue S. Terrell. I reside at 4030 Edwards Mills Road, Raleigh, Wake County, North Carolina.

On October 18, 1987 at 7:15 p.m. I received a telephone call. The speaker stated he was Senator Gordon Humphrey. The call was prerecorded. Mr. Humphrey said that the effort for Judge Bork was continuing and that was the reason for the telephone call. He then stated that I should hold on to hear a plea by President Ronald Reagan for the nomination of Judge Bork. At that point, I hung up the telephone.

Further affiant sayeth not.

LUE S. TERRELL

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[Wake County, North Carolina]

AFFIDAVIT OF PAUL NICKELL

My name is Paul Nickell. I reside at 4574 Springmoor Circle, Raleigh, Wake County, North Carolina.

Late in the week of October 12, 1987 I received a telephone call. The speaker stated he was Senator Gordon Humphrey. The call seemed to be prerecorded. Mr. Humphrey said that the effort for Judge Bork was continuing and that was the reason for the telephone call. He then stated that I should hold on to hear a recorded message from President Ronald Reagan. At that point, I hung up the telephone.

Further affiant sayeth not.

PAUL NICKELL.

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[Wake County, North Carolina]

AFFIDAIVT OF ALEXANDER MIHAJLOV

My name is Alexander Mihajlov. I reside at 3600 Corbin Street, Raleigh, Wake County, North Carolina.

Late in the week of October 12, 1987 I received a telephone call and the speaker stated he was Senator Gordon Humphrey. The call seemed to be a recording and the message stated that President Reagan needed help to have Judge Bork confirmed and that I should stay on the phone to hear a message from the President. The recording asked me to call Senator Sanford and to urge him to vote for Judge Bork.

At the end of the telephone message I was asked to consider making a contribution to the battle for Judge Bork.

Further affiant sayeth not.

ALEXANDER MIHAJLOV.

Mr. HUMPHREY. I thank the Chair.

Mr. President, I certainly bear no personal animosity toward the Senator from Arkansas. I have always gotten along very well with him. I expect I always will, given his good nature and good faith, and indeed I thank him for notifying me ahead of time that he intended to complain on the floor about this phone effort.

I simply want to say this about it. The Senator has read for the RECORD the script of that phone effort. It is a straightforward effort to encourage citizens to phone their Senators and to encourage their Senators to support the Bork nomination. There is no criticism whatever in this script of any Senators and as I understand it this effort was undertaken in some 18 States that involves I guess that many Senators.

There is no criticism either indirectly or directly by name or by implication of any Senator. It is a straightforward factual statement urging citizens to support the President's nomination and to call the Senators at whatever number is stipulated.

There is at the end, as the Senator from Arkansas read, a very low-key pitch for a contribution. It says, "And, if at all possible, please consider making a contribution * * *." "If you would like to make a contribution, please tell me your name * * *."

You can be sure that about 95 percent of the respondents hung up at that point, and this is certainly in no way primarily or secondarily a fundraising effort. This phone campaign was undertaken for 5 days as I understand, and Senators know full well that any fundraising effort is something that requires several weeks.

This was and is, or I should say was, because it is now complete as far as I know, a straightforward factual effort to encourage its citizens to phone their Senators and express their support of Judge Bork if indeed they supported Judge Bork. It is not criticism of any Senator.

I think it is wholesome frankly to encourage citizens to contact their Senators, particularly wholesome where there is no untoward tactics involved.

And just to substantiate the record further, I ask unanimous consent that

a copy of the script be printed in the RECORD.

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

NCPAC BORK SCRIPT

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.

Mr. SANFORD. Mr. President, will the Senator yield for a question?

Mr. HUMPHREY. I do not have the floor, but I am happy to respond to a question.

Mr. SANFORD. it seems to me that the effort here has maybe been straightforward, but it was a straightforward politicization. It seems to me that the complaint is that people were calling Senators and giving them all kinds of information, imposing on other Senators and our colleagues by having them receive phone calls tying up their phones. If that is not politicizing the system what is?

Mr. HUMPHREY. Mr. President, I simply disagree in my judgment with that of the Senator from North Carolina.

To call Senators and urge them if they support their Senators hardly constitutes any unfair tactics, any untoward tactics.

Mr. SANFORD. But it is a political effort. It is politicizing the system.

Mr. HUMPHREY. I suppose in the absolute terms, it is a political tactic. If Senators pay attention to their constituents, which they do, I suppose that is a political fact of life, but I see nothing wrong with a straightforward, nonsensational appeal to voters to contact their Senators if they support the nomination.

Mr. SANFORD. In effect the Senator sees nothing wrong with politicizing the process?

Mr. HUMPHREY. No. The Senator knows I did not say that. If the Senator is trying to draw a parallel between this very mild-mannered, respectful, reasonable approach to stimulating public debate and the distortion of Judge Bork's record which is the true politicization in this Bork controversy, then the Senator is way off base, in my judgment, and I say that with all due respect and friendship to the Senator. He is simply off base.

Mr. SANFORD. I greatly respect my colleague from New Hampshire, but it seems to me that is perhaps at least a questionable thing of putting the burden on our colleagues' offices to tie up their phones and have people calling in. I am not so sure that is a process we ought to pursue in this Senate.

Mr. HUMPHREY. I would be greatly encouraged if the result of this effort tied up Senators' phone. I rather doubt it did. If that were the case, I would be delighted.

Mr. SANFORD. Just for the record, then, 9 out of 10 calls, that is 90 percent in protest being subjected to this kind of a telephone call, so all in all it would probably be good, but I do not think that I would tie up the Senator's phone.

Mr. HUMPHREY. The Senator is welcome to do so.

Mr. SANFORD. I do not think it is a good system for this Senate to practice reaching colleagues in this indirect way. I just point that out to my colleague. I thank the Senator.

Mr. HEFLIN. I wonder if the Senator would yield for a question or two?

Mr. HUMPHREY. I am happy to yield to the Senator from Alabama. In fact I do not have the floor. I did not ask for recognition.

The PRESIDING OFFICER. The Senator has the floor.

Mr. HUMPHREY. If the Chair insists, I am happy to have the floor.

Mr. HEFLIN. Will the Senator yield?

Mr. HUMPHREY. With pleasure.

Mr. HEFLIN. It has been brought to my attention now for several days and it was first brought to our attention in Huntsville, AL, by a lady who was a news reporter for a radio station. This lady and other people who we talked to say that there is a different version of the telephone message, the electronic telephone messsage that Senator PRYOR and I assume Senator HUMPHREY also submitted for the RECORD, that the original one had my voice on it and it was saying that: "This is Senator HEFLIN" and that Senator HEFLIN is reconsidering his vote.

Now, I cannot establish this as being true because I did not hear it and no one of my staff has been able to get a transcript. I could understand that perhaps some people might misunderstand the name HUMPHREY and HEFLIN since both started with an "H." I doubt if they would misunderstand our accent.

But anyway that has been reported, and I would like to know, since the Senator I believe is on this electronic telephone message stating that the Senator is the honorary chairman of the National Conservative Political Action Committee——

Mr. HUMPHREY. That is correct.

Mr. HEFLIN. Whether or not there is a different version and whether or not my voice was placed on there. I certainly did not give any permission to use my voice. I would like to know whether or not my voice was used in regards to this electronic telephone message that went out.

Mr. HUMPHREY. I would regard that unauthorized use of the Senator's voice would be highly unethical. I certainly would not associate myself with such an effort nor am I aware any such effort was undertaken.

Indeed, I am confident it was not. As the Senator knows, people often get confused.

If you ask people what the content was of the phone call 10 minutes or so after they received it, some will make mistakes about who said what. Perhaps that explains it. I do not know what explains it, but I can assure the Senator that is not part of any effort in which I associated myself.

Indeed, I honestly do not think it took place.

Mr. HEFLIN. 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?

Mr. HUMPHREY. 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.

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, which, if I may say, have been far more prevalent and far more lavishly financed and far more irresponsible in their distortions than anything coming from the pro-Bork side.

But, in any event, to answer the Senator's question, I have no knowledge of those ads and no involvement with them.

Mr. HEFLIN. Well, this "We, the people" ad is similar to the ad that was run in the USA Today several days ago. But you or your organization

has no connection with that organization?

Mr. HUMPHREY. Senator, I am honorary chairman of the National Conservative Political Action Committee. The Senator is politically savvy enough to know that means almost nothing. It means I have lent my name—that is to say, I have no direct role in the operation of this organization—I have lent my name on the condition that all operations be cleared with me ahead of time. I have done so only recently and only upon the recent change in management in that organization. I have full confidence in the new management, new manager, new director, I should say, Maiselle Shortley.

That is why, when she asked me for this kind of support, I was glad to give it.

Let me make this final point, at least in regard to this question. I really feel that this is an honorable undertaking. It is straightforward. It in no way criticizes the Senator from Alabama, the Senator from Arkansas, or the Senator from North Carolina. It mentions their names only in connection with their being Senators from that State. It is there for those who feel so disposed to call their Senators and register——

Mr. HEFLIN. You are speaking of the telephone ad, not the newspaper ads?

Mr. HUMPHREY. I have no connection with the newspaper ads.

Mr. HEFLIN. I thank the Senator for straightening that out for me.

Mr. HUMPHREY. Mr. President, the Senator from Arkansas is seeking recognition, so I will yield the floor. But I am perfectly willing to answer any further questions.

Mr. PRYOR. Mr. President, I appreciate the Senator from New Hampshire yielding the floor at this time.

First, Mr. President, the distinguished Senator and my good friend from New Hampshire has sort of raised the issue that the Senator from Arkansas complained. And I think the word was "complained."

Mr. President, I have not complained. I have simply brought to light a telephone communication done by computer by one of our colleagues, including the President of the United States, and included in that telephone communication a suggestion that the recipient of the telephone call send in a contribution or turn in their phone number so that they could be contacted by a representative of the National Conservative Political Action Committee.

Mr. President, this in itself might not be bad. It may not be wrong. I am not chastising the Senator. I am not condemning the Senator. I am simply bringing up the fact of an issue that surfaced last week, the latter part of the week, an allegation that several thousand of these communications were going forward throughout the country in selected States and in selected areas of our Nation.

But I do think, Mr. President, that the Senator from New Hampshire has himself raised a critical question when he stated this is no more than to "stimulate debate." Now, Mr. President, I think it is up to the American people, I think it is up to our colleagues, I think it is up to the press, I think it is up to all of us whether this is merely an attempt to stimulate debate or, the more critical question, to stimulate money—money for an organization that desperately needs financial resources at this particular moment.

If the latter is the case, then I could only say that I think the judgment of the American people will certainly be heard on tactics such as this. I certainly believe, I say, Mr. President, to my friend from New Hampshire, that, in my opinion, this is not becoming of our political system, especially when it relates to a lifetime appointment on the U.S. Supreme Court.

One final thing, Mr. President, and I should not say this—and that is when I usually get in trouble is when I know I should not—I believe that Judge Robert Bork is a good man. I do not think he is an evil man. If his name ever comes before this Senate—and I hope it is sooner rather than later, because of what is happening on the stock market, because of what is happening in the Persian Gulf—I think that we have to get on with this nomination and get it behind us as soon as possible. I hope that we can vote this week. I know that our leader has attempted to work with the leadership on the other side.

But, Mr. President, I will go to my grave feeling that Judge Robert Bork has been used, that he is a pawn, and that some day we may know the truth about the Bork nomination. I hate to say that, because I respect Judge Bork. I hate to see any person dragged around as this administration has dragged this man through the mill if it all comes down to one thing—being able to polarize this country and polarize this Senate and ultimately to be used as a fundraiser somewhere in the middle.

I sympathize with that man. I hope that is not the case. I hope that my perception of what is going on is wrong.

Mr. President, I yield the floor.

Mr. HUMPHREY addressed the Chair.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. HUMPHREY. Mr. President, I am not going to continue this debate. It is really fruitless. I still bear no animosity toward the Senator from Arkansas. Nobody in this body does. I doubt that he has an enemy in the world, such a kind man.

But I truly believe he is mistaken in this case in his suggestion that this is really, the bottom line, a fundraising effort. It is not.

The Senator knows, with a 5-day effort, with a low-key, softball pitch at the very end, which is pro forma in this day of expensive communications, that this is not going to be, that this is not, in fact, a fundraising effort. It is what it appears to be. If you read the transcript, 95 percent of the verbage applies to encouraging people to call their Senators. No criticism of Senators. No characterization of any kind, just urging people, if they are disposed, to call their Senators and support this nomination.

As to who is dragging whom around, who is dragging Judge Bork around, I think the Senator's statement is really—well, it is silly. I mean, the American people at this point know which side has dragged Judge Bork through the mud. There may be different opinions between the Senator and me on that point, but I think the American people can really appreciate it.

After all, which side was it that got Gregory Peck, which side was it that got Hollywood that was involved in a TV shot that was aired extensively across the country? Do you think that did not cost anything, Senator? Do you think they did not have to ask somebody to pay for the production and airing of that ad? Of course they did, in the same fashion making these calls cost money. We do not have any special deal at NCPAC with AT&T or any of those AT&T clones. It costs money. You have to ask. Nowadays it is pro forma when you make a contract. You cannot afford not to ask people to help you pay for the cost of that contract.

So it is what it appears to be. If you analyze this, it is a straightforward, reasonable effort, respectful effort, to get people to call their Senators in support of Judge Bork.

I am glad I did it. Frankly, if the Republican Party were doing anything, if the Republican Party had gotten off its big, fat capitalistic fanny to help this nomination, then we would not have to rely upon NCPAC or any other organization.

So I make no apologies, either to the Democrats or the Republicans, or to anyone. I am glad I did it and I am glad that phones rang.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. PRYOR. If I may have only a moment or two to respond? My good friend from New Hampshire says that this is a softball situation. If you are sitting in Magnolia, AR, some night and you are watching the World Series game and the telephone rings and you

pick up the phone and on the other end of the line there is a U.S. Senator from New Hampshire and then he introduces the President of the United States and then a fundraiser from NCPAC comes on and says please give us your name so we can call on you because Judge Bork has been intentionally misrepresented and character assassination has taken place—if that is softball, I would like to see what hardball is. That is a pretty strong message down in our part of the country, Mr. President.

Furthermore, I think it certainly, in my opinion, is beginning to go against the grain. Whether you are for Bork or against Bork, I think it is going against the grain of the American people as to the polarization of this country at this time. I just hope, Mr. President, that by calling attention to things like this we can minimize the record and get on with the vote, for goodness sake, so that we can have another nominee coming before this body as soon as possible.

I yield the floor.

Mr. HUMPHREY. Mr. President, my last word, I promise. The announcer does not come on and say please send us money. The announcer comes on and says please contact your Senator, his name is, his phone number is, et cetera. Then at the very end after the announcer has urged people to contact their Senators—and what is wrong with that? Are Senators afraid to hear from their constituents on this issue? I hope not. Are Senators afraid of groups stimulating citizens to contact their elected representatives? I hope not. After he says all of that, then at the very end he says: And if—I have already turned in the copy of the statement, I do not have it to read any longer. But he says: And if you think you would like to make a contribution, please stay on the line and provide your name.

As I said, you can be sure 95 percent of the people do not respond to fundraising appeals. You can be sure 95 percent of the people hung up at that time. I really think the Senator from Arkansas is overreacting to this but he is entitled to his judgment. Ordinarily I trust that judgment.

Mr. SANFORD. Mr. President, may I add one interpretation to what the distinguished Senator from New Hampshire has pointed out? I do not know about Gregory Peck and all of those people, but those were citizens outside of government doing what citizens outside of government have every right to do. Here we are talking about a colleague and the use of the President's name and there is a big distinction there. I leave that just as an added interpretation.

Thank you. I yield the floor.

## REQUIRING COMPLIANCE WITH PROVISIONS OF THE WAR POWERS RESOLUTION

The PRESIDING OFFICER. The majority leader.

Mr. BYRD. Mr. President, I have no objection to proceeding to a vote on the Helms amendment.

I ask for the yeas and nays on the amendment.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. WEICKER. Mr. President, I am going to support the amendment of the distinguished Senator from North Carolina. I think it gives an opportunity to explain exactly what is at issue here in terms of both war powers and in terms of the attitudes of Senators and with respect to our policy in the gulf.

If I could have a copy of the amendment, I would appreciate it.

Thank you very much. The amendment says:

"; provided, further, that nothing in this Resolution shall be interpreted or construed in any manner which is inconsistent with the proposition that the United States, as a maritime power, has a preeminent interest in the freedom of the seas and in taking such actions as are necessary to maintain such freedom".

Nobody can argue with that. None of us that have been trying to invoke the War Powers Act would disagree with this.

Likewise, the amendment which has also been submitted by the distinguished Senator from North Carolina:

"SEC. . Nothing in this Resolution shall prohibit the United States Navy from sinking any Iranian vessel, destroying any Iranian missile battery, or neutralizing any Iranian installation which threatens the safe passage of any American warship or of any other vessel known to have on board any citizen of the United States of America."

Speaking for this Senator, I cannot disagree with that.

So, let us understand carefully the distinction between the invocation of the War Powers Act—whether it be by virtue of the Weicker-Hatfield amendment or by the spirit of the War Powers Act as contained in the Byrd-Warner—Warner-Byrd amendments; the difference between those amendments and the matter of our policy in the gulf.

Unfortunately, because of the rhetoric which has been directed against invocation of the War Powers Act, there are those Members on this floor that have been painted in the posture of being soft on Iran because they support the War Powers Act. One has nothing to do with the other.

I have not heard a Senator on this floor that is asking for the withdrawal of U.S. forces in the gulf. I have heard Senators, whether by virtue of the Weicker-Hatfield resolution or the Warner-Byrd amendments ask for information upon which they can base their decisions as they relate to our policies in the gulf.

This is the only comment I want to make and I make these remarks in support of both these amendments. I will vote for both these amendments.

But it has made it very difficult, because of the rhetoric directed against Senators, principally out of the White House, to support the War Powers Act for fear of being painted as being for Iran and against our Armed Forces.

That is preposterous and I am glad these amendments are offered. As a matter of fact, if you will recall early on, what I asked for was a vote on the War Powers Act followed by a vote on our policy in the gulf. I said I thought probably under those circumstances the Senate would vote for the War Powers Act and would vote to support the President. I said that early on. I still make that offer, that we have both those votes on a pure war powers invocation and on statements similar to those proffered to the Senate by the distinguished Senator from North Carolina.

Remember, first things first. Without information, without fact, this body cannot make proper decisions. All the War Powers Act ever did was to require the President to notify the Senate within 48 hours of hostilities of exactly what transpired. I would imagine also he should report on the background thereto. At which time, certain events are triggered which could eventually have this body refuse to support a particular policy or, just as assuredly, have this body support those activities.

I have to point out to my colleagues that we went through a similiar exercise here on the floor. I state it again because it is important to understand that if you are not going to learn from history, you are condemned to repeat it.

I remember the debate that took place on this floor relative to the introduction of the United States Marines into Lebanon and more particularly, a Congress that was supporting the President when it voted to keep our marines in Lebanon for an additional 18 months. Some of us voted against that resolution and we did so not out of disrespect for our Armed Forces or disrespect for the President. But because we thought there was a rather bad tactical situation present there as to having those men on the tarmac in Beirut, that it was an indefensible—from the military point of view—position.

And then after the tragedy that took 241 young lives, all of a sudden we heard from many other sources: "Well, we advised the White House that this should not have been done." I heard from one military expert that this was indefensible.

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# SENATE—*Thursday, October 22, 1987*

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

The Senate met at 8:30 a.m., on the expiration of the recess, and was called to order by the Honorable BOB GRAHAM, a Senator from the State of Florida.

## PRAYER

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

Let us pray.

*Behold, the nations are as a drop of a bucket, and are counted as the small dust of the balance; behold, He taketh up the isles as a very little thing * * *. All nations before Him are as nothing; and they are counted to Him less than nothing, and vanity. To whom then will ye liken God? or what likeness will ye compare unto Him? * * * Hast thou not known? hast thou not heard, that the everlasting God, the Lord, the Creator of the ends of the Earth, fainteth not, neither is weary? there is no searching of his understanding. He giveth power to the faint; and to them that have no might He increaseth strength.*—Isaiah 40:15, 17-18, 28-29.

Eternal God, perfect in wisdom and power, thank You for the word of the prophet Isaiah, reminding us of Your supreme sovereignty over history and the nations. We thank You that You are the Lord of the infinite and the infinitesimal—the macrocosm and the microcosm. You rule the universe and You know when a sparrow falls to the ground. Gracious Lord, in these critical, sometimes confusing, and dangerous days, help us to remember Isaiah's word, to believe it, to trust You, and rest in Your infinite adequacy. In Your transcendent name, we pray. Amen.

## APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. STENNIS].

The assistant legislative clerk read the following letter.

U.S. SENATE,
PRESIDENT PRO TEMPORE,
*Washington, DC, October 22, 1987.*

*To the Senate:*

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable BOB GRAHAM, a Senator from the State of Florida, to perform the duties of the Chair.

JOHN C. STENNIS,
*President pro tempore.*

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

## RECOGNITION OF THE ACTING MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The acting Democratic leader, the Senator from Wisconsin, is recognized.

## ROBERT BORK AND THE INVISIBLE LYNCH MOB

Mr. PROXMIRE. Mr. President, this Senator is one of those who has waited until all the facts are before us to determine how to vote on the Bork nomination to the Supreme Court. And I'm still waiting. I still haven't made up my mind. But I would like to spend a few minutes today protesting what has become a grossly unfair denunciation of the process the Senate has followed in fulfilling its constitutional responsibility to advise and consent to this Presidential nomination. Mr. President, in the more than 30 years I have served in this body, I have been generally impressed with the diligent, conscientious work of Senators and their staffs on legislation. Not on confirmation, Mr. President, definitely not on confirmations but on legislation. When it comes to legislative fights this body heats up. When it comes to confirmation of Supreme Court Justices or others, we go to sleep, while nodding a sheep-like assent. On legislative matters Senators spend many long hours in committee, in conference with the other body, in informal conferences and in debate on the floor. Often the process is tedious. Sometimes it is repetitive, even agonizingly repetitive. But it has generally been thorough.

But there has been one area where the Senate, in the judgment of this Senator, has failed and seriously failed in fulfilling its constitutional responsibilities. And that is in discharging its responsibilities under the advise and consent requirement for confirming Presidential nominations. Somehow the diligence and vigor that characterizes Senate work on legislation curls up and dies when we act on a nomination. Too many of us pay little attention to Presidential nominees unless they come before a committee on which one of us personally serves. Then if there is any question that the committee will not rubberstamp a nominee, the administration sends the nominee to call on each member of the committee. To get an added edge the administration will send a respected member of the administration along with the nominee. Those private conversations between Presidential nominees and individual Senators frequently have a magical effect. Almost all Senators like people, almost all of us want people to like us. When a person drops into our office seeking our support to a position to which the President of the United States has appointed her or him, it is very easy to say: "I like you." "I'm going to vote for you." "What can I do to help you?" This is why the overwhelming majority of Presidential nominees are approved and usually without opposition.

This is why the Senate so rarely fulfills its constitutional responsibility. This body is much too soft, too easy, too permissive in approving any nominee a President sends us. We should say "No!" to our Presidents far more often than we do. If we did, we would have a much better Federal Government than we do.

This is what troubles me most about the Bork nomination. Like other Senators I have listened and studied the record. Unlike most Senators I am undecided. I will stay undecided until the debate has resolved my doubts. But as one of a handful of undecided Senators I cannot for the life of me understand the cries of outrage about the way those for and against Robert Bork have carried on. The other day I received a note from a gentle lady who accused me of being "led around on a leash by the loony-left." Along with her letter, she sent me a dog's leash. So the masters of the political action left could keep me heeling like a good, little doggie. This lady had a marvelous sense of humor. She identified herself as the Chair of NICPAC. Now what's wrong with this kind of pressure? In my view, absolutely nothing. That lady felt deeply in favor of Mr. Bork. Well, good for her. The leash was a nice touch, not subtle, not tender, but cute, as well as nice. Mr. President, that letter constitutes the full extent of arm twisting and pressure from either side on this Senator in this entire Bork confirmation. I have received to date about 50,000 letters and phone calls from Bork opponents and supporters. But with the exception of the lady with the leash, all of them, on both sides, have been

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

thoughtful, temperate, and surprisingly gentle.

Oh, yes, I have heard a few radio ads in opposition to Mr. Bork. They have two characteristics. First, they have concerned themselves strictly with issues relevant to Mr. Bork's likely course as a Supreme Court Justice. They have not mentioned a word critical of Robert Bork's high intelligence, character, or the remarkable quality of his experience. Second, they have had about the same impact on this Senator as a butterfly's hiccough. That is absolutely none. So think of that Mr. President, a great storm was kicked up by those ads. The ads had to be directed primarily at the 10 or 15 of us in the Senate who are undecided. They very likely had no effect.

So where's the lynch mob? Where's the distortion? Where are the lies? After studying the Judiciary Committee report, plowing through a large part of the way through the hearing record, reading press reports, and listening to statements on the floor, the only remnant of even mild hostility in this whole Bork matter I have discovered is the letter from the lady with the leash.

Mr. President, there is no way this Bork matter is a political donnybrook. This isn't mud wrestling. It's not even a ping-pong match. It's a very gentlemanly game of croquet. Not a voice has been raised. Frankly, this Senator is disappointed. I'd like to see at least a little shouting and table pounding. After all a seat on the U.S. Supreme Court should wake us up and stir our emotion.

Some Senators have disputed this observation. They complain that the Senate's traditional civility is breaking down, right here on the floor of the Senate. These Senators simply haven't been here long enough. As one of the Senators who has served in this body for more than 30 years, I strongly disagree. This generation of Senators I'm proud to state, are rhetorical pussycats. As a matter of fact, the Senate has not even momentarily reached the vigor of discussion that characterizes the typical performances of the McLaughlin group on television or of the Agronsky show. We don't belittle or demean or insult each other. So occasionally—too occasionally for this Senator's taste, Members have had some strong words pro or con about Mr. Bork's controversial opinions. Robert Bork expressed his opinions with eloquent emphasis. Why should anyone take umbrage at support or criticism of the nominee's ideas no matter how vigorously that support or criticism is stated?

Mr. President, I ask unanimous consent that the text of the letter to which I have referred from the lady with the leash be printed at this point in the RECORD.

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

NATIONAL CONSERVATIVE,
POLITICAL ACTION COMMITTEE,
*Alexandria, VA, October 8, 1987.*

Hon. WILLIAM PROXMIRE,
*Dirksen Senate Office Building, Washington, DC.*

DEAR SENATOR PROXMIRE: It is clear to the American public that the vocal special interests of the loony left have you and a number of your Senate colleagues on short tethers.

Recognizing that you are now trained to heel—or roll over and play dead—on command by liberal special interest groups such as People for the American Way, the Feminist Men's Alliance, NOW, and the informal associations of abortionists, labor bosses, and the radical left (as exemplified by "Hanoi Jane" Fonda), NCPAC hereby presents you with a Robert Bork Commemorative Leash, to help you keep your "chain" of command intact.

Yours very truly,
MAISELLE DOLAN SHORTLEY,
*Chairman.*

## RESERVATION OF LEADER TIME

Mr. PROXMIRE. Mr. President, I ask unanimous consent that the time of the majority and minority leaders be reserved for their use later today.

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

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

The ACTING PRESIDENT pro tempore. The Senator will withhold.

Mr. PROXMIRE. I withhold.

## MORNING BUSINESS

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

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

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

## THE DEATH OF PHIL McGANCE

Mr. BYRD. Mr. President, I was saddened to learn this morning of the death of former Senator Jennings Randolph's longtime administrative assistant, Mr. Philip V. McGance.

A native of Weston, WV, and a graduate of the U.S. Military Academy at West Point, Mr. McGance began working with Senator Randolph in 1964. From that time onward, Phil McGance assisted Senator Randolph with an efficiency and loyalty that were legendary on Capitol Hill and around Washington.

Subsequent to Senator Randolph's retirement from the Senate, Mr. McGance joined Senator Randolph in his private consulting firm downtown. There, he continued to superintend Senator Randolph's always active career with the same vigor and dedication that marked his work in Senator Randolph's office in the Senate.

I had many opportunities to work with Phil McGance over the years, especially on matters touching on West Virginia. I particularly appreciated his helpfulness and his commitment to finishing well whatever he began. Whoever worked with Phil McGance found him always cordial, thoughtful, and reasonable.

I know that our colleagues extend their condolences to Senator Randolph on the loss of such a valuable and selfless friend and coworker, and that other Senators who knew Phil McGance will join me in offering our sincere regrets to his family on the death of this talented man.

## PROGRAM TRADING AND THE STOCK MARKET CRASH

Mr. LEAHY. Mr. Speaker, Monday's spectacular downturn of the stock market which rippled across the globe has caused pundits in the press, the financial community and in Congress to start pointing their fingers to find someone to blame. This morning's prime suspect is the practice of "program" or index-arbitrage trading.

There are serious questions about the effect index-arbitrage strategies have on already volatile stock markets that deserve serious answers. But to put the blame for Monday's crash on program trading is ludicrous.

Those who would fix that blame solely on Wall Street computers are like ostriches whose heads have been in the sand too long. They must have missed all that has gone on around them—the economic realities of our time and the amazing series of events that led up to black Monday.

On Tuesday, October 6, the Dow Jones took a record 95 point nosedive amid rumors that major banks planned to raise their prime lending rates. The banks followed suit the next day. Just 1 week later, Chemical Bank announced that it would raise its prime rate even higher, nudging 10 percent. The market reacted the next day by taking an even greater record plunge of more than 108 points.

Time after time banks have raised their interest rates when they lose confidence in the Government's ability to reduce the Federal deficit. And, that is what happened again. It was not just the computers that sent the

# SENATE—*Friday, October 23, 1987*

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

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

## PRAYER

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

Let us pray.

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

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

## APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. STENNIS].

The assistant legislative clerk read the following letter:

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

*To the Senate:*

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

JOHN C. STENNIS,
*President pro tempore.*

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

## RECOGNITION OF THE MAJORITY LEADER

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

## THE PRESIDENT DISPLAYED THE RIGHT ATTITUDE

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

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

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

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

Mr. President, I yield the floor.

## MORNING BUSINESS

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

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

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

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

The ACTING PRESIDENT pro tempore. The Senator from Wisconsin.

## CONGRATULATIONS TO THE MAJORITY LEADER

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

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

## A NO VOTE ON THE BORK CONFIRMATION

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

I will not vote to confirm a nominee for Associate Justice of the Supreme Court who has called the 1964 Civil Rights Act, "an act of unsurpassed ugliness." This Senator has served in this body for more than 30 years. In that period the most single contribution to the advancement of justice in this country was the 1964 Civil Rights Act. This Senator would call that enactment an act of unsurpassed beauty. This Senator is proud to recall that I voted for that act. And of the more than 12,000 votes I have cast in this body, in none do I take greater pride or satisfaction. How can anyone who believes in fair and equal treatment under the law make such a demeaning judgment of a Civil Rights Act that for the first time in American history gave black Americans the same rights enjoyed by the rest of us to enter theaters, restaurants, places of culture and enlightenment, to sit freely where they want to sit in vehicles of public transportation, and enjoy the other freedoms available to all other Americans? Mr. President, this country freed

black slaves in 1863 with the Emancipation Proclamation. But for the next 100 years the prejudice and discrimination against our black sisters and brothers constituted an international scandal, a national shame. In 1964, the Civil Rights Act of that year went a very long way toward ending that gross unfairness. I cannot vote for the confirmation of a man to serve on the Supreme Court, a court that is the Nation's final arbiter on the civil rights of all Americans when that man has taken the view Robert Bork has taken toward a law advancing justice in America, a law passed by the Congress and signed by the President of the United States.

Mr. President, the single most cherished affirmation in our great charter, the Constitution—is the first amendment. Most Americans cherish freedom even above the abundant economic opportunities in this blessed land. And, of course, a prime reason for our freedom is the absolute guarantee set forth and spelled out in the first amendment. Yesterday, I discussed with Chairman BIDEN and placed in the RECORD a long and detailed letter from Prof. Vincent Blasi of the Law School of Columbia University. That letter documented very thoroughly the contention that led to Professor Blasi's conclusion that:

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

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

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

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

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

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

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

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

The assistant legislative clerk proceeded to call the roll.

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

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

## SENATOR JOHN STENNIS ANNOUNCES HIS RETIREMENT

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

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

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

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

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

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

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

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

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