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[3] Documents identify current holdings as KS-19 but leave requested guns unidentified. May be substituted with 85mm guns, according to documents.

[4] This figure includes both SA-14 and SA 16 SAM's. Final inventory assumes receipt of half of requested amount of each SAM.

[5] Includes 43 T-54 tanks.

[6] Includes 84 towed (D 30) and 24 self-propelled 122mm howitzers.

[7] May be substituted with 85mm D48 anti-tank gun, according to documents.

[8] Includes 24 identified in documents as 100mm BS-3 antitank gun.

EXTENSION OF TIME FOR MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that morning business be extended 5 minutes.

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

Mr. THURMOND addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from South Carolina.

Mr. THURMOND. May I take 1 minute?

The ACTING PRESIDENT pro tempore. The Senator has 5 minutes.

CONTRA AID

Mr. THURMOND. Mr. President, we are getting ready to go to the nomination of Judge Kennedy to the Supreme Court, and I just had the opportunity of listening to my able and distinguished colleague, from South Carolina Senator HOLLINGS, on the question of aid to the Contras.

I take this opportunity to congratulate Senator HOLLINGS for the courageous position he has taken in this matter. I realize that so many in his party have taken a different view. It has taken vision, it has taken courage, and it has taken experience like he has had to understand this problem and to come to the right conclusion. I commend him for the position he has taken and the sound reasons he has given in arriving at that conclusion.

Mr. HOLLINGS. I thank my distinguished colleague.

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

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

The legislative clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

ORDER OF PROCEDURE

Mr. BYRD. Mr. President, the order provides for 1 hour of debate in executive session on the nomination of Judge Kennedy to fill the vacancy on the Supreme Court. Am I correct?

The ACTING PRESIDENT pro tempore. The Senator is correct. Under the previous order the hour of 9:30 was set that the Senate would go into executive session.

Mr. BYRD. Mr. President, I have a further parliamentary inquiry. Does the vote occur precisely at 10:30 under the order?

The ACTING PRESIDENT pro tempore. The Senator is correct. Under the previous order, the hour of 9:30 was set that the Senate would go into executive session.

Mr. BYRD. Mr. President, I have a further parliamentary inquiry. Does the vote occur precisely at 10:30 under the order?

The ACTING PRESIDENT pro tempore. Under the order there is exactly 1 hour of debate, so the vote would occur at 10:30.

Mr. BYRD. Mr. President, I would not want the yielding back of time, if such would occur, to cause the vote to come earlier than 10:30 today. Therefore, I ask unanimous consent that the vote on the nomination occur at 10:30 a.m., regardless of whether or not time is yielded back.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. BYRD. I make this request, Mr. President, because Senators have been told that the vote would begin at 10:30. I hope that we would not have the vote start earlier today in particular because it might cause some of those Senators to miss that vote.

Mr. THURMOND addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from South Carolina.

Mr. THURMOND. We are in hearty accord with the statement just made by the able majority leader.

Mr. BYRD. Mr. President, I thank the distinguished Senator.

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

EXECUTIVE SESSION

SUPREME COURT OF THE UNITED STATES

ANTHONY M. KENNEDY, OF CALIFORNIA, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The ACTING PRESIDENT pro tempore. Under the previous order, the hour of 9:30 a.m. having arrived, the Senate will now go into executive session to consider the nomination of Anthony M. Kennedy, to be an Associate Justice of the Supreme Court of the United States.

Time for debate on this nomination shall be limited to 1 hour to be equally divided and controlled by the Senator from Delaware, Mr. BIDEN, and the Senator from South Carolina, Mr. THURMOND.

The clerk will report the nomination.

The legislative clerk read the nomination of Anthony M. Kennedy, of California, to be an Associate Justice of the Supreme Court of the United States.

The Senate proceeded to consider the nomination.

Mr. KENNEDY addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Massachusetts.

Mr. KENNEDY. I ask unanimous consent that I be the designee of the time until the chairman of the Judiciary Committee arrives, the Senator from Delaware.

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

Mr. KENNEDY. I yield such time as I might use.

Mr. President, I will support the nomination of Judge Anthony Kennedy to the U.S. Supreme Court. During his confirmation hearings, and throughout his distinguished tenure on the court of appeals, Judge Kennedy has demonstrated integrity, intelligence, courage and craftsmanship—and a judicial philosophy that places him within the mainstream of constitutional interpretation.

Judge Kennedy believes that the Constitution is not a fossil frozen in the past, but a living document, shaped by experience in our Nation's 200-year history, and capable of responding to contemporary threats to fundamental rights and liberties. In his confirmation hearings, he agreed that the Constitution protects rights beyond those specifically enumerated in its text, including the fundamental right to privacy.

On occasion, he has been a brilliant pioneer, as in his landmark interpretation of the separation of powers doctrine in the Chadha case, which correctly anticipated the direction the Supreme Court would take on this controversial issue.

I was also impressed with Judge Kennedy's commitment to vigorous enforcement of the first amendment's guarantee of freedom of speech. That commitment has been reflected in opinions striking down prior restraints and protecting offensive speech in political debate; and it was evident in the confirmation hearings, when Judge Kennedy indicated his view that the first amendment protects all forms of expression.

Although I support Judge Kennedy's nomination, I am troubled by some of his decisions on the rights of minorities, women, and the handicapped. The Supreme Court rejected restrictive positions taken by Judge Kennedy in three civil rights cases. And his past membership in three discriminatory clubs raises questions about his sensitivity to the subtle forms that discrimination can take in contemporary America.

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In the confirmation hearings, I questioned Judge Kennedy about these matters. He made it clear that he now recognizes that the civil rights laws must be interpreted generously—not grudgingly—in order to achieve fundamental purpose of ending discrimination. And he indicated that over the years, he has tried to become more sensitive to the barriers of bias that block women and minorities in our society.

Every day he goes to work—once he becomes Justice Kennedy—he will pass under the four simple eloquent words inscribed in marble above the entrance to the Supreme Court: "Equal Justice Under Law." In a sense, those words define the rule of law in America; and I believe that Justice Kennedy will reflect on them and heed them in all his deliberations.

Obviously, no one can predict with certainty how Judge Kennedy will vote in specific cases as a member of the Supreme Court. That, or course, is as it should be. A justice should be openminded, without an ideological agenda.

Judge Kennedy was not President Reagan's first choice to fill this vacancy. But his nomination demonstrates the genius of our system of constitutional checks and balances. After two false starts, the President heeded the advice of the Senate, and nominated a distinguished judge with mainstream views.

Judge Kennedy is capable of becoming an outstanding Justice of the Supreme Court, and he deserves to be confirmed. I am pleased to support his nomination.

Mr. President, the Senator from Delaware, the chairman of the Judiciary Committee, Senator BIDEN, is ill today. Regrettably, he cannot be here either for the debate or the vote. He has asked me to include his complete statement in the RECORD, and I ask unanimous consent that it be printed in the RECORD after my comments.

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

● Mr. BIDEN. Mr. President, as I said when the Judiciary Committee met last Wednesday, I believe that the Senate should confirm Judge Anthony M. Kennedy to be Associate Justice of the Supreme Court. The process of filling the seat vacated by Justice Lewis Powell has been long and sometimes difficult, but I am confident that the Senate, the Supreme Court, and the Nation as a whole have emerged the stronger for it.

Judge Kennedy's record, as expressed through his more than 400 opinions on the Court of Appeals for the Ninth Circuit, his 20 speeches and his 2 days of testimony, is analyzed in the committee's report. I shall briefly summarize here my evaluation of that record and the reasons I support his nomination.

JUDGE KENNEDY'S JUDICIAL PHILOSOPHY AND APPROACH TO CONSTITUTIONAL INTERPRETATION

Judge Kennedy's judicial philosophy and approach to constitutional interpretation are balanced and are likely to contribute to our evolving understanding of the Constitution. The picture that emerges from Judge Kennedy's record is quite clear: In his words, he is searching for the "correct balance in constitutional interpretation." (Tr., 12/15/87, at 17.) He carefully avoids reliance on a narrow, fixed, or unitary theory of interpretation, testifying that he does not have "a complete cosmology of the Constitution." (Id.)

In Judge Kennedy's view, judges can use the benefit of 200 years of history and the accumulated wisdom of the great justices who have sat on the Court to resolve the difficult questions of constitutional interpretation. He testified:

* * * [T]he Court can use history in order to make the meaning of the Constitution more clear. As the Court has the advantage of a perspective of 200 years, the Constitution becomes clearer to it, not more murky. The Court is in a superior advantage to the position held by Mr. Chief Justice Marshall when he was beginning to stake out the meanings of the Constitution in the great decisions that he wrote.

And this doesn't mean the Constitution changes. It just means that we have a better perspective of it. * * * To say that new generations yield new insights and new perspectives, that doesn't mean the Constitution changes. It just means that our understanding of it changes.

* * * [T]he idea that the Framers made a covenant with the future is what our people respect, * * * and I am committed to that principle. (ID. at 199-200.)

Judge Kennedy seems to recognize, therefore, that, in the words of Chief Justice John Marshall, "the Constitution was intended to endure for ages to come, and consequently to be adopted to the various crises of human affairs." (See untitled speech, Sacramento chapter of the Rotary Club, February 1984, at 6.)

Judge Kennedy has a balanced and thoughtful approach to "original intent." In his words, "original intent is best conceived of as an objective rather than a methodology." (Untitled speech, Ninth Circuit Judicial Conference, August 21, 1987, at 5.) This means that for Judge Kennedy, original intent has a role in constitutional interpretation, but it "does not tell* * * [a judge] how to decide a case." (Tr., 12/14/87, at 223-24.) Accordingly, Judge Kennedy relies on a number of sources in resolving constitutional questions, including "the precedents of the law and the shared traditions and historic values of our people." (1984 Rotary Club speech, at 7.)

In my view, the nominee's opinions on the Ninth Circuit, as well as his testimony before the committee, demonstrate that he is a genuine advocate of judicial restraint. He decides cases based on the facts and the law before him, and he does not reach out for other issues. My review of his opinions indicates that his nominee has no clear ideology or agenda.

A fundamentally important area probed by the committee during the hearings was Judge Kennedy's views on stare decisis—the value of precedent. Judge Kennedy testified about his approach generally to the doctrine of stare decisis and about its role in our system of law. He also discussed the factors upon which he would rely in determining whether a case should be overruled. I have concluded from this testimony that Judge Kennedy has a deep respect for precedent. While he may from time to time seek further movement in the law, there is no evidence of a desire for abrupt departures from carefully developed doctrines or established lines of decisions.

JUDGE KENNEDY'S APPROACH TO LIBERTY AND FUNDAMENTAL RIGHTS

My review of Judge Kennedy's overall record indicates that his approach to liberty and fundamental rights is within the 200-year tradition of Supreme Court jurisprudence exemplified by such Justices as Harlan, Frankfurter, Cardozo, and Powell. Indeed, every one of the past or present Justices on the Supreme Court has refused to read "liberty" as if it were exhausted by the rights specifically enumerated in the Bill of Rights. That tradition establishes, in my view, that the due process clauses of the 5th and 14th amendments protect against governmental invasion of a person's liberty and privacy.

Illustrating Judge Kennedy's view is his statement to Senator HEFLIN that the Constitution provides a means of preventing government from denying individuals their fundamental rights. (Tr., 12/14/87, at 209-10.) Judge Kennedy's record also makes clear that he rejects the view that the people have no liberties except those specifically granted to them by their government. As he said in a recent speech, "[a]s the Framers progressed with their studies, [republican government] came to mean * * * government that emanates from the people, rather than being a concession to the people from some overarching sovereign." ("Federalism: The Theory and the Reality," Historical Society for the U.S. District Court for the Northern District of California, October 26, 1987, at 3.)

Judge Kennedy's testimony suggested that he embraces a view that I share about the creation of our Nation: that the essence of the purpose underlying the Constitution was

the preservation and advancement of individual liberty. In his words:

The Framers had an idea which is central to Western thought. * * * It is central to the idea of the rule of law. That is that there is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the government: Beyond this line you may not go. (TR., 12/14/87, at 93.)

Importantly, Judge Kennedy's understanding of the due process clause protects the values of privacy. He testified that "the concept of liberty in the due process clause is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage." (Tr., 12/15/87, at 42) He also specifically indicated that there is a marital right to privacy protected by the Constitution. (Id. at 42-43.) And Judge Kennedy added that "the value of privacy is a very important part of * * * [the] substantive component" of the due process clause. (Id. at 43-44.)

Judge Kennedy's reasoned and balanced approach to the ninth amendment—which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"— is consistent with his understanding of "liberty" in the due process clause. Judge Kennedy testified that the ninth amendment is a "reserve clause, to be held in the event that the phrase 'liberty' and the other specious phrases in the Constitution appear to be inadequate for the Court's decision." (Tr., 12/14/87, at 97.)

Finally, Judge Kennedy accepts a clear role for the courts in the fundamental rights area. In his words, "the enforcement power of the judiciary is to ensure that the word liberty in the Constitution is given its full and necessary meaning, consistent[] with the purposes of the document as we understand it." (Id. at 178.) He added that "[t]he Framers had * * * a very important idea when they used the word 'person' and when they used the word 'liberty.' And these words have content in the history of Western thought and in the history of our law and in the history of the Constitution, and I think judges can give that content." (Tr., 12/15/87, at 204.)

The committee did not ask for, of course, nor did it receive, any guarantees as to how a "Justice" Kennedy would resolve future cases involving liberty and privacy issues. Nevertheless, I was encouraged by Judge Kennedy's testimony and believe that it suggested that, if confirmed as the 106th Justice, he would be within the 200-year tradition of Supreme Court jurisprudence.

JUDGE KENNEDY'S CIVIL RIGHTS RECORD

While I will vote in favor of Judge Kennedy's nomination, I am concerned about some of his opinions on the rights of women and minorities. Those opinions, in my view, display an undue deference to established institutions and an insensitivity to systemic forms of discrimination.

Three opinions in particular raise concern for me. First, *Aranda* v. *J. B. Van Sickle*, 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980), in which Judge Kennedy filed an opinion concurring in the dismissal of the claims by members of the Hispanic community in the San Fernando Valley that their voting rights had been diluted. Second, *TOPIC* v. *Circle Realty*, 532 F.2d 1273 (9th Cir.), cert. denied, 429 U.S. 859 (1976), disapproved, *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), in which Judge Kennedy's majority opinion held that only direct victims of housing discrimination had standing to sue. Third, *Gerdom* v. *Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1979) (en banc), cert. dismissed, 460 U.S. 1074 (1983), in which Judge Kennedy joined a dissent that accepted customer preferences for "attractive" flight attendants as a basis for the airlines' imposition of weight requirements on women but not on men.

Each of these caused me concern because they show a reluctance on Judge Kennedy's part to deal positively with systemic discrimination. In light of this record, I looked carefully at Judge Kennedy's testimony to determine what his views are today on important civil rights issues.

In the end, Judge Kennedy's testimony led me to conclude that he fosters no hostility or antipathy toward the civil rights of all Americans. His testimony also showed that over the years he has come to have a greater sensitivity to all forms of discrimination.

He said, for example, that "indifference to the civil rights of Hispanics, women, and other minorities is unacceptable." (Answer to written question No. 4 from Senator BIDEN.) Judge Kennedy added that civil rights statutes "should not be interpreted in a grudging, timorous, or unrealistic way to defeat congressional intent or to delay remedies necessary to afford full protection of the law to persons deprived of their rights." (Answer to written question No. 8 from Senator SIMON.) And with respect to gender discussion claims under the 14th amendment, he seemed to embrace the Supreme Court's decisions establishing that such claims require some form of rigorous review. Judge Kennedy said, in fact, that it is necessary to "ascertain whether or not the heightened scrutiny standard is sufficient to protect the rights of women, or whether or not the strict [scrutiny] standard should be adopted." (Tr., 12/14/87, at 169.)

I agree, therefore, with long-time civil rights activist Nathaniel Colley, who said that Judge Kennedy "is a grown man, but he is a growing man." (Tr., 12/16/87, at 322.) He is growing, in my view, in sensitivity to the plight and the rights of minorities and other groups facing discrimination in our society.

I reached a similar conclusion with respect to Judge Kennedy's former membership in private clubs with restrictive membership policies. While I would have preferred that Judge Kennedy's reflections with respect to private clubs had evolved more rapidly and with an appreciation that restrictive membership policies are discriminatory, his actions and testimony demonstrate an increased understanding of the issue and its societal importance.

JUDGE KENNEDY'S RECORD IN OTHER SIGNIFICANT AREAS OF THE LAW

Judge Kennedy's record in other significant areas of the law is balanced and devoid of any ideological bias or agenda.

In the criminal law area, for example, his record is moderate and well-balanced. He takes a practical, commonsense approach to criminal cases, and he respects the rights of both victims and defendants.

His opinions and testimony also show that he respects established first amendment values. Judge Kennedy testified that the first amendment "applies * * * to all ways in which we express ourselves as persons. It applies to dance and to art and to music, and these features of our freedom are to many people as important or more important than political discussions. * * * The first amendment covers all of these forms." (Tr., 12/14/87, at 152.) Judge Kennedy also said that he knows "of no substantial, responsible argument which would require the overruling" of the clear and present danger test as formulated by the Supreme Court in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

In the area of separation of powers, Judge Kennedy generally takes a cautious and measured approach. Importantly, he accepts a clear role for the courts in resolving disputes between the branches in appropriate circumstances. He testified, for example, that "it is quite appropriate for the Court to act as an umpire between the political branches of the government." (Tr., 12/15/87, at 197.)

THE QUESTION OF COMMITMENTS

I questioned Judge Kennedy extensively about whether he made any commitments to the administration or to any other party in connection with his nomination or confirmation. Judge Kennedy indicated, in clear and unambiguous terms, that he made no such commitments.

CONCLUSION

In sum, I believe that we have firm grounds to conclude that Judge An-

thony Kennedy's views reflect the core values of constitutional interpretation. His record warrants confirmation by the Senate.●

Mr. KENNEDY. Mr. President, I wish to pay tribute to the chairman of the Judiciary Committee—who, as I mentioned, is necessarily absent because of illness—for the way that the whole series of hearings has been held to date and for bringing us to this stage in the nomination of Judge Kennedy.

I think I speak for all the members of the Judiciary Committee in commending Senator BIDEN for the fairness and the thoroughness of the series of hearings that have been held, and for the judicious way in which the committee conducted itself. As a result of his work, the Senate and the American people have a greater understanding about our constitutional rights and liberties.

I know that he wanted very much to be here today, and it is only because of illness that he is not. I know that I speak for all when I wish him a speedy recovery and take special note of his extraordinary leadership as the chairman of the Judiciary Committee in bringing us to this point.

Mr. THURMOND. Mr. President, I join in the statement just made by the distinguished Senator from Massachusetts. Senator BIDEN presided over the committee in these hearings in a fair and impartial manner and did a fine job. I regret he is not here today.

Mr. KENNEDY. I withhold the balance of my time.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Mr. President, I yield myself 3 minutes, if I take that much. I want to reserve what is not used at this time.

Mr. President, I rise today in support of President Reagan's nomination of Judge Anthony M. Kennedy to be an Associate Justice for the U.S. Supreme Court.

Mr. President, the duty we undertake today, to vote on a nominee to the highest court in the land, was granted to us over 200 years ago by the Constitution of the United States. The Constitution, one of the most magnificent documents ever written, is one that continues to reflect the wisdom and foresight of our forefathers.

Mr. President, I think it appropriate that we take a moment to reflect on the tremendous responsibility this document confers on the U.S. Senate. The Constitution assigns the Senate and the House equal responsibility for declaring war, maintaining the Armed Forces, assessing taxes, borrowing money, minting currency, regulating commerce, and making all laws necessary for the operation of the Government. However, the Senate alone holds exclusive authority to advice and consent on nominations, and this, without doubt, is one of the most important responsibilities undertaken by this body. It is one that takes on an even greater significance when a nomination is made to the Supreme Court.

Mr. President, a member of this Court must be an individual who possesses outstanding qualifications. In the past, I have reflected upon these prerequisites and I will only briefly reiterate, that I feel it essential that a nominee possess: integrity, courage, wisdom, professional competence, judicial temperament, and compassion. An individual with these attributes cannot fail the cause of justice and I believe that Judge Kennedy is such a person.

Judge Kennedy is one of the most eminently qualified individuals to be nominated to this high and extremely important position. He attended Stanford University from 1954 to 1957 and was awarded the degree of bachelor of arts with great distinction in 1958. From 1957–1958, after he had already fulfilled the principal requirements for graduation from Stanford, he attended the London School of Economics and Political Science at the University of London. During this time he studied political science and English legal history, and also lectured in American Government. Judge Kennedy graduated cum laude, from Harvard Law School in 1961 and practiced law for several years before his appointment to the Ninth Circuit. Since 1965 he has been a professor of constitutional law at the McGeorge School of Law, University of the Pacific. In his almost 13 years of service on the U.S. Court of Appeals for the Ninth Circuit, he has displayed the fine qualities that one looks for in a judge and more significantly in a Supreme Court Justice.

Judge Kennedy has vast judicial experience, participating in over 1,400 decisions and authoring over 400 published opinions. A review of his 400 written opinions indicates that he is among the leaders of thoughtful jurisprudence. His published opinions have earned him the reputation reserved for our most distinguished jurists, and furthermore Mr. President, his opinions clearly show that he is an advocate of judicial restraint. An attribute I consider essential for an Associate Justice of the highest court in the land.

He is a judge who examines viewpoints and arguments from all sides. As his opinions and testimony before the Judiciary Committee show, he is a man of intellect, open-mindedness, fairness, and one who demonstrates a keen sense of justice and scholarly approach to the law. Judge Kennedy does not, before hearing the facts and reviewing the appropriate law, develop preconceived ideas about what the ultimate results in a case should be. I have also noted that Judge Kennedy is a man of compassion. While he has upheld tough sentences, he has shown the fortitude to reverse a criminal conviction if an individual has been treated fundamentally unfair or his constitutional rights have been violated.

Mr. President, the Judiciary Committee held 3 days of hearings on the Kennedy nomination. During that time Judge Kennedy responded to questioning from Senators in an honest and forthright manner. The committee also heard from approximately 30 witnesses. Representatives of the American Bar Association's Standing Committee on the Federal Judiciary testified that Judge Kennedy was found to be among the best available for appointment to the Supreme Court and, therefore, the ABA gave him their highest evaluation, that of "well-qualified." The ABA committee's evaluation of the nominee covered his integrity, judicial temperament, and professional competence.

In summary Mr. President, a complete and thorough review of Judge Kennedy's background and experience indicates that he is competent, openminded, fair and just, and furthermore that he is exceptionally well qualified to serve as an Associate Justice of the U.S. Supreme Court. His vast experience as a practicing attorney, professor of constitutional law, and nearly 13 years of service on the circuit court provide the ideal qualifications for the position to which he has been nominated.

I am confident that Judge Kennedy will have a most successful tenure as an Associate Justice. I congratulate President Reagan for making such a outstanding appointment and I wholeheartedly support it. I urge my colleagues to vote in favor of the confirmation of Judge Anthony Kennedy to be an Associate Justice of the U.S. Supreme Court.

Mr. President, let me repeat that I rise in support of the nomination of Judge Anthony M. Kennedy for the Supreme court of the United States. From every standpoint, Judge Kennedy is well qualified. He graduated from Stanford University in 1958 and received a bachelor of arts degree with great distinction. He attended London School of Economics and Political Science from 1957 to 1958. He graduated from Harvard Law School cum laude in 1961. So he has a very fine foundation, a splendid education to qualify him to begin with.

Then he has had tremendous professional experience. He was in the private practice of law. He has tried cases. He practiced law in San Francisco and also in Sacramento, CA, from 1962 to 1975, a period of 13 years. He has been a professor of constitutional law at the McGeorge School of Law, University of the Pacific, since 1965, a period of 23 years. He has been on the

Circuit Court of Appeals for the Ninth Circuit since 1975, almost 13 years.

Mr. President, I cannot imagine any finer experience of anyone to be on the Supreme Court of the United States than just what I have said about him and his experience, professional experience.

I want to say further that as a circuit judge, he has participated in over 1,400 decisions. Very few judges participate in that many decisions and he has authored himself over 400 published opinions. It shows that he has been very active since he has been on the court. He has had tremendous experience there and in all of this time no one can really raise serious objection to him. One might object to some point he has made at one time or another, in maybe one decision, but taken overall, on balance, I doubt if you will find a man in the United States who would meet more general approval than Judge Kennedy.

Judge Kennedy received the ABA's highest evaluation, a well qualified. That is the highest term rating the ABA gives—the American Bar Association—"well qualified." This is based on three points. One is integrity, another is professional competence, and the third is judicial temperament. On all of these counts Judge Kennedy qualified and received that rating of well qualified.

In closing, Judge Kennedy has demonstrated he is a man of intellect, openmindedness, fairness, and one who displays a keen sense of judgment and scholarly approach to the law. He is an advocate of judicial restraint, which is greatly needed in the courts of this country today.

Mr. KENNEDY. Mr. President, I yield such time as the Senator from Alabama requires.

The ACTING PRESIDENT pro tempore. The Senator from Alabama.

Mr. HEFLIN. Mr. President, I rise today to again vote my support for the nomination of Judge Anthony M. Kennedy to be an Associate Justice of the U.S. Supreme Court.

Over the past several months President Reagan has nominated three individuals for a lifetime position on the Supreme Court.

Judge Kennedy has practiced law, taught law, and since 1975 has been a judge on the Ninth Circuit Court of Appeals. While on the bench, Judge Kennedy has written over 400 opinions which show him to be a conservative jurist in the mold of Justices Powell, Harlan, and Frankfurter. Many of Judge Kennedy's opinions have dealt with criminal law. Indeed, Judge Kennedy has become somewhat of an expert on criminal law. Importantly, Judge Kennedy has been tough, but fair, with criminals, and, as a judge, has been willing to consider the rights of victims.

In a recent speech in New Zealand to the Sixth South Pacific Judicial Conference, Judge Kennedy spoke of the need to be concerned about victim's rights. Judge Kennedy said that "the victim of crime, the only person who suffered harm in any immediate physical sense, has been left out of the criminal justice equation." I am in full agreement with his statement in that speech. I believe that the rights of victims should have equal consideration with the rights of the accused.

During Judge Kennedy's nomination hearing, he exhibited a remarkable understanding of our Nation's Constitution and our system of government. His written decisions and speeches reveal a man who is an able and intelligent jurist. He is a man who understands the critical role the Supreme Court plays in our democracy in preserving the rights of all, also understands the need for restraint in the exercise of judicial power.

Judge Kennedy's career on the ninth circuit has been characterized by this sense of restraint. It is evident from his desire to ensure that there is an actual case or controversy before hearing a case, his care in examining whether the parties have standing, and his practice of only deciding those issues necessary to reach a decision, that Judge Kennedy is truly one who believes in the concept of judicial restraint. Furthermore, in his questionaire, Judge Kennedy wrote that, "the courts must insist upon adherence to a set of principled restraints that will confine their judgments to the judicial sphere. Judges must strive to discover and to define neutral juridical categories for decision, categories neither cast in political terms nor laden with subjective overtones. Life tenure is in part a constitutional mandate to the Federal judiciary to proceed with caution, to avoid reaching issues not necessary to the resolution of the suit at hand, and to defer to the political process."

I am in full agreement with and strongly support Judge Kennedy's traditional view of judicial restraint.

While some individuals and groups have opposed Judge Kennedy, I do not believe that their opposition is warranted in light of Judge Kennedy's overall record. While I do not agree with all of his opinions, this disagreement in no way lessens my belief that Judge Kennedy will make an excellent Justice. A most fitting description of Judge Kennedy came from Mr. Nathaniel S. Colley, Sr., who described Judge Kennedy as a grown man but also a growing man.

During the Judiciary hearings on his nomination, Judge Kennedy was questioned about his views on a broad spectrum of constitutional issues. His answers were cautious, but forthright. He showed himself to be a judge who is sensitive to minorities and to the less fortunate. Importantly, Judge Kennedy demonstrated that he had no rigid constitutional theory or formula for deciding all cases.

While Judge Kennedy has no rigid constitutional theory for deciding all cases, his decisions do show the mark of a conservative jurist. He is a man who understands both the good and the evil for which judicial power has been utilized throughout our history and therein lies his philosophy of moving cautiously in this sphere. His conservatism, while pronounced, is not so severe as to prevent him from listening to other points of view or from keeping an open mind while he hears the arguments in a case.

I believe that the Supreme Court and our Nation will benefit from the presence of Judge Kennedy. I believe that he will leave his mark on the Supreme Court and on law in America.

Finally, I should like to take this opportunity to wish Judge Kennedy well in his new position, for I firmly believe that he will be confirmed.

Mr. THURMOND. Mr. President, I now yield 3 minutes to the distinguished Senator from Iowa [Mr. GRASSLEY].

The ACTING PRESIDENT pro tempore. The Senator from Iowa.

Mr. GRASSLEY. I thank the distinguished ranking minority member for yielding 3 minutes to me so that I can tell this body that I am very pleased to support President Reagan's choice of Judge Anthony Kennedy to the Supreme Court.

One week ago in the Judiciary Committee, I announced my reasons for supporting Judge Kennedy's nomination. I will not repeat that rationale here. Instead, I should like to focus on a related and important issue, one that is particularly relevant in the wake of the Bork, Ginsburg, and Kennedy nominations.

That issue is the role the Senate Judiciary Committee has permitted the American Bar Association to play in the Supreme Court nomination process.

As my colleagues know, I am not a lawyer. Those of my many colleagues who are lawyers know the ABA as an association representing about half of the country's practicing attorneys.

But the Judiciary Committee—with the executive branch as its accomplice—has permitted the ABA a role that far exceeds its rightful influence.

The ABA's standing committee on the Federal Judiciary currently conducts an evaluation process which purports to be an objective assessment of professional competence—but, in practice, has become quite vulnerable to partisan politics.

Everything that we stand for in this body and in this Nation—open, not secret, meetings; public deliberation and debate; the opportunity to con-

front one's accusers, and government accountability—all are absent from the ABA process.

The events of recent years have severely undermined the ABA's once unquestioned objectivity on judicial nominees. As one of my colleagues on the committee once concluded allowing the ABA to rate judges is like having "Jack the Ripper determine the qualifications of surgeons in 18th century England."

Mr. President, the time has come to dethrone the ABA. Increasingly, others are coming to the view that this element of the prevailing legal establishment has no special competence to sit in judgment of those nominated to the Federal bench. The January 28 editorial of the Wall Street Journal persuasively argues for an end to the status quo.

During the nomination hearings on Judge Kennedy, Judiciary Committee Chairman BIDEN suggested that perhaps the time had come to take a fresh look at the ABA's role. I am willing and anxious to participate in that reevaluation. As we reconsider the relationship between the ABA, the executive branch and the Senate, let us remember that it is the President's constitutional responsibility to nominate and the Senate's function to "advise and consent." Nowhere in our constitutional structure is there room for the role currently played by the ABA.

Currently, the ABA's Standing Committee on the Federal Judiciary conducts an investigation of the President's nominee and reports its "findings" to the public as: "well qualified," "not opposed," or "not qualified." The committee transacts its business in complete secrecy and offers no substantive legal analysis in support of its conclusions.

The ABA president selects 15 lawyers to serve on the committee, with no apparent requirement that they have any recognized expertise in constitutional law. Committee conclusions are, however, accorded great weight by the news media, which breathlessly awaits and reports the ABA "verdict."

Some on the Senate Judiciary Committee also believe the ABA is indispensable. Last year, our committee delayed hearings on Judge Robert Bork's nomination to the Supreme Court and seemed prepared to delay hearings on the nomination of Judge Douglas Ginsburg, pending completion of the committee's secret evaluation process. It is interesting to note that the committee increased the time taken for its evaluation of Supreme Court nominees from an average of 2 weeks to 2 months, with the coming of the Reagan administration.

Through its unofficial—but powerful—role, the ABA attempts to influence the ideology of the Federal courts. This contravenes the committee's avowed purpose and the ABA model code of professional responsibility, which encourages "lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges."

Until 1983, the committee specifically excluded consideration of "political or ideological matter with respect to the nominee." But in response to President Reagan's efforts to appoint qualified conservative lawyers to the courts, the ABA now states:

> The committee does not investigate the prospective nominee's political or ideological philosophy except to the extent that extreme views on such matters might bear upon judicial temperament or integrity.

Recent events illustrate that the exception swallows the rule and that despite its protestations to the contrary, the ABA closely scrutinizes the political views of judicial nominees and bases its evaluation on its perceptions of those views.

For example, when Judge Robert Bork was nominated for the District of Columbia Court of Appeals in 1982, the committee unanimously gave him its highest rating. He served with distinction on the appeals court; not a single one of his more than 100 opinions was overturned by the Supreme Court. His nomination to the Supreme Court in 1987 following this brilliant 5-year record as one of our leading jurists resulted in the most protracted investigation in the committee's history. Incredibly, the ABA's conclusion was divided, with four committee members voting Judge Bork "not qualified" on the basis of his "extreme views respecting constitutional principles."

During the ABA's investigation of Judge Douglas Ginsburg, a committee member disclosed to the press that he, or she—the ABA never revealed who breached its confidential process, had concerns that Judge Ginsburg shared Judge Bork's ideological beliefs. The committee member stated we might be getting little more than "a Borklet," further demonstrating the prejudice and politics of the ABA evaluation, not to mention that the "secrecy" of its process is honored only when the committee finds it convenient.

The ABA must be dethroned. I agree we need a check on the Executive and Senate to ensure that political cronies and favorites are not appointed to the Federal bench. This is as true today as when Alexander Hamilton warned of it in 1787 in Federalist 76. But the ABA has demonstrated a cronyism of its own; they are partial to, as Joseph Goulden in his study, The Benchwarmers, has put it, "men dedicated to the preservation of a milieu in which they have prospered." Traditional establishment lawyers are "in." Legal scholars and intellectuals—particularly conservatives—are "out." Consider the ABA's ratings of three other eminent conservative legal scholars Frank Easterbrook, Richard Posner, and Ralph K. Winter, all of whom now serve with distinction on our appellate courts. As conservative academics, their ABA ranking of "qualified" was the minimal level of acceptability. Clearly, the ABA, at least since 1983 when it expanded the scope of its evaluation to include ideology and philosophy, plays politics.

The ABA must account for its ratings. The unique role it plays requires it be honest with the Judiciary Committee and American public. As Senator Hugh Scott once noted:

> I doubt whether or not any private body should be privileged to exercise a veto over a function to be exercised by Congress; namely, the selection of judges. [For example,] I would not think the American Medical Association should pass on the Public Health Service. * * *

The Judiciary Committee has two choices to resolve this dilemma. First, we can simply discontinue the ABA's preeminent role in Supreme Court nominations. After all, the Judiciary Committee already conducts the same investigation undertaken by the ABA: The nominee's colleagues are interviewed; articles, speeches, and opinions are analyzed; and other legal experts are consulted about the nominee. If we choose this route, the ABA will still be welcome to present its views, as any interested group is, on a particular nominee, but its testimony will be recognized as that of the constituency it represents—lawyers in traditional law firm, corporate or other business setting.

Alternatively, we can continue to utilize the ABA to assess nominees' "competence, integrity, and judicial temperament," as the ABA currently defines its role, so long as the ABA adheres to the provisions of the Federal Advisory Committee Act. This 1972 law requires that, among other things, advisory committee meetings be open to the public. The act, passed to limit the "potential dominance," as Judge Charles G. Richey once phrased it, of advisory groups, clearly applies to the committee. In fact, the ABA views its role as that of an advisor in the nomination process. Lawrence Walsh, a former chairman of the committee, once told the Judiciary Committee:

> We are an advisory group. We do our best to present the facts openly and frankly and fairly to the President and his agents and to the Senate through [the Judiciary] Committee.

At the present time, the deference accorded the ABA gives it the power to undo a person's entire career, as a result of its clandestine and vague process. We must either discontinue the role of the ABA in its present capacity or recognize its advisory status and require it comply with the Federal Advisory Committee Act.

Mr. President, I ask unanimous consent that the Wall Street Journal arti-

cle to which I referred be printed in the RECORD.

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

[From the Wall Street Journal, Jan. 28, 1988]

LEST YE BE JUDGED

As Judge Anthony Kennedy rolls on toward confirmation, the Bork fallout continues, not least in raising the issue of whether the organized bar has any special role to play in judicial selection. For the net result of its split decision on Robert Bork was to give a patina of professional and intellectual respectability to the scurrilous campaign being run against him.

At one time everyone officially recognized Judge Bork's true pre-eminence. When he was appointed to the Court of Appeals for the D.C. Circuit, the ABA rating committee unanimously rated him "exceptionally well qualified." Subsequently he participated in 400 decisions and wrote 100 opinions as a member of the nation's second most important court. Not a single one was reversed, while several of his dissents were upheld on appeal.

After which, the ABA committee approved him by only a 10-4 vote. His nomination drew outright opposition from the Association of the Bar of the City of New York. It is ludicrous to suppose that Judge Bork's professional qualifications in 1987 were less impressive than they were before his five years of service on the bench. What changed was the political context; the political stakes were higher and the Reagan administration was weaker. The Bork-Reagan foes launched a political-advertising campaign against the nomination—at a cost of $10 million to $15 million according to the estimate of Suzanne Garment in her superb article in the current commentary. Suddenly Judge Bork's professional capabilities became a matter of debate within the bar.

What then is the meaning of the bar's supposedly technical and professional judgment? We do not need this judgment when, as in the Anthony Kennedy nomination, there is no controversy. But if at the first smell of blood the bar is going to play politics like everyone else, why should its opinions have any special status? Indeed, is it wise for the bar to lend its name to such an exercise? If a professional assessment becomes mere politics, will not this discredit the notion that there is something more regal to the law itself?

Some in the bar are asking these questions. Indeed, a group of dissenting New York lawyers has sued the City Bar Association seeking an injunction against further ratings of Supreme Court nominees, noting that the group's carefully drafted charter authorizes only the assessment of local judges and federal judges who sit in New York City. Judge Edward Greenfield denied a temporary restraining order, but asked the executive committee to wait until he ruled on the suit's merits before announcing its conclusion on Judge Kennedy.

The association responded by rushing out its recommendation of Judge Kennedy in direct defiance of the judge's request. Such is the respect for the judicial process displayed by the same lawyers who objected to Judge Bork on the grounds of "judicial philosophy." The dissidents will continue their suit, but nothing in the episode suggests that the bar enjoys any status that commands deference from the rest of us.

Several senators expressed similar doubts during the Kennedy hearings, questioning Harold Tyler, head of the ABA federal judiciary committee. They wanted to know, for example, why the committee votes in secret. Why don't the four anti-Bork members go before the public to defend their views, as senators do every day of the week? Indeed, there is a law, called the Federal Advisory Committee Act, which requires that advisory groups reach their recommendations in the full light of day. Mr. Tyler asserted his committee was exempt from the act, and needs confidentiality so that it can interview numerous sources, including sitting judges who would not be able to express themselves in public.

Senators also were testy about an anonymous quote from a member of the ABA committee in the Washington Post, calling Judge Douglas Ginsburg a "Borklet" even before the rating process. The Washington Post's leaker said something interesting: "There are concerns that Ginsburg shares many of the conservative ideological beliefs that doomed the Bork nomination." We certainly would like to know what member of the committee said Judge Bork was defeated over ideology, not professionalism.

On the broader question, Mr. Tyler's explanation was recorded back during the Bork hearings. "We cannot be unrealistic about what we are," he said. "I have admitted to this committee, my committee—they all knew it anyhow—my prejudices or biases as best I can. Others have done the same. But we cannot divorce ourselves and be 15 people who live a neutral, sheltered, irrational, nonworldly life." In other words, the members' assessments can't be counted on to be purely technical and professional after all.

The ABA committee had been shrouded in controversy even before the Bork nomination. The question of its status under the Federal Advisory Committee Act is at issue in two lawsuits pending in Washington. They started back in September 1985, when a Congressional quarterly article reported that the ABA committee gave names of people "under consideration" to Susan Liss, head of the Judicial Selection Project, so that "Member groups such as the NAACP Legal Defense Fund then may conduct their own investigations and send information to the ABA." The Washington Legal Foundation, a conservative legal group that didn't get such supposedly confidential names in advance, asked the ABA why.

The ABA committee said it would stop the practice, but the Washington Legal Foundation filed suit for the group's minutes under the FACA. WLF, joined by Public Citizen Litigation Group, a Ralph Nader affiliate, also has sued the Justice Department for asking a group for its views without enforcing FACA.

We referred to this controversy during the Bork battle, in a 107-word item concerning John D. Lane, a Washington lawyer who served on the ABA committee when the WLF suit was filed, was not reappointed when his term expired, and has again been appointed after a new position was created. This elicited from Mr. Lane a letter full of such words as "false and malicious" and other litigous language we wouldn't have expected from someone who presumes to vet judicial nominees for "judicial temperament." This was followed up by a letter from Mr. Tyler to the chairman of Dow Jones assuring us among other things that Mr. Lane "certainly does not have any desires to sue the Journal or anyone else."

The burden of Mr. Lane's complaint is that we suggested he had been accused of "leaking" the names and had been removed from the committee as a result. Both Mr. Tyler and Mr. Lane assure us he was not "removed" from the committee, and certainly we ought to make clear we hold Mr. Lane no more responsible than other members of the committee for the revelations to Ms. Liss. Our complaint is not with an individual, but with a process that invites politicization, then masks its results under the guise of objective, professional judgments.

The process invites the politicization not only of the bar, but, we are increasingly coming to suspect, also of the bench itself. The ABA committee sought opinions on Judge Bork from 77 Federal Court of Appeals judges and five Supreme Court justices, as well as other lower-court judges. A minority of these sitting judges opposed Judge Bork in these private hearings, no doubt encouraging the minority on the ABA panel, again lending a professional patina to the opposition.

What was the basis for these clandestine judgments? The judges making them offer no opinion that must withstand the scrutiny of either their peers or the public. Is it a good idea even to invite sitting judges to participate in such a process?

The back rooms of the D.C. Circuit Court are still buzzing with an anecdote. Just after Ronald Reagan went on television to announce his surprise Ginsburg nomination, Pat Wald, the liberal chief judge, ushered visitors out of her chambers to take a call from Senator Teddy Kennedy. Judge Wald told us that she took the call "out of courtesy's sake," that it lasted less than a minute and that she told Senator Kennedy that in Judge Ginsburg's "relatively few opinions, his positions were in most cases in conformity with those of the more recent Reagan appointments."

Then Senator Kennedy headed for the floor of the Senate to dismiss Judge Ginsburg as "an ideological clone of Judge Bork—a Bork without a paper trail—instead of a real conservative." This was a very different view than Senator Kennedy took of Douglas Ginsburg in 1986 when he introduced the former Cambridge, Mass., resident to the Judiciary Committee for unanimous approval as a circuit judge.

Several decades of activist judges already have diminished the law in the eyes of many people, who see it as essentially a political exercise in which the legal spoils go to the most effective special interest. The status of the law will be restored by restraint on the bench and by an ABA that restrains itself from claiming special competence to judge nominees. Certainly the executive branch ought not accord the ABA that status. Presidents don't let the American Bankers Association pick Fed chairmen, the Seven Sisters pick energy secretaries or the AFL-CIO pick labor secretaries. Why should lawyers have a quasi-constitutional role in picking judges?

Mr. THURMOND. Mr. President, I now yield 3 minutes to the distinguished Senator from Utah, [Mr. HATCH].

The ACTING PRESIDENT pro tempore. The Senator from Utah.

Mr. HATCH. I thank my distinguished colleague and thank my friend from Ohio for allowing me to go out of turn so that I can get over to the Rules Committee.

Mr. President, today we take the final step in filling this Supreme Court seat which has remained vacant, as far as I am concerned, for far too long. The nominee before us today has demonstrated that he possesses the qualities that are necessary and important in this most taxing of public callings.

I have been very impressed with Judge Kennedy. I think a lot of him. I think everybody does here. And this vote here will make that point, I think, in very, very strong terms.

I might say that the explanations of the majority report failed to reflect, it seems to me, a sound historical or jurisprudential picture of the reasons that Judge Kennedy will be and should be confirmed as an Associate Justice of the Supreme Court. Rather than dwell on the distortions and inaccuracies of this report, however, I prefer to focus on the merits of the individual chosen to succeed Justice Powell on our Nation's Highest Court.

Accordingly, I am honored to express my approval for an individual who is eminently qualified to serve in the highest judicial office of our land. Fourteen years as a practicing attorney, 20 years as a professor of constitutional law, and more than 12 years on the circuit court that defines Federal law for nine States and 37 million people have prepared Judge Anthony Kennedy well for the trust placed in him by President Ronald Reagan. I have no doubt that in coming decades this nomination may be counted as among the most significant actions taken by President Reagan in his two terms at our Nation's helm.

I express this confidence because Judge Kennedy has exhibited the kind of courage that is the hallmark of a great Supreme Court Justice. While on the ninth circuit, Judge Kennedy had the courage to refuse to enforce Federal statutes which failed to comply with the terms of the Constitution. For example, he invalidated legislative veto provisions in the Chadha decision.

This kind of courage will again be required of Judge Kennedy. Even while his nomination was pending, a circuit court in the District of Columbia invalidated the independent counsel law because it violated the separation of powers in the Constitution. I do not presume to know how Judge Kennedy might vote or even if he will be called upon to review that particular law, but I am confident that he possesses the ability and courage to decide whether Federal laws overstep the bounds of the Constitution.

Even more important than the courage to undertake that task, however, is a judge's wisdom and restraint. Judge Kennedy will no doubt become a respected Justice because he will base his decisions on the Constitution and the laws of the Nation. He does not have any political agenda and will not attempt to write his own preferences into law.

Some legal scholars and even some Senators have contended that judges need not base their decisions on the words of the Constitution. Instead they contend that judges are not worthy of service on the supreme Court unless they are willing to reach outside the Constitution to protect human dignity or some other vague and undefined principle. The problem with this notion is that it permits unelected judges to override the democratic laws created by the people without constitutional justification. For example, judges have overturned the capital punishment laws of 34 States even though the Constitution itself mentions the death penalty. This is known generally as judicial activism. In my mind, judges who take upon themselves to overrule the people's laws without clear warrant from the Constitution overstep their authority. Judge Kennedy's years of service on the ninth circuit and his testimony before this committee indicate clearly that he is not this kind of judge.

As he stated, he will practice judicial restraint, which is another way of saying he will refrain from using extraconstitutional principles to decide cases. This is the task of judges—to read the Constitution and to apply it to the facts of specific cases. A judge who reads things into the Constitution is not really acting as a judge, but as a politician in robes.

I recall what Judge Kennedy stated in a speech a year before his nomination: "The imperatives of judicial restraint spring from the Constitution itself, not from a particular judicial theory. * * * The constitutional text and its immediate implications, traceable by some historical link to the ideas of the framers, must govern judges." Judge Kennedy's profound respect for the Constitution is his best qualification to serve on the Supreme Court.

To those who classify judges who practice judicial restraint as conservative, he has the best response. As he states, judicial restraint is neither conservative nor liberal, but a requirement of the Constitution and a natural predicate for the doctrine of judicial review.

Judge Kennedy will be a champion of judicial restraint, like Justices Harlan, Frankfurter, Burger, Stewart, Powell, and many others before him. It is easy to understand why he has won President Reagan's trust. And it is easy to understand why he will win the trust of the American people as well. After all, he will let the people govern themselves, rather than presuming that he knows better than the people what rights and values deserve judicial enforcement.

Let me spend a few moments with my colleagues and examine some of the issues raised during the hearings that reinforce my belief that Judge Kennedy is well qualified for this most important governmental position.

CRIMINAL LAW

Few people realize that no category of case is more often litigated in the Supreme Court than criminal cases. From my point of view, this is entirely appropriate because life and liberty, not to mention the order and safety of our society, are no where more at stake than in criminal trials. Accordingly, I would like to review a portion of Judge Kennedy's record on criminal issues.

Studies have shown that the poor, women, the aged, and minority groups are disproportionately victimized by crime. When our criminal justice system fails, these groups are the first to suffer. Judge Kennedy has indicated that the plight of victims of crime ought to play an important role in the criminal justice process.

In October 1987, the Bureau of Justice Statistics reported that the rate of violent crime dropped 6.3 percent in 1986. Of course, this is no consolation to the victims of crime, but it is important to realize that since 1981, the rate of violent crime has dropped nearly 20 percent. Seven million fewer crimes occurred in 1986 than in the peak year of 1981. This does not mean the battle is being won. I am sure we can find statistics to show that drug abuse and its link to crime is on the rise. Nonetheless we are gaining ground on crime to some degree. Judge Kennedy feels that the courts have a role to play in ensuring that this hard-won progress continues.

In this regard, I would like to discuss one of Judge Kennedy's death penalty cases; namely, Neuschafer versus Whitley. In which an inmate had murdered another inmate. When Judge Kennedy first received the case, he sent it back to the lower court to make sure the evidence—a statement by the accused—was proper. When this was established, the case returned to the circuit court. Although several arguments were made against the State's decision to order the death penalty, Judge Kennedy found them to be insufficient. He found that there were aggravated circumstances that warranted capital punishment and that the penalty was not disproportionate to the crime.

Another capital case was Adamson versus Rickets. This involved the murder of an Arizona newspaper reporter with a car bomb. The defendant had confessed to the murder but escaped the death penalty in his first trial because of plea bargain. In a second trial, after the defendant had breached the plea bargain agreement, the Ninth Circuit Court of Appeals,

with Judge Kennedy dissenting, held that the double jeopardy clause barred a second trial on the issue. The Supreme Court overturned the majority of your court and followed your dissent in finding that the plea bargain should not figure into the double jeopardy clause in this instance. This resulted in the reinstatement of the death penalty for the cold-blooded car bombing.

We should also review a few other aspects of criminal law. For example, some court rulings might deprive the police of tools they need to investigate crime and apprehend criminals. Some courts have applied doctrines which result in convicting evidence being thrown out of court. This could allow a criminal to go free on a technicality. Few things undermine the integrity of the justice system in the mind of the American people any more. In any event, Judge Kennedy has decided several cases affecting the ability of police to fight crime. For instance, he decided in U.S. versus Allen in 1981 that helicopter overflights could be used for the purpose of gathering information of drug dealing.

Few doctrines have been more controversial than the exclusionary rule. This rule excludes any evidence from a trial that the police might have acquired in a flawed manner. In some ways, this emphasizes scrutiny of every minor aspect of police conduct to the exclusion of the search for truth in our courts. Justice Cardozo described this rule as allowing the "guilty to go free becaue the constable blundered." Judge Kennedy has had several opportunities to rule on the exclusionary rule. For instance, in the case of U.S. versus Peterson, he applied the good faith exception to the exclusionary rule to a drug arrest that occurred in the Philippines. He held that the introduction of evidence was permissible where U.S. officers reasonably relied on the assertions of Philippine officers that they had abided by the law, even though the Philippine officers had not. We can ask no more of our police than that they make every good faith effort to comply with the law. One other exclusionary rule case is perhaps worth examination. In U.S. versus Harvey, Judge Kennedy dissented from a ruling that overturned an involuntary manslaughter conviction because the results of a blood alcohol test were admitted into evidence. In that case, the defendant's blood had to be drawn at once or the alcohol content would have diminished. As he said in his opinion, "in this case, the exclusionary rule seems to have acquired such independent force that it operates without reference to any improper conduct by the police."

On the other hand, he seems to be clearly attuned to constitutional protections for defendants as well. For instance, in the case of U.S. versus Jewell in 1976, he dissented because a conviction occurred without ample instruction to the jury about the nature of intent required for a conviction. He was joined in that dissent by conservatives like Judge Wallace and liberals like Shirley Hufstedler. In any event, his record on criminal law issues is, in my mind, exemplary. He balances carefully the rights of law abiding citizens to a safe community and the rights of suspects to a fair trial.

U.S. VERSUS LEON

The press gave wide coverage to Judge Kennedy's dissent in the U.S. versus Leon case involving the exclusionary rule. The majority in that case contended that evidence in a drug case had to be thrown out of court because it was obtained on a warrant that was not supported by probable cause. The majority refused to create a "good faith" exception to the exclusionary rule in the absence of Supreme Court guidance.

In his dissent, Judge Kennedy contended that the warrant was in fact supported by probable cause and that the evidence of the drug transactions was therefore admissible. He, therefore, found it unnecessary to address the "good faith" issue. The Government appealed the case to the Supreme Court and argued for a good faith exception, rather than basing their appeal on the validity of the warrant, which was Judge Kennedy's argument. It would be wrong, therefore, to suggest that he acted without Supreme Court guidance in creating a "good faith" exception to the exclusionary rule.

Judge Kennedy's Leon dissent is noteworthy in its own right, however. In the first place, it seems to me that it demonstrates his judicial restraint. He dissented on the narrowest possible grounds—the validity of the warrant—instead of reaching out into uncharted territory, like the "good faith" exception reasoning. This shows also his commitment to law enforcement and his understanding of the realities of criminal law. As he noted in his dissent, the exclusionary rule becomes too rigid when courts "presume innocent conduct when the only common sense explanation for it is ongoing criminal activity." This case is one further instance of his commitment to an ordered society with ample tools to fight lawlessness.

COMPARABLE WORTH

Mr. President, we heard concerns expressed in the Judiciary Committee hearings from groups such as the National Organization of Women. This group and others had reservations about the legal and jurisprudential merits of Judge Kennedy's ninth circuit comparable worth case, AFSCME versus Washington, 1985. The comments on this particular group, without a clarification, might leave the false impression that Judge Kennedy is not fully supportive of women's rights. I would like to help clarify these issues. In the first place, that 1985 opinion expressed support for the Equal Pay Act, which requires equal pay for equal work.

My reading of Judge Kennedy's cases indicates that he is among the first to vindicate the rights of women who do not receive equal pay for equal work. He has expressed his willingness to enforce the Equal Pay Act.

Next, I would like to turn directly to the issues raised by the AFSCME case. That case presented a vary narrow issue, namely whether title VII of the Civil Rights Act was violated by the State of Washington in light of a study showing a wage disparity between several jobs held mostly by women and comparable jobs held mostly by men. In other words, this was a case requiring a determination of whether title VII defined wage disparities in comparable jobs as sex discrimination.

Because his opinion was based on the language of the statute, nothing in that decision, as I read it, prevents the State of Washington from changing its laws to adopt a compensation system based on comparable worth.

Morever, nothing in that opinion would prevent Congress from making wage disparities in comparable jobs evidence of sex discrimination. In my opinion, this would be a very questionable thing for Congress to do because, as Judge Kennedy stated:

> Neither law nor logic deems the free market system a suspect enterprise.

Nonetheless, Congress has done foolish things before and nothing in the AFSCME opinion would prevent Congress from expanding title VII to include wage disparities in comparable jobs.

I would like to make one further point before we look more closely at the specific reasoning of that opinion. Two circuit courts—the eighth circuit in the 1977 case of Christensen versus Iowa and the 10th circuit in the 1980 case of Lemons versus Denver—had rejected comparable worth arguments even before Judge Kennedy's 1985 opinion. Moreover, another circuit, the seventh, has since decided a comparable worth case and cited his opinion as authority for once again rejecting a comparable worth claim. This was the 1986 case of American Nurses versus State of Illinois.

I would just like to quote from one of those other opinions, the 1977 opinion out of the eighth circuit. This court stated several years in advance of Judge Kennedy's opinion that:

> We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

This language sounds remarkably similar to Judge Kennedy's conclusion that:

> The State did not create the market disparity and has not been shown to have been motivated by impermissible sex-based considerations in setting salaries.

I would like to examine to some degree the methods of analysis Judge Kennedy employed in deciding this case because I think this case is an excellent example of the kind of careful legal analysis we should seek in our Supreme Court Justices. The Supreme Court has acknowledged two theories of employment discrimination under title VII. The first is the disparate impact theory which means that a neutral employment practice may nonetheless be illegal if it has a disproportionate impact on women. The second is the disparate treatment theory which means an employment practice is only illegal if undertaken with a discriminatory intent. Judge Kennedy's opinion analyzed the facts of the case under both theories.

Under the first test or the disparate impact test, Judge Kennedy found that allowing market forces to set salaries was not the kind of specific, clearly defined employment practice to which disparate impact analysis may be applied. To make this clear, he would be likely to apply a disparate impact analysis to a specific employment practice that excluded individuals below a certain weight or height because this would have the effect of excluding women. In fact, this is the situation presented by the Dothard case where the Supreme Court applied the disparate impact test. On the other hand, several courts have acknowledged that broad ranging compensation policies are not well suited to the disparate impact model.

As the Senate knows from considering civil rights legislation in the past, discriminatory intent may be inferred from circumstantial evidence. In Judge Kennedy's analysis of this case, there was not sufficient circumstantial evidence to support a finding of discrimination based on the second test, which requires some showing of discriminatory intent.

The Willis study, which identified the salary disparities in various comparable jobs in the State of Washington, and was offered as evidence in this case, was not evidence of this intent. The study identifies some disparities but it does not show evidence of discriminatory motive in setting those different salary levels. In fact, just the opposite, it shows that the market was relied upon by the State and the market system created some differences. I would just observe that Judge Kennedy's treatment of this very sensitive issue is itself very sensitive. He examined every possible legal theory; he gave every possible advantage to the evidence presented by the plaintiffs; and he finally reached a result.

In addition, this was a unanimous opinion, which was not reheard en banc by the ninth circuit. These facts speak even more persuasively for the efficiency and accuracy of Judge Kennedy's legal reasoning. We have heard that some legal commentators have criticized this opinion in law reviews and other publications. According to my quick search, this case has been the subject of 13 law review articles. It is not correct to say that all of these have been critical. In fact, several have been very complimentary. For example, the Washington Law Review in 1986 contained the following observations:

> Judge Kennedy was correct in holding that AFSCME failed to establish a prima facie case of sex-based wage discrimination, because the use of market wage rates, alone, is not sufficient evidence of discriminatory intent.

Another observer noted that Judge Kennedy's opinion was an "admirable exercise of judicial restraint;" 9 Harvard Journal of Law and Public Policy 253 (1986). Although not noted for legal commentary, the Washington Post editorial of November 22, 1987 seemed a fine summary of this entire subject:

> Judge Kennedy was right. The law requires equal pay for equal work, not comparable work.

I would simply note that Judge Kennedy was not only correct, but he was sensitive and careful in his legal analysis. The care with which he reached his conclusion is just as important as the conclusion itself. I commend the judge for his work on this difficult issue.

CIVIL RIGHTS CASES

Based on a few isolated cases, the impression has been created that Judge Kennedy is not fully sensitive to the rights of minorities and women. I would respectfully suggest that a full reading of his civil rights cases and record clearly yields a very different conclusion. Let me just review with my colleagues a few of his cases that will present a more complete picture of his record on civil rights.

In the 1980 case of Flores versus Pierce, Judge Kennedy heard a suit brought by several Mexican-American restaurant owners who alleged that city officials were racially motivated in protesting their applications for liquor licenses. In his holding, Judge Kennedy found that the protests which were frustrating efforts of these Mexican-Americans to do business were indeed racially motivated. Using both the disparate impact and disparate treatment theories, he found clear evidence of discriminatory intent and upheld the damage award of $48,500 against the prominent city officials who were the defendants. In my mind, this is a classic example of a courageous judge standing up, when the evidence warranted it, for the rights of minorities against the powers of city hall.

In a similar vein, I would like to review the 1984 Jones versus Taber case involving a prisoner who had been mistreated but had foregone any legal claims for a mere $500. This prisoner had been stripped, gagged, chained to a wall, and hosed with cold water, yet without the advice of counsel had accepted $500 in exchange for an agreement not to seek legal redress. Judge Kennedy found that the acceptance of the $500 was not completely voluntary and informed, thus not binding. This had the effect of restoring the prisoner's rights to sue the offending officials. Once again, this must be viewed as an instance of judicial protection of valuable civil rights.

Another 1984 case, McKenzie versus Lamb, raises the same point. In that instance, several turquoise jewelry salesmen were arrested without probable cause. The plain clothes police had no evidence that the defendants were selling stolen property, yet they arrested them anyway. Accordingly, Judge Kennedy permitted a lawsuit against the defendants.

Although many other cases might show a similar disposition to protect individual and minority rights, I will just call attention to one more example—the 1984 case of Bates versus Pacific Maritime. This involved an employer who had certain firm obligations to correct racial discrimination under title VII. The employer sold his business and his successor claimed that he did not need to abide by the obligations to hire minorities. In his opinion, Judge Kennedy held the successor—who had assumed the same operations and kept the same personnel as the offending employer—was bound to meet all the obligations of the remedial consent decree. This vindicated the civil rights of those who had been, or might have been, discriminated against by this firm. Undoubtedly there are many other examples of Judge Kennedy's sensitivity to civil rights, but I selected these few to highlight his larger record.

Moreover, I would suggest that several cases which might be cited for evidence of reluctance to uphold civil rights in fact stand for a much different proposition when viewed carefully. Take, for example, the case of Topic versus Circle Realty dealing with jurisdiction under the Fair Housing Act. The real effect of this 1976 holding did not deny the minority plaintiffs any civil right, but only suggested that the best remedy for the violation might be the administrative conciliation process. In the event the conciliation failed, the plaintiffs could still have returned to court. In other words, this holding denied no rights,

but only sought the best way of vindicating those rights.

In that case, the individuals seeking relief were teams of investigators trying to find out if steering were taking place, although they were not personally seeking housing. Judge Kennedy found that these individuals were entitled to pursue relief under section 3610 of the act which leads to administrative conciliation remedies. He found that these housing testers were not entitled to access immediately into the Federal court system under section 3612 because this latter section was much more narrowly worded and appeared to exclude individuals who had not actually been the victims of discrimination. Direct access to Federal courts was limited to actual victims of discrimination, while any person could get access to the administrative remedy which Judge Kennedy and his colleagues noted might be "not only * * * an adequate, but a superior, remedy." This was a unanimous case that was not reviewed by the Supreme Court.

It is true that the Supreme Court found that section 3610 and section 3612 offer parallel remedies to the same plaintiffs, but this occurred 3 years later in the Gladstone Realtors case. Even this Supreme Court case was split with two Justices dissenting. In any event, this was a complex statutory interpretation case, but Judge Kennedy's holding did not deny anyone the right to fair housing. In fact, his holding specifically stated that anyone who was actually steered away from housing opportunities due to race would get immediate access to court. This is hardly a holding adverse to civil rights.

One final point on Judge Kennedy's reasoning. He reasoned that if everyone could get immediate access to Federal courts, the administrative remedies under section 3610 would become mere surplusage because everyone would circumvent the administrative procedures and go directly to court. His reasoning gave meaning to both sections 3610 and 3612. This, in my mind, was very strong reasoning and probably a significant reason that his ruling was unanimous.

I would next like to turn to the case of Spangler versus Pasadena City which arose in 1977. Judge Kennedy actually decided two cases dealing with the issues involved with court-ordered desegregation in Pasadena schools. The first was a procedural matter concerning whether certain parents could challenge the creation of magnet schools. The second and more important case dealt with whether the district court should relinquish its jurisdiction after more than 10 years of court-ordered busing.

His conclusion that the district court should relinquish its jurisdiction was based on the clear finding that the school board was in full compliance with integration efforts and had committed to maintain the policy.

> The remedy ordered by a federal court to correct racial segregation in a school system may not be more extensive than is necessary to eliminate the effects of the constitutional violation that was the predicate or the court's intervention.

Again, this was a unanimous opinion which was not reviewed en banc or reversed by the Supreme Court. As Judge Godwin stated about this request to declare the desegregation order a success by ending it:

> "If not now, and on this showing, when, and on what showing" will the governance of the school system be restored to the elected officials who are charged with that governance under state law?

In other words, this opinion was little more than a declaration of victory for desegregation and a determination to terminate the burdens of busing in light of the success. Once again, this is hardly a case of insensitivity to civil rights. Judge Kennedy's record on civil rights is one of which he can be justifiably proud.

CLUBS

Mr. President, I would like to revisit for a moment the question of club memberships, and answer a few questions that may still linger. First, let's examine Judge Kennedy's Olympic Club membership. He joined this club in 1962. Despite the club's virtues of public service and charitable activities it also had flaws. At the time he joined, the club was restricted to white males.

We all agree that this racial policy was reprehensible, but we must recall that this was 2 years before the Civil Rights Act of 1964 which outlawed discrimination in public accommodations. In 1962, it is sad to say that many clubs had such policies. That was why Congress enacted the 1964 act. It took a few years for individuals and clubs to learn the full implications of the 1964 enactment, but the Olympic Club removed its racial ban in the late 1960's.

The next important event in this entire saga deals with the events of last summer. Evidently the Olympic Club was the site of the U.S. Open, a great honor for the club. When the press learned that the club, according to its bylaws, was only open to "gentlemen," the reaction was one of tremendous controversy.

It seems to me that this reaction might have been somewhat unexpected. As I understand it, over 1,000 women have privileges at the club and regularly use its facilities. The problem is that they are not members in their own right, but based on their husband's membership. Still, with women at the club regularly, the bylaws were probably not a burning question. I mention this only because some might question why Judge Kennedy did not start to act sooner to remedy the situation. Apparently this heightened scrutiny called the matter to the judge's attention, because it was at this time that he began to discuss with the club leadership his concerns about the club policy. These discussions also included a letter dated August 7, 1987, in which the judge asked to be notified of the results of a poll of the membership. That letter is a clear indication that he intended to take action based on the outcome of the poll. I would like to quote just a sentence from the letter: "The fact is that constitutional and public morality make race or sex distinctions unacceptable for membership in a club that occupies the position the Olympic Club does." Judge Kennedy was strongly urging the club to end discrimination.

One other point is worth repeating. This occurred in the first week of August. At that point, Judge Bork was President Reagan's nominee, hearings had not yet begun for Judge Bork, and most commentators were predicting that it would be a difficult fight, but Judge Bork would be confirmed. Moreover Judge Kennedy's name had not surfaced as one of the leading candidates for a Supreme Court nomination in the way that Cliff Wallace had. I only mention this because we ought to be completely clear that he was acting out of a sense of "constitutional and public morality" as he said, not on the basis of any hint that there might be a higher calling in his future.

Frankly, Judge Kennedy's actions seem to be above reproach. He is no longer a member of the Olympic Club and the most he could be faulted for is not recognizing the problem earlier, but then no one else had either. It was the U.S. Open which brought attention to the issue. Many clubs may have similar policies that have gone unnoticed. I am aware of popular clubs in Washington, DC, for instance, with this kind of policy. In any event, I can not see how his conduct can bring anything more than praise.

The same can be said for Judge Kennedy's involvement with the Del Paso Country Club, the Sutter Club, and the Elk's Lodge. The Del Paso Club also conducts several worthwhile activities and supported worthy community ventures and its membership is open to all persons. In fact, the club has women and minority members according to my understanding. It has had women members since the 1940's according to my records. This might be viewed in some respects as a very commendable record. The concern in this case involved technical language of the bylaws which appeared to favor males. In the late 1970's, at a time when the Supreme Court was an institution Judge Kennedy probably never expected to join, he expressed concern

over the perception problem of the club.

Judge Kennedy's concern prompted changes in the bylaws, however, the perception problem continued to some degree, which prompted the judge to resign. Once again, I can only say that his actions demonstrate nothing but acute sensitivity to any perception of bias. Even when the bylaws might have technically complied with the law, he urged effort to remove any residual sense of difficulty.

Judge Kennedy's attention to his judicial and ethical duties is particularly underscored by his activities with respect to the Sutter Club. He joined this club in 1963, well in advance of the enactment of the 1964 Civil Rights Act. In this case, however, the club's bylaws did not bar women, but the club's practice appeared to exclude females.

His sensitivity to this concern in 1980 is once again a compliment to his moral sense of balance. Even before Reagan was elected President, let alone before he appointed Judge Kennedy in his second term, the judge was aware of the problems in this club's practice and acted to remove himself. He removed himself from this club in 1980, because the practice of the Sutter Club was much more open and clearly in conflict with his judicial duties.

The propriety of his actions with respect to club memberships is bolstered by his actions with respect to the Elks lodge, well known for its charitable and service activities. Again, this organization does not provide membership to women, and in 1978, years before President Reagan was elected, Judge Kennedy responded to the perception problem and resigned. His actions as a whole are very commendable with respect to upholding his ethical duties.

VOTING RIGHTS

Voting rights may well be the central rights of a system of self-governance. By voting, Americans directly shape the laws and rules to which they will be subject. Judge Kennedy has decided one voting rights case—the 1980 James versus Ball case. In that case, he considered an Arizona voting plan that limited votes for a water development project to landowners. The question was whether this particular voting plan fit within an exception to the one-man, one-vote rule which permits a disproportionately affected group to have a larger role in governing a water district.

In his review of the case, Judge Kennedy found that this water district produced power that would go to landowners and nonlandowners alike. Therefore, the Supreme Court disagreed. The Supreme Court holding was 6 to 3 and was essentially just a finding that this particular water district was sufficiently specialized and narrow to fit within the exception.

The Supreme Court did not question Judge Kennedy's reading of the law, only the facts. The higher Court read the facts differently and concluded that this water district was specialized enough to fit within the exception to the one-man, one-vote rule. In any event, no one can question that Judge Kennedy was seeking the broadest possible protection for voting rights.

FIRST AMENDMENT

Few provisions of the Constitution are more important to Americans and our way of life than the free speech guarantees of the first amendment. Judge Kennedy has expressed his view of the importance of the speech clause and its role in our society.

American jurisprudence is a model for the rest of the world because it forbids any prior censureship or restraints on speech except under the most extenuating circumstances. One of Judge Kennedy's cases dealt with an attempt to place a restraint on the broadcast of a TV program. This was the 1979 case of Goldblum versus NBC, where he held that the privacy and fair trial interests of the petitioner, an executive officer implicated in an equity funding scandal, were not sufficient to block broadcast of the TV program.

In my mind, it is significant that the courts, too, can sometimes forget to protect the Constitution's prior restraint doctrine. Fortunately, other courts are available to correct those errors. Although access to government records is not a first amendment speech issue, it is nonetheless related to the access which our citizens have to their government. In that sense it is related to the very principles by which citizens participate in a government run by the people. In this regard, Judge Kennedy, in his 1985 CBS versus District Court case, rejected the Government's effort to suppress the media's access to certain sentencing documents in a case related to the DeLorean trial. His decision was based on "the presumption that the public and the press have a right of access to criminal proceedings in documents filed therein. * * * The right of access is grounded in the first amendment and in common law * * *."

One further first amendment issue arose in his past cases. This involved the operations of the Federal Election Commission. In the 1980 California Medical Association case, he decided that contributions to political action committees are not eligible for the full protections of the free speech clause and may be limited. He held that when people contribute to a PAC, they choose that committee in order to express themselves on political issues and they make the contribution to advocate their views. These donations are analogous to contributions to candidates.

In reaching his decision, Judge Kennedy referred to the Buckley versus Valeo to support his holding. This was a case in which the Supreme Court split 5 to 4 on these issues. They are difficult ones. No doubt the Supreme Court will continue to make important decisions relative to the bounds of the free speech clause and the people's access to information about their government. In light of Judge Kennedy's record, I have full faith that he will weigh the appropriate factors and be guided by the appropriate doctrines.

PRIVACY DOCTRINE

As Judge Kennedy correctly noted in a speech to the Canadian Institute for Advanced Legal Studies last year, "Neither the right [of privacy], nor the word [privacy], is mentioned in the text of the United States Constitution." However this does not mean that the Constitution affords no protection to privacy.

I certainly share Judge Kennedy's view that vital privacy values are protected by the first amendment speech and religion clauses, the fourth amendment search clause, the fifth amendment and so forth. If, however, a court accepts a general notion of privacy protection in the due process clause or elsewhere, how does a court find a principled basis for limiting that protection to marriage and family concerns? How would a court find authority to devise a principle that excludes other privacy concerns, like homosexuality, drug use, and the like?

Few of Judge Kennedy's cases have received more attention than the homosexual rights case, Beller versus Middendorf. As we all know, the Supreme Court has decided a similar issue in the Bowers case where it was asked to determine if the general privacy right embraced homosexual conduct. In his determination of the issue, Judge Kennedy stated: ". . . where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test * * * may be used."

As we well know, no general right of privacy was recognized for the first 175 years of our Constitution's history, which may cause some to question whether it is indeed fundamental. In that same speech to the Canadian Institute, Judge Kennedy noted that "the Due process clause in not a guarantee of every right that should inhere in an ideal system" and that "* * * judicial independence and its legitimacy is a necessary part of the equation when one debates the legitimacy of a source or method of constitutional interpretation. If we overreach, it is fair to call our commissions in question."

I would only note that in this area one respected legal scholar, Larry Tribe of Harvard, has predicted that

the "eventual unfolding of doctrine in this area" will someday encompass "homosexuality, polygamy, adultery, bestiality, as well as variations such as group sex which are generally dealt with under sodomy and fornication laws." American Constitutional Law at 944-946. I would hope that legal predictions and writing of this nature will not influence the directions of Supreme Court decisions.

ORIGINAL INTENT

During the Judiciary Committee hearings with Judge Kennedy there was much discussion about original intent. In his characterization of what he means when he refers to original intent, Judge Kennedy stated that the term is best viewed "in the sense of what were the legal consequences" of the actions of the legislators. Referring to Congress, he noted: "Your actions have an institutional meaning. One of you may vote for a statute for one reason, and another for another reason, but the courts find an institutional meaning there and give it effect."

Thus our fundamental law is the text of the Constitution as written, not the subjective intents of individuals long dead. Specifically he was asked if statements by the Members of the 39th Congress acknowledging segregated schools meant that the 14th amendment permitted a "separate but equal" reading. Judge Kennedy stated, and I believe he was correct, that the text of the 14th amendment outlaws separate but equal regardless of the statements or subjective intents of some of its authors. Often the framers write into the Constitution a rule which they themselves cannot live. This happened with the 14th amendment. The 39th Congress never completely lived up to the aspirations they included in the Constitution, but we should live by the words of the Constitution, not by the subjective intent or practices of its authors.

In a similar vein, the framers could not anticipate the age of electronics, but they stated in the fourth amendment that Americans should not be subject to unreasonable searches. The words and principles of the fourth amendment govern situations beyond the subjective imaginings of its authors in 1789. Judge Kennedy noted that judges inquire into original intent "to determine the objective, the institutional intent. It is the public acts of the framers—what they said, the legal consequences of what they did, and * * * not their subjective motivations."

The statements of single individuals may be important, but courts should seek for the general consensus of the ratifying society at large. Individual statements are only valuable if they represent that consensus. All historical evidence of original meaning is relevant to the meaning of the text, but none should be given undue weight or taken out of context.

Some have argued that original meaning requires courts to decide cases based on what the framers would have said had today's problems been put to them as an original matter. It seems to me that this overlooks that our modern society is vastly different from the past. We should ask what principle the framers put into the Constitution. Once that is ascertained, it is our job to apply it to modern problems. Trying to guess what the framers might have done places undue emphasis on intent again. The question is what does the Constitution say about modern problems, not what framers might have said if they could have foreseen those problems. We must be true to decisions they did make, not decisions they might have made.

Judge Cooley, a 19th century jurist, stated: "What the Court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Judge Kennedy's statements on this issue indicate that it is his view that courts are indeed called upon to apply the Constitution's set principles to new circumstances. This will develop new doctrines and new applications. But the meaning of the Constitution does not change, only its applications.

STARE DECISIS

Respect for precedent, also known as the doctrine of stare decisis, is an important ingredient of American law. Justice Brandeis expressed the purpose of the doctrine with great power: "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true * * * provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." Burnet versus Coronado Oil (1932). This is a formulation of stare decisis with which Judge Kennedy agrees.

The merits of following past precedent, particularly in statutory interpretation where Congress can make corrections by statute, are predictability and confidence that the law does not change with the personnel of the court. On the other hand, it is wise to overrule an erroneous statutory interpretation when disruption to institutions and the intent of Congress outweigh the need for stability.

The Supreme Court is sworn to uphold the Constitution, not its own case law. We are all grateful that past Courts have taken this view because they upheld the Constitution in overruling Plessy versus Ferguson and the Court's Lochner substantive due process era. Therefore, the occasion may arise when the Court would consider overruling its own constitutional precedent. At the same time, many great jurists have reached the conclusion that some past Supreme Court decisions should not be overruled even if they appear to have been incorrectly decided years ago. The reason given for refusing to revisit settled cases is that they have now become so engrained into our jurisprudence and so many expectations and institutions have been built up around those settled cases that it is no longer prudent to consider a reversal. Judge Kennedy has indicated that he will carefully weigh both of these values as he confronts the issue of stare decisis.

SEPARATION OF POWERS

Our Constitution envisions a National Government of separated powers. Each of the three branches is supreme within its own areas of governance and each is subordinate to others in areas not allocated to it by the Constitution. The judiciary and particularly the Supreme Court has the responsibility to police the bounds which separate the coordinate branches. These points are hallmarks of Judge Kennedy's legal philosophy, as evidenced in his Chadha decision which protected the prerogatives of the executive and judicial branches against Congress' efforts to impose an unconstitutional legislative veto.

The Chadha decision, in a fashion that seems to be characteristic of his thorough approach to cases, considers each of the justifications for a one-house veto and shows how none of them satisfies the Constitution. I would like to go through those briefly to better illustrate how he breaks a case down into smaller issues and resolves those questions.

Immigrants are either deported or not depending on an executive determination by the Justice Department. That executive decision can be appealed to a circuit court. The first argument for a one-house veto was that it was necessary to correct errors made by the executive or judicial branches. Judge Kennedy found this veto to be insufficient as a corrective device because it usurped certain functions central to the executive and judicial branches and disrupted the operations of those other branches. The judiciary, for instance, is responsible to adjudicate cases and controversies, yet this veto rendered the judicial adjudications null and void. Similarly the executive branch's execution of the laws was voided by the congressional interference.

The next justification for the veto was just that Congress was entitled to

share in the administration of a statutory program. The flaw here was that Congress was not attempting to change the course of future administation of a program, which it is entitled to do by changing the law. Instead Congress was meddling in specific facts of past cases without changing the law. This was a congressional attempt to execute the current law, rather than to change it.

Finally it was argued that Congress was just using the veto as a quasi-legislative act, much as it might pass a private bill to affect the outcome of a particular matter. This argument was also found to be insufficient. A one-house veto would not suffice as a legislative act because it did not go through the second house, nor did it gain Presidential approval. This Chadha decision was a courageous judicial act. It is not easy for a judge to risk disagreeing with Congress, yet it is essential to our constitutional system. The best statement of why this kind of courage is essential is found in Judge Kennedy's writings. He states: "The * * * first purpose [of the separation of powers principle] is to prevent an unnecessary and therefore dangerous concentration of power in one branch."

According to my analysis, Judge Kennedy also decided one other important separation of powers case—namely Pacemaker versus Instromedix which dealt with the validity of trials conducted by magistrates with the consent of the parties. This process was upheld. Individuals could allege no harm in trials conducted by magistrates because the parties agree in advance to submit to that jurisdiction. Moreover there is no harm to the constitutional structure because article III judges appoint and can remove magistrates thus assuring that full control of the judicial process remains with life-tenured judges. Several other circuits have considered this issue and have generally agreed with Judge Kennedy's analysis.

The question of the proper balance to be struck in separation of powers issues will be important to the Supreme Court in future years. It seems to me that Judge Kennedy has demonstrated a marvelous grasp of these issues and has indeed been a magnificent defender of constitutional principles in this area.

SUPREME COURT INSTITUTION

There is much value in a unanimous Court. When the Court is unanimous, it tends to put an end to any further debate about the merits of a decision. Supreme Court historians have recounted how Chief Justice Burger labored diligently to get a unanimous Court in the United States versus Nixon case concerning Executive privilege during the Watergate era. Similarly, historians report that Chief Justice Warren worked to get a unanimous Court on Brown versus Board. A Supreme Court Justice is sworn to uphold the Constitution and we should expect Judge Kennedy to do nothing else, but there might be times when unanimity on a ruling is more important than a dissenting view. In his analysis of this particular issue, Judge Kennedy indicated that he has grappled with this issue and has at times "concurred in an opinion simply because [he] didn't think the majority had it right * * * and * * * there is much * * * to commend judges to try to concur in other judges' opinions."

There is another side of this coin—the need to stand courageously alone for principle. Plessy versus Ferguson was the infamous separate but equal case of 1896. As you well know, a single Justice—Justice Harlan—issued a remarkable dissent reminding the Nation that the Constitution ought to be colorblind. Judge Kennedy indicated that if a matter of principle has been ignored, or if a matter of principle affects constitutional rule, or there is a principle that affects the judgment in a case, then a judge "must state that principle regardless of how embarrassing or awkward it may be."

The Supreme Court is an institution which must gauge and protect its own credibility and standing as the leading voice of one of the coordinate branches of government. In recent years, the Court's opinions have become far more complex. Plurality opinions have multiplied. Hardly any opinion is issued without an accompanying flurry of concurrences and dissents. On one hand, this is an important part of the process because arguments are preserved for the future and the law tends to develop more deliberately as the legal and political communities respond to an unresolved mosaic of opinions on a single issue. On the other hand, when the Court issues an opinion which nods to both sides of an issue or which includes a five-prong analysis of complex factors, what the Court has actually done is abdicate. Instead of giving clear guidance, it has left to lower courts to give various kinds of emphasis to various parts of the mosaic.

In order to get shorter, more succinct, and clearer guidance in these opinions, Judge Kennedy indicated that "Justices must be conscious of the duties that they have to the public, the duties they have to the lower courts, the duties they have to the bar—to give opinions that are clear, workable, pragmatic, understanding, and well-founded in the Constitution. * * * [J]udges must be also careful about distinguishing between a matter of principle and a matter that really is dear to their own ego."

SCHENLEY INDUSTRIES ALLEGATIONS

Questions were raised about Judge Kennedy's conduct as a representative for Schenley Industries which is one of the larger liquor distillers in the United States. In fact, the L.A. Times reported on November 12 that he was a lobbyist for the company at a time that it was paying illegal kickbacks to liquor distributors and restaurants in New York. The facts show that this allegation is totally false.

Judge Kennedy stopped representing Schenley when he took a seat on the ninth circuit in 1975. It was not until 1977 that Schenley pled guilty to paying some illegal kickbacks in New York in 1973 and 1975. Judge Kennedy has stated that he never had any involvement with Schenley's business dealings outside of California. Moreover, officials of the intelligence unit of the New York Liquor Authority confirm that there is no record of any involvement of Judge Kennedy in the violations by Schenley.

Upon closer examination, even the L.A. Times article is careful to state that "records give no indication that Judge Kennedy * * * played any role in the illicit schemes, for which Schenley later agreed to pay $79,000 in fines." I only wish this had been the headline. One further point, the California Department of Alcohol Beverage Control affirms that Judge Kennedy's name never arises in connection with any investigatory matters. I hope these facts put any lingering questions about this point to rest.

CONCLUSION

Judge Kennedy has had a distinguished legal career. A review of his decisions on the Ninth Circuit Court of Appeals and his testimony before the Judiciary Committee reveal a man who understands the law and the role of the Supreme Court in upholding the law. He is a man of compassion who will use the Constitution to protect the rights of all citizens. The President has made an excellent decision in submitting the name of Judge Kennedy to this body for its advice and consent, and I would urge all of my colleagues to support this nomination.

I express my remarks for Judge Kennedy and my total support for him and I believe the American people are going to be very pleased and very happy to have this man on the Court.

Mr. KENNEDY. I yield the Senator from Ohio 15 minutes.

The ACTING PRESIDENT pro tempore. The Senator from Ohio.

Mr. METZENBAUM. Mr. President, I am pleased to stand in support of the nomination of Judge Kennedy to be an Associate Justice of the U.S. Supreme Court. Judge Kennedy is eminently qualified by reason of character, temperament and judicial philosophy to serve on the Nation's Highest Court.

Judge Kennedy impressed the entire Judiciary Committee with his intel-

lect, judiciousness, openmindedness, respect for precedent, and capacity for growth. These are the quintessential qualities of judging, qualities which Judge Kennedy possesses in abundance. He is a judge's judge.

While the nominee is well-qualified for a seat on the Court, I am troubled by what appears to be an insufficient sensitivity on his part in the area of civil rights. Though his personal commitment to racial and sexual equality is beyond question, he is not one who, by temperament or outlook, has reacted aggressively and boldly against discrimination, in whatever form it raises its ugly head. In too many cases—the Aranda, AFSCME, and Topic decisions, to name a few—he has tolerated subtle, systemic forms of racial and sexual discrimination. Too often he has upheld discriminatory conduct simply because there was no clear evidence or discriminatory motive or intent. The law, however, is not this narrow; it condemns both intentional and unintentional discrimination. I would hope that Judge Kennedy, when he is Justice Kennedy, will be more receptive to claims of subtle yet very real discrimination, than he has been in the past.

But even if Judge Kennedy has not been quite as sensitive to claims of systemic discrimination as I would have liked him to be, that alone is not a sufficient basis for opposing his confirmation. For as the Judiciary Committee report states, the Senate must not dictate its particular choice to the President. Rather, its constitutional task, before granting its consent to the appointment, is to certify that the nominee's judicial philosophy is sound and poses no threat to constitutionally protected rights enjoyed by all Americans.

I have weighed Judge Kennedy's constitutional and judicial philosophy and found that it is that of a classical mainstream conservative, in the tradition of Justices Powell, Harlan, Black, and Frankfurter. It is a philosophy that recognizes that the right of privacy is an inherent element of individual liberty, that the words of the 14th amendment, "No person shall be denied the equal protection of the law," admits of no exception.

It is a philosophy that recognizes that the Constitution is a living thing, that its meaning changes as, in Judge Kennedy's words, "our understanding of it changes"—an understanding anchored to the fundamental values of the framers, but shaped and reshaped by the history and experience of each succeeding generation.

It is a philosophy that exhibits an abiding and passionate respect for precedent, for a stable, reasoned, evolutionary change in the law and meaning of the Constitution.

It is a philosophy that respects the will of the people, as expressed through their elected representatives, and that is reluctant to thwart their wishes. But it is also a philosophy that will not hesitate to override the popular mood when it threatens to trample upon the constitutional rights and liberties of the minority, the poor, and the powerless.

It is a philosophy that approaches and decides each case one at a time, without any overarching, absolutist view of constitutional interpretation. It is a philosophy that rejects, as an end in itself, the rigid and unworkable doctrine of "original intent" espoused by the previous nominee and repudiated by this body in its rejection of that nominee.

It is a philosophy that recognizes that compassion, pragmatism, and commonsense notions of justice and fairness are valid components of judicial decisionmaking, that recognizes that the great words and clauses of the Constitution—liberty, due process, equal protection—are, in Judge Kennedy's words, "spacious phrases," to be understood and applied flexibly, humanely, from the heart as well as the head.

In short, it is the philosophy of cautious and compassionate judging that has always been the bulwark and genius of our system of jurisprudence, that has built slowly, steadily, inexorably, upon the constitutional foundation laid by our forefathers.

On the great questions of equality and liberty that will come before him, I am satisfied that Justice Kennedy will respond with a devotion to justice and to law, with a humble appreciation of the immense power of the Court, and with the courage and determination to defend the ideals of the Constitution whenever the law and his conscience require him to do so.

The confirmation of Judge Kennedy will be a triumph not only of justice but of process. The Judiciary Committee, guided so ably and fairly by Chairman BIDEN, has done its job well. Senators have conducted themselves honorably and courageously, guided by their concept of the Constitution, their consciences, and their sense of duty.

At a time of increasing public concern about the Senate as a working, functioning institution, we can be proud that in these nominations—matters of great current and historic significance—we rose to the occasion and did our duty.

But we must not rest on our success. For this experience to have lasting value, it must become a precedent for the future. Never again must we return to the lazy practice of the past, of rubberstamping nominees to the Supreme Court, of permitting them to evade legitimate substantive inquiry.

While it is not appropriate for the Senate to inquire into how a nominee will vote in a particular case, it is essential that it conduct a searching examination of the nominee's general judicial philosophy, in order to satisfy itself that he or she respects certain inviolate principles and values of our constitutional system of government. That is the standard we have applied in our consideration of the present and previous nominee—a standard fully consistent with the dictates of the Senate's constitutional power of advice and consent. And it is the standard which we should apply to all future Supreme Court nominations.

Judge Kennedy meets this standard, and I join with all of my colleagues today in wishing him a long and distinguished career on the Court.

I yield the floor.

Mr. THURMOND. Mr. President, I now yield 3 minutes to the able Senator from Wyoming [Mr. SIMPSON].

The PRESIDING OFFICER. The Senator from Wyoming is recognized.

Mr. SIMPSON. Mr. President, I lend my support to the nomination of Anthony Kennedy to be the next Associate Justice of the Supreme Court.

I think we are very fortunate to have this man and to be able to confirm such an outstanding nominee.

I want to also add that the skill and fairness of the Judiciary Committee chairman, the junior Senator from Delaware, was very evident. We held our hearings in a timely fashion and reported to the Senate the nomination with unanimous approval.

I thank the chairman and the ranking member, Senator THURMOND, for his fine work and superb job. This nominee is going to do a superb job, too. He has a history of unanimous approval. For his current post in the ninth circuit, he received unanimous confirmation. It was the unanimous opinion from the ABA that he is "well qualified" for this position, and the Judiciary Committee unanimously recommended him.

When we started this we stated that our inquiry should have been simply whether Judge Kennedy possessed the integrity, temperament, and ability to be on the Supreme Court and whether his judicial philosophy, without consideration of his political philosophy, was worthy of representation on the Court. Through 3 days of hearings, on which I sat, of consideration by the Judiciary Committee, we heard nothing at all that changed our opinion that Judge Kennedy met every one of those tests. He passed every single test.

So as we perform our fulfillment, of our duty of advice and consent, the only troublesome thing we see is we do not really have an objective or uniform standard to which each Senator may look in making his or her decision on such a critically important matter, and indeed that is so troublesome because the tenure of these Justices will

likely far exceed the tenure of those of us who provide the advice and consent.

It is a troublesome thing, not in this situation, but in previous activity in my time on the Judiciary Committee. Senators are free to consider whatever criteria they wish, and that may and certainly has unfortunately included the political litmus test or reaction to an individual or at least the reaction of the most vocal interest groups.

Perhaps we need to review that. We will in the future I know.

So the Court needs the addition of Judge Kennedy for this February term. It requires his addition, and he will assure faithfulness to the Constitution.

A final irony of the proceedings to me was that we were cautioned not to speak about the Bork nomination during the Kennedy nomination, and yet during the hearings in Judiciary, that seemed to be about all I heard.

So hopefully, we put all that aside and will come now to this.

It is good to be able to cast this vote for this remarkable man, and I hope we can do things with our procedures in the future that will avoid things that happened in the previous nomination.

Thank you.

The ACTING PRESIDENT pro tempore. The Senator from Massachusetts.

Mr. KENNEDY. I yield such time to the majority leader as he may require.

The PRESIDING OFFICER (Mr. REID). The majority leader.

Mr. BYRD. Mr. President, I thank the distinguished Senator from Massachusetts, [Mr. KENNEDY].

Mr. President, today is a proud moment in the history of the Senate. Under the simple but remarkable provisions of article II, section 2 of the Constitution, the Senate is completing its advice and consent function in the appointment of a Justice of the Supreme Court. I commend the Judiciary Committee, and its chairman, Senator BIDEN, in particular, for the fair and thorough consideration of the President's nominations for the vacancy created by the resignation of Mr. Justice Powell.

This has not been an easy time for the Senate. It has not been easy to say no to a popular President, to say no to a well-known judge and scholar, and to insist upon a different nominee. But I believe that history will record this as one of this body's great moments. For the Senate has done nothing less than to seek to protect the Constitution itself, by placing the document in the trust of one who views it as protecting, rather than limiting, the liberty of our people, including the right of privacy.

The Senate has sought and hopes to obtain—at least a good many of us have sought and hope to attain—in Anthony Kennedy an Associate Justice who is a conservative devoted to genuine judicial restraint. Judge Kennedy claims no grand ideological scheme of constitutional interpretation, and, as a judge, his practice has been to limit the effects of his decisions to the particulars of each case. He is a man of intelligence and humility. He understands the need for a commonsense approach to criminal law, by considering the rights of society and victims as well as those of the accused. He respects the great institutions of our Government, by showing equal regard for each of its three branches, and acknowledging the occasional need for Congress to appeal to the courts to determine its rights vis-a-vis the Executive.

Judge Kennedy appears to be a true conservative, and the Senate can be proud for its part in achieving his appointment.

Mr. THURMOND. Mr. President, I now yield 2 minutes to the able Senator from Virginia, Senator WARNER.

Mr. WARNER. Mr. President, today the Senate considers the nomination of Judge Anthony M. Kennedy to the position of Associate Justice of the Supreme Court of the United States.

As we proceed to this historic vote, we have very much in mind Judge Bork as well as Judge Kennedy. Speaking for this Senator, while I disagreed with Judge Bork and eventually on the day of the vote cast a vote against him, today I rise to say that nothing in my deliberations with respect to him was intended to be personal or to reflect in any way adversely upon his professional attainments, his character, or that of his family. In fact, I open my remarks today by wishing him well as he steps down from the bench. He fought a courageous battle professionally and personally, and now he and his family have a new venture before them which we all hope will be successful.

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. It requires the collaborative efforts of the Senate as a whole. As do others in this Chamber, I take this responsibility very seriously.

I have had the privilege of meeting with Judge Kennedy, selectively read from his opinions and examined the record of the Judiciary Committee, which, although late, we have had an opportunity to look at. Further, I have had extensive conversations on this nomination with my Senate colleagues, many Virginians, and others whose judgment I value. The extraordinary qualifications of this nominee have brought forth many statements of commendation, but have provoked little debate. This reflects great credibility upon Judge Kennedy.

Judge Kennedy will fill the position on the Court left vacant by the retirement last June of Justice Lewis F. Powell, Jr. Justice Powell, a fellow Virginian, served with great distinction on the Supreme Court. I have been honored to know him, and we all are greatful for his service to the Nation. Over the years his decisions consistently revealed an understanding and sensitivity to the rights and freedoms guaranteed by the Constitution and the traditional role of the Supreme Court in interpreting and protecting those rights. It is a tribute to Justice Powell to appoint as his successor one who the President and the Senate have confidence will continue his traditional approach to service on our Highest Court.

Mr. President, I believe that Judge Kennedy will be such a jurist, and I rise today in support of his confirmation as Associate Justice of the Supreme Court.

Judge Kennedy received a unanimous endorsement of "well qualified" from the American Bar Association. This endorsement is reserved for those who meet the highest standards of professional competence, judicial temperament and integrity.

There is no question of Judge Kennedy's professional competence. An honors graduate of Stanford University and a graduate cum laude of Harvard Law School, he practiced law in his home State of California, and he has taught constitutional law at the University of the Pacific since 1965. He is a 12-year veteran of the Ninth U.S. Circuit Court of Appeals where he participated in over 1,400 decisions and authored over 400 opinions.

Just as important, however, Judge Kennedy exhibits those qualities of judicial temperament and integrity that are so essential for one occupying any judicial position, especially that of Justice on the Supreme Court.

I was privileged to serve as a law clerk for Judge Barrett Prettyman who left an indelible mark on my own concept of judicial temperament. The compassion, sensitivity, and understanding of the pleas of the people shown by that distinguished jurist form the benchmark against which I measure any judicial nominee. These are the standards I adhere to in my consideration of judicial nominations.

It is clear to me that Judge Kennedy accepts those fundamental constitutional values long recognized by the Supreme Court, and he is sensitive to those rights that underlie the great issues that come before the Court. When questioned about any right to privacy inherent in the Constitution, Judge Kennedy replied:

> * * * there is a "zone of liberty" * * * where the individual can tell the government, "Beyond this line you may not go."

Judge Kennedy's numerous criminal law opinions reveal the mind of a fair jurist—fair to the rights of the accused and fair to the rights of society. His decisions concerning the separation of powers indicate an appreciation for the delicate system of checks and balances inherent in our Constitution.

Judge Kennedy's decisions reveal a respect for Supreme Court precedent and a belief in judicial restraint—but not judicial rigidity. At the hearings, Judge Kennedy spoke of a Constitution with a built in capability for growth. In speeches and writings he has stated that no one can plumb all the Constitution's ambiguities to provide definitive answers to the hardest questions it poses—questions as to how far the Supreme Court should go in restraining majority rule, and how powers over foreign affairs should be allocated between the President and Congress. His decisions show a cautious case-by-case analysis of the complexities of law and fact presented rather than an overarching "unitary theory" engraved in stone. Authored decisions show a mind willing to search for the appropriate balance between the rights of individuals and the power of government in a diverse and pluralistic society.

Judge Kennedy has an open, constantly probing mind. The public record of his service to our Nation clearly documents a strong adherence to the fundamental principles of mainstream conservatism. I am hopeful he will carry forward these characteristics and principles in rendering judgment on the important issues he will face in the future.

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator's time has expired.

Ms. MIKULSKI. I ask unanimous consent that I may proceed for 5 minutes.

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

Ms. MIKULSKI. Mr. President, of the thousands of votes I will cast as a Senator, a vote on the confirmation of a nominee for the Supreme Court is among the most important and far reaching. As I see it, the paramount responsibility of the Supreme Court is 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 the words in our Constitution.

There are three key criteria I use in evaluating a nominee for the U.S. Supreme Court.

First, is the nominee competent?

Second, does the nominee possess the highest personal and professional integrity?

Third, will the nominee protect and preserve the core constitutional values and guarantees that are central to our system of government, such as freedom of speech and religion, the right to privacy and to equal protection of the law?

I have considered the nomination of Judge Anthony Kennedy using these criteria. There is no question that Judge Kennedy is an able, experienced and very competent jurist. Accordingly, the American Bar Association gave Judge Kennedy its highest rating.

However, there is one aspect of Judge Kennedy's record that I find troubling and I would like the RECORD to show and for Judge Kennedy to keep in mind.

Judge Kennedy has for many years belonged to clubs that discriminate against women and minorities. He maintained membership in such clubs even after the California Code of Judicial Conduct was amended to provide that such membership was inappropriate for a judge. It was only when he was under serious consideration for this nomination that he resigned his membership in the Olympic Club, a club that discriminates against women.

The obvious question such membership raises is whether a judge who belongs to clubs that have discriminatory membership policies—be they based on race, gender, religion, or some other invidious factor—is truly committed to equal justice under law? As regards Judge Kennedy, the record is very unsettled on this critical point.

Judge Kennedy's longstanding membership in discriminatory clubs, at a minimum, gives rise to the perception by minorities, women and others that the judge's impartiality is impaired. A review of the judge's decisions in cases involving the civil rights of minorities and women, where he overwhelmingly has rejected their claims, supports such perception. In 1982, Judge Kennedy dissented from a ninth circuit decision which found that an airline's policy requiring women, but not men, flight attendants to meet certain weight restrictions discriminated against women. Judge Kennedy thought that the company ought to be able to justify its policy based on what it called customer preference for attractive women. Certainly chubby male airline flight attendants were just as offensive as chubby female airline flight attendants. He failed to recognize that both the policy and the supposed business justification were discriminatory. Male flight attendants had as much customer contact as the female attendants.

Equal justice under the law is not just some bumper sticker slogan. It is the central promise of the Constitution. It is the cornerstone of our democracy. The Supreme Court is the guarantor of constitutional rights in the ongoing struggle for equal justice under the law. A Supreme Court Justice's commitment to equal justice must be absolute and unequivocal. And to be meaningful, that commitment must be based on an understanding or discrimination and of the impact of the barriers minorities and women face in their struggle for equality.

Before the Judiciary Committee, Judge Kennedy discussed his club membership and his understanding of the statutory and constitutional protections against discrimination. Eventually, he said the right things. He acknowledged that the "highest duty of a judge is to use the full extent of his or her power where a minority group or even a single person is being denied the rights and protections of the Constitution." He agreed that "civil rights statutes should not be interpreted in a grudging, timorous or unrealistic way to defeat congressional intent or to delay remedies necessary to afford full protection of the law to persons deprived of their rights."

I am going to take Judge Kennedy at his word because I believe he is an honorable man.

Judge Kennedy has promised this Senate, and the American people, that he will vigorously and aggressively enforce our rights under the Constitution. I submit that the American people, in all our diversity, are entitled to nothing less. Based on Judge Kennedy's testimony, the entire record developed by the Judiciary Committee, and on the premise that this nominee is a man of honor who can be taken at his word, I have decided to vote to confirm Judge Kennedy, and hope that he would learn from the process of discussion with the committee that our Constitution and our country is broader than he might have once thought.

I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator has yielded back the remainder of her 5 minutes.

The Senator from South Carolina.

Mr. THURMOND. Mr. President, I now yield 3 minutes to the able Senator from Pennsylvania, Mr. SPECTER.

The PRESIDING OFFICER. The Senator is recognized for 3 minutes.

Mr. SPECTER. I thank the Chair and I thank my distinguished colleague, the ranking member of the Judiciary Committee on the Republican side, the former chairman, Senator THURMOND.

Mr. President, I support the nomination of Judge Kennedy for the Supreme Court because he is well qualified by way of academic experience, a practicing lawyer, and his work as a court of appeals judge. While I do not agree with all of his decisions and have made some comments during the course of the hearings about reservations on minorities' rights and women's rights, I think that his response was very pointed and appropriate on the issue of sensitivity to Hispanic concerns.

I believe that Judge Kennedy is a man who has the capacity to grow and will be an outstanding U.S. Supreme Court Justice.

Mr. President, I believe that the nominating process of Judge Kennedy has been a growing experience for the Senate and for the country as it follows on the heels of the nominating process for Judge Bork and Judge Ginsburg. We have established, I believe, in the 100th Congress a very important precedent that judicial philosophy is relevant and appropriate for Senate consideration. There was a dispute on this issue, significantly, during the confirmation proceedings for Chief Justice Rehnquist and Justice Scalia, but I think that the precedent is now established. In a speech recently, Chief Justice Rehnquist agreed that judicial philosophy was appropriate for consideration. And it is important to note that Judge Bork agreed with that as a matter of principle. And now, with the Judge Bork proceedings and with Judge Kennedy's proceedings, I think that is firmly established.

There is another important consequence, Mr. President, of these nominating proceedings, in my judgment; that is, the impact of the U.S. Senate and of the public concern about the administration of justice as it has an effect on the nominees who come before the Senate. When I had a session with Judge Kennedy in my office, he asked me—and I repeated this on the record during the hearings—he asked me whether I thought the advice and consent function of the Senate included advice to those who were nominated. I said that it would really be up to the nominees as to whether they would take that advice and suggestions from the Senators.

During the course of our proceedings with Judge Kennedy, and as with Judge Bork and other matters, Senators make as many speeches as they ask questions and give their own views as we believe them from our own experience and from our sense of representation of our constituency. I had made the comment to Judge Kennedy that I thought the process was a very useful one, as we heard the judicial philosophy.

I am supporting the nomination of Judge Anthony Kennedy to be an Associate Justice on the U.S. Supreme Court. I think Judge Kennedy is well qualified on the basis of his excellent academic record, his distinguished work as a practicing lawyer, and his balanced record as a judge on the U.S. Court of Appeals for the Ninth Circuit.

Judge Kennedy's record, including his testimony before the Judiciary Committee, demonstrates that he does not wear an ideological straightjacket and that he is devoted to genuine judicial restraint. I do not necessarily agree with all of Judge Kennedy's decisions. In my view, however, the appropriate issue for the U.S. Senate is not whether individual Senators agree with all of a nominee's decisions, but whether the nominee is within the tradition of U.S. Supreme Court jurisprudence. I am convinced that Judge Kennedy is within that tradition.

I was particularly pleased by a response made to a written followup question based upon the testimony of one of the witnesses who appeared before the committee after Judge Kennedy's appearance. Ms. Antonia Hernandez, president and general counsel of the Mexican American Legal Defense and Education Fund, made a very important point when she indicated that she and her group, while not opposing Judge Kennedy's nomination, were genuinely concerned about his sensitivity to issues of importance to Hispanic Americans, and were hopeful that Judge Kennedy would clarify his views and beliefs in a way that could reassure her.

Ms. Hernandez raised concerns about the AFSCME case, the Spangler case, the TOPIC case, and the Aranda case. During the hearings, I had questioned Judge Kennedy about those cases. I believe that Judge Kennedy's response to Ms. Hernandez's testimony shows an appropriate sensitivity and capacity for growth as a judge.

I also am particularly impressed by Judge Kennedy's characterization of the 14th amendment's liberty clause as a spacious one, which can enable a "people [to] rise above its own injustice" to correct "the inequities that prevail at a particular time."

One witness, Mr. Nathaniel S. Colley, Sr., a black civil rights leader from California provided key insights into the nominee's approach to constitutional rights. Mr. Colley had known Judge Kennedy's family for almost 40 years and had known Judge Kennedy himself for 20 years. He testified about Judge Kennedy's solid record on civil rights and minorities' rights, notwithstanding that Mr. Colley disagreed with some of the nominee's specific decisions. And Mr. Colley well summarized Judge Kennedy's record when he characterized Judge Kennedy as a grown man who would grow more.

The Judiciary Committee's and Senate's confirmation procedures over the last 7 months, with three different nominees to the Supreme Court, have been a growing experience for our country.

While today we will end the process of filling the current Court vacancy, I do not think the debate about the nomination process is over. I do think, however, that we have firmly established that judicial philosophy is a relevant and proper issue for the committee and full Senate to consider. Each nominee agreed with this position, and Chief Justice Rehnquist, who was not willing to answer all such questions during his own confirmation hearings 18 months ago, recently said in a speech that he now thinks that questions about judicial philosophy are appropriate.

In closing, I would like to mention an interesting remark that Judge Kennedy made during one of our private meetings which I referred to in the hearings. Judge Kennedy asked me whether I thought the advice and consent clause of the Constitution provided for Senators to give advice to a nominee. My response was the clause does not mandate such advice but that it would be useful, if a nominee was willing to take such advice I believe the Senate can have a significant impact on the thinking of nominees. In our private meetings with nominees, and through our questions—which sometimes resemble speeches—we convey our own views to a nominee. I believe that nominees may emerge from this with a different perspective. This process of interaction and growth is ongoing. In my view Judge Kennedy has grown, the Judiciary Committee and the Senate have grown, and our country has grown—all for the better.

The PRESIDING OFFICER. The Senator from Maryland.

Ms. MIKULSKI. Mr. President, I yield, on behalf of the Judiciary Committee, 5 minutes to the Senator from Vermont.

The PRESIDING OFFICER. The Senator from Vermont is recognized for 5 minutes.

Mr. LEAHY. Mr. President, I thank the Senator from Maryland.

Mr. President, I will vote to confirm the nomination of Judge Anthony Kennedy to be an Associate Justice of the U.S. Supreme Court. I also wish to cast a vote of support for the confirmation process that the Judiciary Committee began and that the Senate completes today. I am proud to be able to cast both votes. I believe that we have fairly established the record by which this body can judge Judge Kennedy, just as we have firmly established the process by which the Senate will scrutinize all future nominees for the Supreme Court.

I think we are at a turning point in Senate history. All nominees for the Supreme Court can expect and should expect rigorous examination of their views and their record of their philosophy before they go on the Supreme Court.

The Senate's duty of advice and consent is, without question, a tremendous responsibility. It is a constitutional responsibility which, by its nature, affects all three branches of our Government. It is a responsibility that we fulfill only by a rigorous confirmation process.

The process we have now established in the Senate is a rigorous one. In three important ways, it follows the

high standards we set several months ago when we considered the nomination of Judge Robert H. Bork.

Our review of Judge Kennedy's nomination, like our review of Judge Bork, has been thorough and extensive. The Judiciary Committee reviewed all of Judge Kennedy's 438 published opinions. We read his public speeches. We examined his private law practice and his extrajudicial activities. Then, in 2 days of hearings, we questioned Judge Kennedy for over 12 hours on a wide range of subjects.

Second, as with Judge Bork, our review of Judge Kennedy's nomination focused on his judicial philosophy: his approach to the Constitution, and to the role of the courts in discerning and enforcing its commands. By rejecting the argument that a nominee's philosophy is irrelevant or inappropriate for Senate consideration, we reaffirm the best traditions of the Senate. As Senator George Norris told this body more than half a century ago:

> When we are passing on a judge . . . we ought not only to know whether he is a good lawyer, not only whether he is honest . . . but we ought to know how he approaches these great questions of human liberty.

No issue is more central to a decision on the nomination of a Justice to the Supreme Court—the Court which is the ultimate arbiter of our constitutional rights—than the nominee's judicial philosophy.

The Judiciary Committee questioned Judge Kennedy at length about his approach to the Constitution, and especially to the critical issues of individual rights—the right to privacy, the right to freedom of speech, the right to equal protection of the laws, the rights of criminal defendants. "The result," as the New York Times later observed, "was an absorbing real-life course in constitutional law in which the nominee and the [committee] learned from each other."

Third, the committee's review of Judge Kennedy's nomination, like our review of Judge Bork, was fair and open. Judge Kennedy himself was given a chance to respond to every question, to address every concern, to put his record into context. Thereafter, the committee heard testimony from 28 public witnesses, both for and against the nomination. And Judge Kennedy was given an opportunity to respond in writing to issues these witnesses raised.

The result is a record on which the Senate may soundly judge the nomination, and a confirmation process that fulfills our duty to the Constitution and to the American people. It is a process of which I think we can all be proud.

What did this rigorous confirmation process tell us about Judge Kennedy, and about whether his nomination should be confirmed?

For one thing, we learned that Judge Kennedy is a man for whom ethics is not a recent discovery. As one of his boyhood friends recounted, "It always seemed to me that when we did something naughty, Tony went home."

We also learned that Judge Kennedy is an excellent professor of constitutional law, whose students often applaud when he completes a lecture. We learned that he is a judge who comes to court prepared and with an open mind, ready to listen to the arguments of both sides in the case before him. He takes each case as it is presented and carefully crafts an opinion that tries to resolve the dispute between the parties.

But most of all, we learned about Judge Kennedy's judicial philosophy—his approach to some of the fundamental issues on which a Supreme Court Justice must rule.

As we probed his thinking, we learned that Judge Kennedy is a case-by-case judge. To use his words, he does not offer "a complete cosmology of the Constitution." He has no "unitary theory of interpretation."

Nor, it appears, does he have an agenda to reverse scores of important Supreme Court decisions. Unlike Judge Bork, he does not promise to "sweep the elegant, erudite, pretentious and toxic detritus of non-originalism out to sea."

Rather, Judge Kennedy has respect for many of the major rulings that the Court has handed down in the last three decades—rulings that go to the heart of the Supreme Court's role a guardian of constitutional rights. As Congresswoman Barbara Jordan so eloquently put it in her testimony to the Judiciary Committee several months ago:

> Many people, particularly weak people, underprivileged, unrepresented, minority people, particularly the outs, have looked to the Supreme Court as the rescuer. The Supreme Court [has] throw[n] out a lifeline when the legislators and the governors and everybody else [has] refuse[d] to do so.

I questioned Judge Kennedy about some of these lifelines—about some of the important cases decided by the Court under the fourth, fifth, and sixth amendments to the Constitution. I found his answers thoughtful and reasonable.

What, I asked, did he think of the Supreme Court's decision in Miranda versus Arizona, the ruling that required police to warn suspects of their rights to remain silent and to be represented by counsel? "It was a sweeping, sweeping rule," he replied. "It went to the verge of the law. * * * But since it is established, it is entitled to great respect. I know of no strong argument to overturn it."

What, I asked, did he think of Mapp versus Ohio, the decision requiring courts to exclude illegally seized evidence? Judge Kennedy answered, "Now that it is in place, I think we have had experience with it, and I think it is a workable part of the criminal system."

What about Gideon versus Wainwright—the decision establishing the right to have counsel appointed in all felony cases—did he have a problem with that? "No," he answered, adding "I know of no really substantial advocacy for its change."

In each of these instances, Judge Kennedy indicated his respect for a landmark decision in constitutional law, and thus his recognition of an important constitutional right. He also indicated an openness to consider arguments that each of these decisions should be overturned, but not without compelling and "substantial" advocacy—a thoroughly fitting view for a member of our Highest Court.

I was also reassured by Judge Kennedy's testimony on the subject of unenumerated rights—fundamental rights not spelled out in the text of the Constitution—and especially the unenumerated right of privacy.

Judge Kennedy testified that "There is a zone of liberty, a zone of protection, a line that's drawn where the individual can tell the Government, 'Beyond this line you may not go.'" That zone of liberty, he later said in response to one of my questions, is "quite expansive, quite sufficient to protect the values of privacy that Americans legitimately think are part of their constitutional heritage."

Judge Kennedy also recognized that it is the role of the Supreme Court to draw the line that protects the zone of liberty, but he declined to specify where exactly the line should be drawn. He would not specify which unenumerated rights the courts may enforce under the Constitution and which rights must be protected by the other branches of Government. He did say, however, that he recognizes a marital right of privacy.

I also appreciated Judge Kennedy's explanation of some of the factors he would look to in deciding whether an unenumerated right is a constitutional right that may be enforced by the courts. "There is a whole list of things," he said, but among them were:

> We look to see the concept of individuality and liberty and dignity that those who drafted the Constitution understood. We see what the hurt and the injury is to the particular claimant who is asserting the right. We see whether or not the right has been accepted as part of the rights of a free people in the historical interpretation of our own Constitution and the intentions of the Framers.

This testimony impressed me favorably. It reflects a philosophy of the Constitution as a living document that is fully capable of responding to the

challenges to our liberties that the future may present.

By contrast, I remain somewhat troubled by Judge Kennedy's record on civil rights and discrimination issues. This record was highlighted by a number of impressive witnesses who testified before the committee. One of the witnesses, Prof. Susan Deller Ross, pointed out that Judge Kennedy has repeatedly rejected discrimination claims by requiring a higher showing of intent to discriminate that the Supreme Court has ever required. She also noted that Judge Kennedy has never ruled for a woman on a substantive sex discrimination issue.

Another witness, Antonia Hernandez of the Mexican-American Legal Defense Fund, eloquently articulated the serious concerns of the Hispanic community about some of Judge Kennedy's decisions. In her view, Judge Kennedy's rulings in several important discrimination cases brought by Mexican-Americans improperly threw the claimants out of court.

There is also the troubling issue of Judge Kennedy's membership in several private clubs that do not accept women and that may discriminate against members of minority groups. It is true that Judge Kennedy made efforts to change the membership policies of two of these clubs, but these efforts did not begin for some time after the American Bar Association passed a rule discouraging judges from membership in discriminatory clubs. Judge Kennedy was a member of these clubs for many years, but he resigned from two of them only on the eve of his nomination. He told the committee he resigned "to prevent my membership from becoming an issue" in the confirmation process.

In his testimony before our committee, Judge Kennedy tried to lay to rest some of these concerns by a frank and simple statement about his commitment to equal rights. He said, "We simply do not have any real freedom if we have discrimination based on race, sex, religion or national origin, and I share that commitment."

I was also reassured by another statement Judge Kennedy made in connection with his membership in the private clubs. He said,

> Over the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and minorities. This [is] an issue on which I [am] continuing to educate myself.

I sincerely hope that Judge Kennedy continues to seek an understanding of the many forms that discrimination can take. In particular, I think he needs to continue what he has described as a process of self-education about the many forms in which the courts may encounter unfair discrimination against women and members of minority groups. But I must say honestly, Mr. President, there is probably not a single Member of this body who could not also undergo that continuing education.

From the measure I have of the man, I believe that he will continue to do so, just as I believe he will strive to perform fairly the duties of a Justice of the Supreme Court.

If Judge Kennedy's nomination to the High Court is confirmed, I am sure that I will not agree with every one of his decisions. But I believe that Judge Kennedy is a man of integrity, intelligence, and balance. He has a sense of history and a sense of the proper role of the Supreme Court. He has, I believe, the capacity to become a distinguished Supreme Court Justice.

This is a nomination to which the Senate should give its consent. I will vote to confirm Judge Kennedy as a Justice of the U.S. Supreme Court.

Mr. President, I wish also to take this opportunity to commend the distinguished chairman of the Judiciary Committee [Senator BIDEN] and the distinguished senior ranking member [Senator THURMOND] for their handling of this nomination and the prior nomination. Everybody had a chance to be heard fairly. Members on both sides of the aisle were heard fairly and then the Senate was able to work its will, as it will today. I think that is because of the cooperation between Senator BIDEN and Senator THURMOND. It is a joy to serve on that committee, knowing that these hearings will be held and have been held as fairly, openly, and honestly as they have.

I yield back whatever time I have remaining.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. KARNES. Mr. President, like many of my colleagues, I am relieved that the Senate now moves toward a vote on Judge Anthony M. Kennedy to be an Associate Justice of the Supreme Court. Judge Kennedy is a highly respected individual, lawyer, and jurist. He is worthy to fill that position. But, the fact remains that a previous nominee of the President whom I supported failed to survive the confirmation process because of strident attacks on his judicial philosophy. With that experience in mind, I believe all of us have taken even more seriously our constitutional role in confirming an individual to serve on the High Court.

It is with great interest as an attorney that I have engaged in the Supreme Court hearing process and arrived at a set of standards by which I evaluate judicial nominations. I have set out six principles that I will use to evaluate judicial candidates. These being character, integrity, intellect, and the judicial qualities of temperament, legal experience, and philosophy.

I have pursued the same analytical procedure with regard to Judge Kennedy's nomination that I have followed previously. I have evaluated this nomination, as I have other Presidential nominees: with an open mind and without any preconceptions. Only fairness and objectivity have dictated my final decision.

With regard to Judge Kennedy, no evidence has been produced which in my opinion constitutes grounds to oppose his confirmation. The unanimous vote for Judge Kennedy from my colleagues on the Senate Judiciary Committee further attests to his fitness to be a member of the Supreme Court. In the six areas I have used to test judicial nominees, Judge Kennedy has exhibited outstanding qualifications and qualities. He is a man of intellect, with sound values, an excellent academic record, extensive experience as a practicing lawyer, and balanced, well-reasoned opinions and positions as a Federal court of appeals judge on the Ninth Circuit Court of Appeals.

Judge Kennedy does not wear ideological blinders, but has demonstrated judicial restraint in limiting his opinions to the narrow issues of the cases before him without a tendency toward "judicial legislating." He is not a judicial activist. His opinions, speeches, and answers to questions, while showing a capacity for growth, also reveal an appreciation of the fact that our Constitution is a dynamic document which many times must be interpreted to respond to social issues born of changing times. Judge Kennedy has shown that he is capable of interpreting the Constitution to meet those changes without sacrificing the basic principles laid down by the Founding Fathers.

During Judge Kennedy's 2 days of testimony before the Senate Judiciary Committee, he proved himself to be a conservative, but not an extremist nor an activist. He is clearly within the mainstream of American judicial thought. During the hearings he was very open in expressing his judicial philosophy and I was pleased to hear that he has no single, simple constitutional theory for interpreting all cases.

Mr. President, much has been said about the seat Judge Kennedy has been nominated to fill—that of Justice Powell. The concern of some stems from the number of 5-to-4 decisions of the Court during Justice Powell's tenure, where he was in the majority. However, I believe that Judge Kennedy, if confirmed, will approach his service with the same sense of restraint, respect, and humility that Justice Powell exhibited during his tenure on the bench.

The American Bar Association was unanimous in giving Judge Kennedy its highest rating for a Supreme Court nominee—well-qualified. The ABA representative who testified during the hearings commented that he had ques-

tioned almost all of the 27 judges on the Ninth Circuit Court of Appeals that served with Judge Kennedy and that all of them had a deep and abiding respect for Judge Kennedy's sense of justice, for his ability to give everyone a fair hearing, and to make a decision on the facts before him. The ABA spokesman went on to testify that this accolade came from judges who carried a reputation of being liberal and judges who had a reputation of being conservative. Thus, among Judge Kennedy's peers, regardless of ideology, he has received high marks as a lawyer and jurist.

As with any judicial nomination, especially one to the Supreme Court, there may be those who will oppose this nomination just as in the case of Judge Bork. However, the arguments of those opposed to Judge Kennedy while deeply felt, are in my opinion, not supported by the nominee's judicial record or the weight of the testimony in his favor.

Judge Kennedy wrote more than 400 opinions while on the court of appeals. Many of these decisions demonstrate his commitment and sensitivity to civil rights. They also indicate that Judge Kennedy clearly understands the problems faced by law enforcement officials and that he is sensitive to the rights of the victims, as well as those of the accused. I am in complete agreement with the recent speech given by Judge Kennedy where he noted that, all too often in our criminal justice system, the rights of the victims are overlooked.

It is true that Judge Kennedy was noncommittal on some difficult issues like the Roe versus Wade decision, the Miranda decision, affirmative action and the death penalty, but he has given a good defense of his own opinions which were later reversed by the Supreme Court, such as the Washington State case where he rejected the claim for equal pay for jobs of comparable worth.

Mr. President, when I met with Judge Kennedy prior to the hearings, he addressed the issue of original intent, the 9th amendment, the equal protection clause of the 14th amendment, the right to privacy, and criminal law, all issues which have been the focus of great public interest during hearings on previous Supreme Court nominees. I am comfortable with his responses in each of these areas.

Judge Kennedy has a sound understanding of our Constitution and of its history, as well as its applicability in the current era. More importantly, I believe he is committed to safeguarding the U.S. Constitution, that great and most precious possession of American democracy. I believe that Judge Kennedy will work to achieve justice and equality under its provisions and the law. Therefore, I am proud to vote for his confirmation to the U.S. Supreme Court.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. HUMPHREY. Mr. President, amid the wide support for Judge Kennedy's confirmation it is important to keep a critical issue in perspective.

Many Senators who opposed Judge Bork are supporting Judge Kennedy. And some of us who viewed Judge Bork as the ideal nominee are somewhat less enthusiastic about Judge Kennedy, even though we believe he will be a good Justice.

These "cross-currents" should not obscure a fundamental fact. While certain portions of Judge Kennedy's testimony raised concerns for some of us, his overall record demonstrates a strong commitment to judicial restraint and a healthy disdain for judicial activism.

Those of us who greatly admire Judge Bork may take some comfort in the fact that these statements bear a striking similarity to Judge Bork's statements on this same issue—judicial usurpation of the democratic, legislative process. As Judge Bork framed the issue:

> * * * Only by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislatures, avoid enforcing their own moral predilections, and ensure that the Constitution is law.

And as Judge Bork has further stated:

> When a court becomes that active or that imperialistic, then I think that it engages in judicial legislation, and that seems to me inconsistent with the democratic form of Government we have.

It is this Senator's hope that the similarities between the foregoing observations of Judges Kennedy and Bork on the critical issue of judicial restraint will be reflected in Judge Kennedy's decisionmaking on the Supreme Court.

It is instructive to consider several of Judge Kennedy's statements on the judicial role made before his nomination. These statements provide a more valuable insight into his philosophy than the testimony given under the glare of the television lights.

In discussing the controversial issue of unenumerated constitutional rights developed by judges, Judge Kennedy made the following key points:

> One cannot talk of unenumerated constitutional rights under the U.S. Constitution without addressing the question whether the judiciary has the authority to announce them * * *.
>
> I submit it is imprudent as well to say that there are broadly defined categories of unenumerated rights, and to say so apart from the factual premises of decided cases. This follows from the dictates of judicial restraint * * *.
>
> The imperatives of judicial restraint spring from the Constitution itself, not from a particular judicial theory * * *.

Judge Kennedy summed up these views by pointing out the dangers to our entire democratic process created by improper judicial activism. As he eloquently stated:

> If the judiciary by its own initiative or by silent complicity with the political branches announced unenumerated rights without adequate authority, the political branches may deem themselves excused from addressing constitutional imperatives in the course of the legislative process. This would be a grave misallocation of power * * *. The unrestrained exercise of judicial authority ought to be recognized for what it is: The raw exercise of political power.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, if there is another Senator on the other side of the aisle who wishes to proceed, he may. We do not have another speaker waiting at the moment.

Mr. THURMOND. Mr. President, I yield 3 minutes to the able Senator from California, Senator WILSON.

The PRESIDING OFFICER. The Senator from California, Senator WILSON, is recognized for 3 minutes.

Mr. WILSON. Mr. President, I have the advantage over my colleagues in that in casting this vote I will not only have paid attention to the record, but will have the benefit of 20 years of personal knowledge of Judge Anthony Kennedy.

Mr. President, I have known Tony Kennedy since he was a young lawyer. Of all of the votes that I will cast, the hundreds on the floor of this Senate, few will give me greater pleasure. I will cast few with greater confidence. And I think few will be cast by this body with greater confidence than that which we have today in Tony Kennedy.

He is a man whose entire life and certainly his career in law has inspired confidence by those who have watched him: by adversaries, by jurors, by judges.

Mr. President, I am proud to have been one of the many who brought his name to the attention of the President and recommended that he be appointed to fill this crucial vacancy on the Supreme Court.

Mr. President, I know that personally he is possessed of the intellect, the character, the integrity, the judicial temperament, and the compassion required for a great jurist. He has been a great judge and will be a great Justice.

Mr. President, he has been a student, a practitioner, and a distinguished teacher of the law as well as a discerning judge. When I speak of compassion, I would lay emphasis on the fact that he has been concerned not solely for the rights of the accused as, of course, he must be under our system of justice, but also, he has taken into account and enunciated, as few judges have, the necessity that there be in the law a clear recognition

for the rights of the victims of crimes. In particular, he has made clear that in order for justice to be served and for our system of justice to inspire the confidence required for a people who will take pride in and actually believe in the rule of law, it is necessary that that system of judges be seen as working. It must work. It must be seen to work. To be seen to work, it must adequately look to and compensate the victims of crimes.

He has made that clear not only in speeches and in articles, but in his own decisions. He has never lost sight of the need for the criminal justice system to seek justice for all those affected by crime.

In an eloquent speech in New Zealand last year, he stated forthrightly:

> A decent and compassionate society must recognize the plight of its victims.

It is little wonder that victims often fail to report crimes, Judge Kennedy notes.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. WILSON. Mr. President, I will conclude and say only that we can and should expect great things of this judge. He will be a leader, not simply serving the law but also serving this Nation.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I yield myself 1 minute.

Mr. President, it is an interesting situation in the Senate that after months and months of wrangling over who is going to be the next Supreme Court Justice, we find 1 hour of debate, with everybody in complete unanimity, a foregone conclusion that Judge Kennedy will be confirmed.

I think that many lessons were learned from that, not the least of which is that all Presidents must have a sense of history when they appoint a Supreme Court Justice, realizing they are appointed for life, that they extend beyond any President, that they are there to represent all people in this country, not one isolated judicial philosophy.

Also, we have demonstrated, I believe, for all time, that the Senate will not longer be a rubberstamp, but will very carefully look to each nominee and then, when satisfied, reflect really the feelings of the people of this country who also, I believe, are satisfied and happy with his nomination.

The PRESIDING OFFICER. The Senator's time has expired. Who seeks recognition?

If no one yields time, time will be charged equally to both sides.

Mr. LEAHY. Mr. President, I yield 1 minute to the Senator from Colorado.

The PRESIDING OFFICER. The Senator from Colorado is recognized for 1 minute.

Mr. WIRTH. Mr. President, since Supreme Court Justice Lewis Powell, Jr., announced his intention to resign his seat on the Nation's highest court last summer, this Nation has been embroiled in a far-reaching debate over the fundamental principles upon which our democracy was founded. While the difficult and emotional issues raised in this process have regrettably caused some polarization among many of our citizens, in general, I believe that the vigorous debate of the meaning of our constitutional guarantees has served us well.

This national debate has 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. In the hearings and the subsequent vote on Robert Bork's nomination, the Senate fulfilled its advise and consent role prescribed by the Constitution in the selection of Supreme Court justices. In so doing, this body pursued its responsibility to examine the judicial temperament, philosophy and experience of nominees with the grave seriousness the democratic process commands.

In considering the qualifications of Judge Anthony M. Kennedy to assume the position of Associate Justice of the Supreme Court, I reviewed the criteria I developed last summer prior to the Judiciary Committee's hearings on Justice Powell's successor. I submit those criteria and ask that they appear in the RECORD at the end of my statement.

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

(See exhibit 1.)

Mr. WIRTH. The evidence presented by Judge Kennedy and by the witnesses indicate that he is a balanced jurist who decides cases based on a strict, but nonideological, interpretation of the laws involved. Judge Kennedy appears to understand both the meaning and the power of our traditions of individual liberty and social equality. He exhibits a willingness to view the Constitution as a tool for correcting injustice and ensuring equity.

In reviewing the records of Federal judges in the 1980's, I think we have to examine issues related to the right of citizens to challenge governmental action. In the course of cleaning our air and water and protecting citizens from exposure to toxic chemicals, the right to have disputes settled in the Nation's courts of law is a precious one—particularly for citizens in my own State of Colorado. Judge Kennedy's record reveals a heartening perspective on the doctrine of standing. His view of the judicial process appears to support the extension of prudent access to the Federal courts as a vital instrument for the protection of environmental values as well as for economic well-being.

Further, Judge Kennedy has exhibited a respect for the continuity of critical Supreme Court decisions and of fundamental American values. Throughout his career, his opinions impress upon the reader a deeply rooted sense of balance, understanding and maturity. This sense of proportion and perspective makes Judge Kennedy's qualifications for the position of Associate Justice that much more compelling.

The placement of a Justice on the Supreme Court is of such consequence that I believe we should only agree to do so when the weight of evidence clearly suggests that the individual is fully cognizant and respectful of the rights and liberties of citizenship which set this Nation apart. Supreme Court Justices sit for life in final judgment on matters of the utmost importance to the American way of life. They are often the last bastion of protection that citizens have against the tyranny and power of organized government and other forces which would curb the rights of individual Americans. No Senator may lightly confirm a Supreme Court Justice.

The distinguished record of Judge Anthony Kennedy, I believe, comports with the fundamental rights and values of the American people and with our system of jurisprudence. His view of the Constitution, judicial philosophy and role of the Supreme Court conforms with that of many of the most distinguished jurists our Nation has known. As a result, I intend to vote for his confirmation as an Associate Justice for the U.S. Supreme Court.

Mr. President, I do concur in the judgments that have been made by my colleagues here today on the fitness of Judge Kennedy for this very important appointment and hope that we confirm him very rapidly, fill out the Court, and get on with our business.

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 views 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?

Mr. DOMENICI. Mr. President, I rise to support the nomination of Judge Anthony M. Kennedy to be an Associate Justice of the U.S. Supreme Court. Judge Kennedy's distinguished legal career, which includes over 12 years of service as a Federal appellate judge, demonstrates that he possesses the intellect, character, and temperament to serve on our Nation's Highest Court.

Judge Kennedy earned his undergraduate degree from Stanford University and was awarded a law degree cum laude from Harvard University.

From 1961 to 1975, Judge Kennedy practiced law in California. Since 1965, Judge Kennedy has taught law part-time at the McGeorge School of Law at the University of the Pacific.

In 1975, President Ford appointed Judge Kennedy to serve on the U.S. Court of Appeals for the Ninth Circuit, which covers the far Western part of the country.

In his 12 years on the bench, Judge Kennedy has authored over 400 opinions and has participated in over 1,400 cases.

Judge Kennedy has played a major role in a number of significant decisions. He authored the appeals court decision in the Chada case, which held the legislative veto to be unconstitutional. He also argued for a "good faith" exception to the exclusionary rule when he dissented from the ninth circuit's opinion in the Leon case. The exclusionary rule has been used by criminal defendants to prevent evidence from being used against them in court because of technical defects in search warrants, even though the police were acting reasonably. In both the Chada and the Leon cases the Supreme Court subsequently agreed with Judge Kennedy.

Judge Kennedy's opinions demonstrate that he is a firm advocate of law and order, yet is sensitive to the constitutional rights of criminal defendants. He respects civil rights and is committed to eliminating discrimination. He also understands the doctrine of separation of powers, that is, the Congress is to make laws, and the courts are to interpret them, and the need for judicial restraint.

The Judiciary Committee, which conducted an exhaustive examination of his background, unanimously recommended that the nomination of Judge Kennedy be approved, and the American Bar Association unanimously gave Judge Kennedy its highest rating of "well qualified." Judge Kennedy has a well-deserved reputation for fairness, open-mindedness, and scholarship. It is obvious to all who have examined his credentials that Judge Kennedy will make an excellent addition to the Supreme Court, and will likely carry on the distinguished tradition of the man he will replace, former Justice Lewis Powell.

Justice Powell's seat has been vacant for 7 months. Because of the vacancy, the Supreme Court has been unable to reach a decision on several important cases that have come before it. Every Member of this body is aware why the vacancy has taken so long to fill, and I shall not recount the details, except to say that it is time to put the episode behind us and return the Supreme Court to its full strength. The parties who bring their cases to the Court deserve a hearing before a full Court, and the people of the United States are entitled to have their laws interpreted by nine members of the Supreme Court.

Judge Kennedy is an excellent choice to fill the vacancy and bring the Supreme Court back to full strength. I encourage all Senators to unite behind this nomination and give Judge Kennedy their full support.

Mr. BUMPERS. Mr. President, I take seriously our responsibility as U.S. Senators to advise and consent to nominations to the Supreme Court of the United States. It is one of our most important functions, and I believe we must discharge our responsibility with vigor and with respect for our great Constitution. It is clear that our Founders intended for the Senate to play a coequal role in the confirmation process.

It is with these thoughts in mind that I come before the Senate this morning to state my support for the nomination of Judge Anthony Kennedy for Associate Justice of the Supreme Court of the United States. I have reviewed his judicial record and testimony before the Senate Judiciary Committee, and am convinced that he is within the mainstream of constitutional jurisprudence in this country. Although I will not agree with him on every issue, just as I frequently find myself in disagreement with current Justices, I believe he is a man of considerable intellect and sound judgment. He will be a consistent adherent to the sound doctrine of judicial restraint, and I commend him for that, but I do not believe he will give the majestic language of our great Constitution a narrow or crabbed interpretation.

Mr. President, I wish soon-to-become Justice Kennedy well as the Supreme Court faces the many contentious issues it must deal with in the months and years ahead.

Mr. KASTEN. Mr. President, I rise today to express my support for President Reagan's nomination of Judge Anthony Kennedy to fill the vacancy on our Nation's Supreme Court.

We've already gone 8 months without a full complement of Justices. Our Nation's judicial needs will not be met until the vacancy created by the retirement of Justice Powell is filled. And I agree with President Reagan that Judge Kennedy would fill this Supreme Court vacancy—and meet those needs—with intellectual vigor and distinction.

Anthony Kennedy has been a distinguished member of the Federal bench since 1975, when President Ford appointed him to the Ninth Circuit Court of Appeals. The record of his 12 years of appellate decisionmaking shows him to be a man of judicial temperament and intellectual clarity.

In the more than 400 decisions in which he has taken part, Judge Kennedy has remembered that it is the role of the judiciary to interpret the laws, not to make the laws. I think the addition of his voice to the Court would help preserve this principle of the separation of powers, so vital to the maintenance of our systems of Government.

The many decisions Judge Kennedy has authored, most notably Chadha versus Immigration and Naturalization Service, make clear his powers of reasoning and his place in the mainstream of American judicial thought. I do not expect to agree with Judge Kennedy on every case; I do have confidence that his judicial opinions on the Court will be founded securely on the rock of the Constitution and legal precedent.

Judge Kennedy also recognizes the primary purpose of our system of criminal law: the preservation of social order through a regime of liberty under law. In numerous criminal-law decisions, Judge Kennedy has sided with America's first line of defense against random thuggery and violence—our local police forces.

In short, Judge Kennedy is an enthusiastic defender of civil rights and civil liberties, and of the measures necessary for their defense.

I urge all my colleagues to join me in seating this man right where we need him—on the U.S. Supreme Court.

Mr. CONRAD. Mr. President, I rise in support of the nomination of Judge Anthony M. Kennedy to be Associate Justice of the Supreme Court.

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. I find in Anthony Kennedy these qualities and more: he is a first-rate constitutional scholar.

His background clearly commends him for the job. A practicing lawyer with a small firm and a teacher of constitutional law, he has been a judge on the Ninth U.S. Court of Appeals for 12 years. The American Bar Association has given him its highest recommendation and the Judiciary Committee has unanimously voted to recomend his confirmation to the Supreme Court.

During his confirmation hearings before the Judiciary Committee, Judge Kennedy was praised for his temperament and character. The committee's review of his decisions showed him to be open-minded; a judge committed to the fair-minded resolution of particular cases, rather than being driven by an overarching, predictable ideology. His decisions while a member of the appeals court are not boldly extreme, but carefully drawn interpretations of the fundamental law. His philosophy, like that of the distinguished Justice Powell, resists easy categorization. Judge Kennedy's measured, case-by-case approach to judicial decisionmaking gives me much greater reassurance than the rigid ideological views of earlier nominees.

To be certain, Judge Kennedy might not have been my first choice for the Supreme Court. But he is the President's choice, and I hope that he will be sufficiently devoted to the judicial protection of liberty and equality.

I will vote to confirm Judge Kennedy, and I applaud the President for the selection of a nominee who brings consensus, and not divisiveness to the nomination process.

Judge Anthony Kennedy is a conservative in the best of our constitutional traditions—he wishes to preserve that which is best, while recognizing that the Constitution is not a static and bloodless document. It will survive and serve our Nation only if it is interpreted with wisdom and common sense.

Mr. MOYNIHAN. Mr. President, when the Senate last debated a vacancy on the U.S. Supreme Court I stated that:

> 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.

The recently completed Judiciary Committee hearings regarding Judge Kennedy were greatly welcome to me in this regard. Judge Kennedy affirms the existence of a general right to privacy in the Constitution. During the confirmation hearings Judge Kennedy, asked whether he believed there was such a right, responded that:

> I think that the concept of liberty in the due process clause is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage. * * * It is very clear that privacy is a most helpful noun, in that it seems to sum up rather quickly values that we hold very deeply.

In particular, Judge Kennedy endorsed the Supreme Court's ruling in Griswold versus Connecticut. When asked his views on Griswold Judge Kennedy said:

> I would say that if you were going to propose a statute or a hypothetical that infringed upon the core values of privacy that the Constitution protects, you would be hard put to find a stronger case than Griswold.

Plainly, Judge Kennedy's views on privacy were not fashioned merely to accommodate the confirmation process. For example, in United States versus Penn, Judge Kennedy, in a dissenting opinion, argued against a police practice of offering $5 to a 5-year old child to get her to inform on her mother. He wrote:

> If we can, and do, protect the relation between a dentist and his clients from a disruptive search, certainly we have the authority, and the duty, to protect the relation between a mother and child from such manipulation. * * * Indifference to personal liberty is but the precursor of the State's hostility to it.

Without privacy there can be no liberty, no freedom. Judge Kennedy seems to realize this fundamental notion, one that dates back all the way to English common law. This was surely a concern of the 18th century. It may fairly be said to be the central concern of the 20th. For ours is the century of totalitarianism, and wherever it has come to power, whatever its particular doctrines, the central act of totalitarian Government is to annihilate individual privacy. Thus did Orwell's 1984 become the great political statement of this age. Thus equally are democratic societies put on their guard.

I am sure that Judge Kennedy's views on privacy have reassured many of my fellow New Yorkers. Indeed, the Association of the Bar of the city of New York, headed by Robert M. Kaufman, has recommended that Judge Kennedy be confirmed as a member of the Supreme Court. I concur with the bar association. Though I would not agree with Judge Kennedy on every point, his basic judicial philosophy recognizes that fundamental rights and liberties are protected by the Constutition. For this reason, I support the confirmation of Anthony M. Kennedy as an Associate Justice of the Supreme Court.

Mr. LEVIN. Mr. President, in exercising its advice and consent responsibility with respect to a Supreme Court nominee, the Senate should make a thorough assessment of the nominee's competence character and individual temperament. There are also a few instances where it is appropriate for the Senate to consider a nominee's policy values. For instance, a nominee's policy values are relevent if those values are inconsistent with a fundamental principle or principles of American law. The second instance occurs when the nominee is so controlled by ideology that such ideology distorts their judgment and brings into question a nominee's fairness and openmindedness.

Judge Kennedy's performance during 13 years on the Federal bench leaves no doubt about his competence or his integrity. And his policy values appear to be neither inconsistent with settled constitutional law, nor a controlling factor in his judicial decisions.

Mr. President, Judge Kennedy does not appear to be a zealot, or a jurist who allows an ideology to dominate his approach toward a particular decision. Rather, he appears to be an open-minded judge who will fairly construe the law in each case that comes before him.

I see nothing in Judge Kennedy's record or testimony to indicate rigidity or inflexibility. One remark Judge Kennedy made during the Judiciary Committee hearings in response to a question by Senator SPECTER is, I hope, indicative of what his approach will be on the Supreme Court.

> It is difficult for me to offer myself as someone with a complete cosmology of the Constitution. I do not have an over-arching theory, a unitary theory of interpretation. I am searching, as I think many judges are, for the correct balance in constitutional interpretation. (Hearing transcript, December 15, 1987, p. 17.)

Although it appears that Judge Kennedy will be fair and open-minded as a Supreme Court Justice, I did have some concerns about his responses to questions about his previous membership in clubs that discriminate against women and minorities.

In a Senate Judiciary Committee questionnaire filled out by Judge Kennedy before his confirmation hearings began, he responded to several questions concerning his membership in business and social clubs. The questions refer to the American Bar Association [ABA] Code of Judicial Conduct, which was amended in 1984 to state that:

> It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

The ABA Code does not define what is meant by "invidious discrimination," although it adds that "whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive."

Judge Kennedy made an effort in his answer to the committee questionnaire to define invidious discrimination, explaining that it—

> suggests that the exclusion of particular individuals on the basis of their sex, race, religion or national origin is intended to impose a stigma on such persons. (questionnaire, p. 50).

Responding to Senator KENNEDY during the hearings, he further stated that:

> Discrimination comes from several sources. Sometimes it's active hostility, and sometimes it's just insensitivity and indifference. (transcript, December 14, 1987, p. 137).

He went on to suggest that the discrimination practiced by the clubs he had belonged to was not invidious be-

cause it arose from insensitivity, not from active hostility.

Because I was not sure of Judge Kennedy's basis for determining what was or was not invidious discrimination, I asked him about it, as one of several questions I submitted in writing. I asked him to give some real life examples of when discrimination against women and blacks would not be invidious, and whether he thought that the discrimination against women and blacks practiced by clubs he had belonged to was invidious.

I found his response reassuring in one respect: he said that he did not mean to imply that legalistic interpretations of the phrase "invidious discrimination" could "provide an appropriate basis for individuals or organizations to justify their conduct." He went on to say that "discrimination against women, blacks, or other minorities imposes real injury and is wrong whether it arises from intentional, active bias or from indifference and insensitivity." On the other hand, Judge Kennedy also reiterated his belief that the membership practices of the clubs he belonged to "were not invidious in the sense intended by the ABA Code because they were not animated by ill-will."

Judge Kennedy cannot be held responsible for the ambiguity of the ABA Code as to the meaning of "invidious discrimination," and I have written to the ABA seeking clarification on this point. However, I was somewhat troubled by the judge's justification of his previous club memberships based on an interpretation of the ABA Code for which I find no supporting evidence.

My lingering doubts about that matter are outweighed by my overall impression of Judge Kennedy. He appears to be a fair and open-minded jurist who will decide cases based on the specific facts and arguments before the Court, not on the basis of a precast, preformulated, preordained ideological agenda. Therefore, I will vote in favor of his nomination to the Supreme Court.

Mr. CHAFEE Mr. President, it is with pleasure that I vote today to confirm the President's nomination of Judge Anthony M. Kennedy to be an Associate Justice of the U.S. Supreme Court.

It is clear to me, as it was to all 14 members of the Judiciary Committee, that Judge Kennedy is the right person to replace Justice Lewis Powell. In casting my vote today in favor of Judge Kennedy I note that the committee report states, "Judge Kennedy seems to possess the truly judicious qualities that Justice Lewis Powell embodied."

Judge Kennedy's background and career history make him eminently qualified to serve on the Supreme Court. He received his bachelor's degree from Stanford and his law degree from Harvard.

He practiced law in San Francisco and Sacramento for 14 years before President Ford appointed him to the U.S. Court of Appeals for the Ninth Circuit.

Throughout his career, Judge Kennedy has demonstrated his excellent understanding of the law and the role of the courts in the American legal system. In addition, he has shown himself to possess the qualities and character that one associates with the leading names in our judicial tradition. The American Bar Association has given him its top rating, "well qualified," and reports, as noted by the Judiciary Committee, that his "integrity is beyond reproach, that he enjoys justifiably a reputation for sound intellect and diligence in his judicial work and that he is uniformly praised for his judicial temperament."

Mr. President, I would like to underline at this point that Judge Kennedy demonstrated in the hearings on his nomination his firm belief in the tradition of judicial restraint, but also his refusal to turn that approach into an inflexible philosophy or ideology. This is just the point of view that I have been looking for in the individual who would replace Justice Powell.

As the Judiciary Committee's report states, "Judge Kennedy has no single immutable or overarching theory for interpreting the Constitution and thus he pursues a cautious and measured approach."

I agree with Judge Kennedy and with the committee report that rigid ideologies have no place on the Supreme Court. The genius of the Constitution has been, in my mind, its ability to serve our country so well over the last two centuries, years of incredible change. Its protection of freedom of speech, of the right to privacy, of equal protection under the law, and of a great array of individual rights, is owed to the wondrous elasticity of its language.

Our Supreme Court justices have recognized the Constitution as a document meant to be interpreted, not according to a strict literal reading of its words, but according to the broader and wiser intent of the Framers. That intent was to create a document that would serve the Nation as it grew and matured over the years. Judge Kennedy clearly understands this tradition and places himself firmly within it. He has the right combination of intellectual ability and judicial temperament to continue the great tradition.

Mr. HATFIELD. Mr. President, I am pleased to cast my vote in favor of Judge Anthony M. Kennedy to serve as an Associate Justice of the U.S. Supreme Court.

Having reviewed his background, I am convinced that Judge Kennedy possesses those qualities of intellect, scholarship, humility, and a sense of fundamental fairness that will make him one of the great Justices of the Supreme Court.

Born in Sacramento, CA and schooled at Stanford University, the London School of Economics, and Harvard Law School, Judge Kennedy has had a distinguished career as a private lawyer, a professor of constitutional law, and as a Federal judge on the U.S. Court of Appeals for the Ninth Circuit.

Having served on the Federal bench for 13 years, Judge Kennedy has authored over 400 opinions and participated in over 1,400 decisions. His decisions have spanned many areas of law, including criminal law, constitutional law, civil rights, and criminal procedure. The tone of his opinions demonstrates that he is a conservative jurist in the best sense of the word, and in the best tradition of some of the great Justices of the Supreme Court.

Judge Kennedy believes that a judge must base his or her decision on neutral principles, applicable to all parties. Although an advocate of basic tenets of constitutional interpretation such as judicial restraint and the separation of the powers of government, Judge Kennedy has no rigid theory of judicial interpretation. Rather, as he testified before the Judiciary Committee, he is "* * * searching, as I think many judges are, for the correct balance in constitutional interpretation." As his testimony indicates, the judge is a thoughful man, capable of continued growth and evolution in his thinking.

In my private meeting with Judge Kennedy, I was struck not only by his intellectual ability, but by his genuine reverence for the law and the Supreme Court. Judge Kennedy also possesses those intangible, but important, qualities of humility, empathy, and compassion that have displayed themselves in the quality of his legal reasoning and in the fairness of his judicial opinions.

Clearly, Judge Kennedy will make an excellent addition to the Supreme Court and I welcome the opportunity to declare my support.

● Mr. GORE. Mr. President, I would like to take this opportunity to announce my support for the nomination of Judge Anthony Kennedy to the Supreme Court.

The Judiciary Committee conducted careful hearings on Judge Kennedy's nomination—as it must do on all nominations to the Federal judiciary, especially appointments to the Supreme Court. My review of Judge Kennedy's testimony during those hearings satisfies me that he is a careful, conscientious, and openminded judge.

Judge Kennedy is an advocate of judicial restraint—limiting his holdings to those facts before him. Yet he does not feel that the Constitution is an im-

mutable document that yields yes and no answers to all legal disputes. He understands that the meaning of the Constitution today can be ascertained only by careful construction of its text, accurate reading of the historical intentions of the framers, and sensitive application of its principles to the vastly changed society in which we now live. And just as he sees the Constitution as a dynamic document, Judge Kennedy has shown a capacity for growth himself.

I believe Judge Kennedy has demonstrated a growing sensitivity to the plight of the disadvantaged in our society, to minorities, and to women. Along with my vote for Judge Kennedy I make a plea that when he takes his place on the Supreme Court of our Nation, that he be vigilant in his protection of those whose rights are all too often ignored, and that he remember that the Supreme Court is often truly their court of last resort.

Judge Kennedy has shown himself to be conscientious, thoughtful, and openminded. These are the qualities most crucial for a Supreme Court Justice. The ABA committee unanimously found Judge Kennedy to be "well-qualified." The Judiciary Committee was unanimous as well in its endorsement. To this I am happy to add my support.●

Mr. HECHT. Mr. President, I rise today in support of the nomination of Anthony M. Kennedy to be an Associate Justice of the U.S. Supreme Court. I would like to say, at the outset, that I am pleased with the manner in which this confirmation process has been handled this time around. It should be obvious to everyone who has watched the Kennedy nomination proceed through the Senate, that we have before us an extremely qualified, well-respected, and outstanding nominee, and I feel very confident in saying that in my estimation, Judge Kennedy will serve our country admirably as a member of the U.S. Supreme Court.

Judge Kennedy has served with distinction as a member of the Federal judiciary on the Ninth Circuit Court of Appeals in San Francisco, and through his opinions and writings, he has certainly proved himself to be qualified and consistent. In addition to his service on the bench, Judge Kennedy has been an outstanding law school professor at McGeorge Law School in Sacramento, CA. It did not come as a surprise to me, then, when I received favorable and supportive letters from a number of my constituents who, coincidentally, had been taught by Judge Kennedy. Among these former students, praise of his ability was universal. In fact, to quote Mr. James Jacques, a Reno, NV attorney:

> I found him (Kennedy) to be an absolutely outstanding professor. He is the kind of person that I firmly believe we strongly need on our U.S. Supreme Court.

I couldn't agree more!

Mr. President, we all know by now that Judge Kennedy was given the top rating of "well qualified" by the American Bar Association Standing Committee on the Federal Judiciary, which suggests that the praise of Judge Kennedy's ability is not limited to his former students, but also the praise appears to be consistent from within the legal profession. In this day and age, as my colleagues well know, this type of overwhelming support is indeed very rare, and should be taken as another example of the fact that Judge Kennedy is an exemplary nominee, and should be confirmed unanimously. If the American Bar Association can give him a unanimous recommendation, the U.S. Senate can likewise give him a unanimous confirmation vote.

Mr. President, I would be remiss in my responsibility as a representative of the citizens of the great State of Nevada, however, if I did not make reference, at this point, to the entire process which has taken place in the efforts by our President to fill the vacancy of Justice Lewis Powell's seat on the Court. Specifically, I would like to reiterate my comments of last October regarding the President's first nominee to fill this vacancy, Judge Robert Bork.

Although I would in no way wish to diminish the favorable response given to Judge Kennedy's nomination today, I feel that it is extremely important for my colleagues to remember the absurdity of the confirmation process which proceeded Judge Kennedy. All of us who are privileged enough to serve in this body know that when our constituents feel strongly about an issue they certainly do not hesitate to call or write us. During the hearings and votes on Judge Bork, I can honestly say that I received more calls and letters than on any other single issue since I have been a U.S. Senator.

Mr. President, I was proud to stand here last October and vote in support of Judge Bork because that is how my constituents felt about the issue, and that is, overwhelmingly, the way in which my constituents wanted me to vote. I only wish that there were a few other Senators on that day who had listened to their constituents instead of listening to the overwhelming thunder by those special interest groups who took it upon themselves to determine what was in the public's best interest. As I said back then, the intense and inappropriate political debate surrounding Judge Bork was extremely unethical, and it was certainly an unfortunate blemish upon the legislative record of this historic body.

I am pleased by the fact that Judge Kennedy's nomination has not been surrounded by the whir of inappropriate political debate, but we must never forget the manner in which the previous nomination was handled and make every possible attempt to avoid future situations which lower the quality and the demeanor of the U.S. Senate. Again, I ask my colleagues to join my support of Judge Kennedy and to give him a unanimous confirmation vote.

Thank you, Mr. President.

Mr. BAUCUS. Mr. President, I rise in support of the President's nomination of Judge Anthony Kennedy to become an Associate Justice of the Supreme Court.

I have reviewed Judge Kennedy's testimony before the Judiciary Committee very carefully. I have also reviewed many of the decisions Judge Kennedy wrote during his long and distinguished tenure on the Ninth Circuit Court of Appeals.

While I do not agree with everything Judge Kennedy has said and written, I find Judge Kennedy to be, on balance, an extremely thoughtful and articulate jurist. I believe he is eminently qualified to take a seat on the Supreme Court.

Mr. President, under our constitutional form of government judicial appointments are a responsibility shared by the President and the Senate. The President nominates Supreme Court Justices and the Senate advises and consents on those nominations.

Our responsibility is to insure that the individual nominated by the President is qualified to serve on the Court. In addition, we must assure ourselves that a nominee's view of the role of the Supreme Court is consistent with the best interests of all the American people.

That is the responsibility given to us by the Founding Fathers in article III of the Constitution. It is a judgment not to be made lightly.

These are exactly the same standards I applied to Judge Bork: competence and judicial philosophy. While I had grave misgivings over whether Judge Bork would defend the basic constitutional liberties of the American people, I have no such qualms with Judge Kennedy.

After carefully reviewing Judge Kennedy's record, I believe he easily passes both these tests.

It is clear that Judge Kennedy is qualified to sit on the Supreme Court. He has had a distinguished career on the Ninth Circuit Court of Appeals, which includes my own State of Montana. In addition, the American Bar Association unanimously gave him its highest rating.

It is equally clear to me that Judge Kennedy is committed to the protection of the basic constitutional rights of the American people. In this he stands in marked contrast to Judge Bork.

I am confident Judge Kennedy will decide each case that comes before him individually, on its own merits. He

will not bring to the Court his own pet theory of constitutional interpretation.

Judge Kennedy told the committee that he is still searching for the correct balance in constitutional interpretation. I think that is exactly right.

Whenever a judge stops searching for that precious balance, justice suffers. In my view, a judge who believes he or she has found all the answers should start thinking about a different career.

Judge Kennedy also believes that the American people have a right to be left alone. He finds that right in an expansive interpretation of the word "liberty" in the 5th and 14th amendments. Again, I think that is exactly right.

He said that there is a line beyond which an individual can tell the Government not to go. Certainly that line is not clearly drawn. But, it is a relief to this Senator to know that Justice Kennedy will search for its contours.

Finally, Mr. President, I am convinced that Judge Kennedy is a true judicial conservative in the best sense of the word. He recognizes that the role of the courts is limited. He appreciates the differences between the legislative and judicial functions.

He knows that the Congress is charged with making the laws, while the Court is directed to interpret them. His will be a voice of restraint on the Court.

Mr. President, I sincerely hope my colleagues will join with me in voting to confirm the nomination of Judge Anthony Kennedy to become an Associate Justice of the Supreme Court.

Mr. MITCHELL. Mr. President, I rise in support of the nomination of Judge Anthony M. Kennedy to be an Associate Justice of the U.S. Supreme Court.

The Senate Judiciary Committee moved expeditiously in completing its hearings and favorably reporting the nomination to the Senate. I am pleased that the Senate vote was scheduled promptly as well.

The year-end report on the state of the judiciary by Chief Justice Rehnquist last year reflected the fact that caseloads throughout the Federal judiciary are at record or near-record levels. The Supreme Court alone acted on 4,340 cases.

Because the rulings handed down by the Supreme Court are essential for the guidance of the lower courts, it is important that the vacancy left by Justice Powell's resignation be filled as soon as possible.

In this regard, I am pleased that the President nominated Judge Kennedy.

Judge Kennedy has 12 years of experience on the appeals court. He has written and taken part in several hundreds of cases, including some which have been of seminal importance to the Nation.

His ruling in Chadha versus INS, for instance, struck down an enormous range of statutes in which Congress had granted itself the right, by one-house votes, to override the decisions of the executive branch in carrying out statutory law. The Supreme Court upheld Judge Kennedy's ruling that this was an impermissible intrusion of the legislative into the proper sphere of activity of the executive branch.

Judge Kennedy's view as reflected in his record do not mirror mine in every particular, but I do not expect them to do so.

Such disagreements do not, however, constitute a sound reason to reject an otherwise very well-qualified nominee.

In a broader sense, Judge Kennedy's responses to the committee on questions such as respect for precedent, unenumerated rights and constitutional philosophy reflect the measured and thoughtful judgments for which he is known on the bench.

Judge Kennedy has stated he has no overarching philosophy of the Constitution. Instead, he says the role of the court is to reach conclusions of law and fact in each particular case before it. He believes this is the soundest means of developing a body of precedent and law to guide the Nation.

The roles of the President and the Senate in appointing men and women to the courts have been highlighted over the past year. Individuals and groups with different philosophies have sought to persuade all of us of the legitimacy of their claims.

Some say the President's choice must be respected and therefore supported by the Senate.

Others claim that because no truly objective form of judicial reasoning can be demonstrated beyond argument, the Senate has a right to reject nominees on result-oriented grounds.

Neither view is grounded in the Constitution.

There is no single right of appointment to the Supreme Court. The Constitution gives the President the right to nominate. But it explicitly gives the Senate the right to "advise and consent," not merely to rubberstamp.

The sharing of this responsibility arises because the founders recognized that no President should have a free hand in shaping the third branch of Government and that no Senate's partisan tendencies should govern it either. Instead, the two branches—executive and legislative—both have an important role to play.

The Constitution is wiser than many of those who have lived under it. It does not contain criteria for judges any more than for Presidents or Members of Congress. Instead, those criteria are left to the wisdom of the voters in the latter two cases and to the judgment of their elected representatives in the former.

The founders knew what too many of today's political leaders tend to forget—that their wisdom and insights were limited to their own times, just as ours are to our time. So they wove no straitjacket for our political future. Instead, they left us a set of rules by which the political differences of our times must be adjudicated.

We have heard judges labeled "conservative" or "liberal." There are probably as many definitions as there are people making them. But catchall labels are no way to reach a consensus of what we expect in a Supreme Court Justice.

Intellectual brilliance alone is not enough. Neither is long experience. Both are valuable. Neither, taken alone, is sufficient.

The role of our courts is not to dispense moral advice or to correct the moral lapses of the larger society. The role of our courts is to dispense justice according to the law and the Constitution.

That means the Constitution as amended. The courts are not the guardians of the 19th century, or the vanguard of the 21st. They reflect the society in which their presiding judges live, and they dispense justice in accordance with the laws of that society, enacted by the voters' representatives.

The courts occupy a special place in our democratic system. They are the one element of our government which is not democratically selected because they are the element of our government whose function it is to protect the unpopular, the minority against the majority.

When the courts reach too far or fail to reach far enough, redress is the role of the legislative branch or the people themselves through the amendment process. But for the numerically insignificant, or the temporarily controversial, justice not dispensed promptly is justice denied.

That, too, is a particular responsibility of the courts in our system. The judges who sit on those courts must be aware that the unique, the particular—in common terms, the oddball—deserve the full protection of the laws, just as the mainstream does.

Judge Kennedy's emphasis on the goal of seeking justice in the particular facts and the particular case before him reflects a sensitivity to that element of our system which makes him a valuable addition to the Supreme Court.

In choosing Judge Kennedy, the President has selected a nominee of broad and deep experience in the judicial system, with a demonstrated record of careful and judicious reasoning, and personal and public probity.

I am pleased to give this nomination my full support.

Mr. CRANSTON. Mr. President, I will vote to confirm Anthony M. Ken-

nedy to serve as an Associate Justice of the U.S. Supreme Court.

The vote on the confirmation of an individual to serve on our highest court is one of the most important and far-reaching decisions which a Member of the Senate will face in the course of service in this body.

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, long after the expiration of the terms of office of the President who made the nomination and the Senators who voted on it.

The framers of the Constitution recognized the great importance of the selection of individuals to serve on the Supreme Court. They deliberately refused to entrust this heavy responsibility to any one branch of government. Instead, they determined that this should be a matter of shared power and shared responsibility.

Senator Robert Griffin, then-Republican Senate whip, aptly described this shared responsibility during the debate on the Haynsworth nomination in 1969:

> Under the Constitution, the President is vested with only half 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.

In the past year, both the Nation and the Senate have come to understand more deeply the full meaning of that shared responsibility. In its decisive rejection of President Reagan's third nominee to the Court, Judge Robert H. Bork, by a vote of 58-to-42 on October 23, 1987, the Senate assumed and reaffirmed its constitutionally mandated obligation to exercise independent judgment as to whether confirmation of a judicial nomination would be in the best interest of the nation.

In rejecting the Bork nomination, the Senate refused to place upon the Supreme Court a judicial radical with an avowed ideological agenda.

The Senate rejected a nominee who, over the course of several decades, had repudiated, disparaged, and derided a body of law and principles which form the framework for much of the individual liberties and freedoms which Americans enjoy.

The Senate refused to entrust the awesome responsibilities of an Associate Justice of the Supreme Court to a nominee who had given repeated warnings that he was prepared to rewrite settled principles of constitutional law.

In rejecting the Bork nomination, the Senate discharged its responsibilities well and in the best interest of our Nation.

The pending nomination of Anthony M. Kennedy presents a sharp contrast to the failed nomination of Robert H. Bork.

CONTRAST TO JUDGE BORK

Unlike Judge Bork, there is no indication that Judge Kennedy has an ideological agenda he is committed to carrying out once confirmed. On the contrary, the evidence seems clear that Judge Kennedy is predisposed to approach each issue on a case-by-case basis. That pattern appears throughout his decisions during his 12 years on the Ninth Circuit Court of Appeals. As the American Bar Association noted in its report to the Senate Judiciary Committee, practicing lawyers familiar with Judge Kennedy's record and demeanor on the Federal bench uniformly characterize him as utilizing a case-by-case approach without any particular preordained agenda or set philosophical perspective on relevant areas of the law. Judge Kennedy repeatedly affirmed this approach during his confirmation hearings. Testimonials from the numerous students in his constitutional law classes at McGeorge Law School over the past two decades reiterated this perception of Judge Kennedy's analysis of legal issues.

Judge Kennedy's legal and judicial philosophy appears to be well within the mainstream of legal thought. Judge Kennedy's legal philosophy, as illustrated in his opinions on the bench and in his speeches, can best be characterized as moderate, cautious, and restrained, albeit conservative.

Judge Kennedy has indicated his support for the notion of an evolving concept of liberty drawn from both the enumerated and unenumerated rights in the Constitution. Professor Laurence Tribe succinctly observed in his testimony before the Judiciary Committee supporting the nomination:

> Judge Kennedy's opinions reveal a belief in the fundamental constitutional principles that have been of concern to this committee. In particular, they demonstrate the absence of any categorical opposition to a view of the Constitution as an organic, evolving document; dedication to the fundamental role of the courts in our constitutional system as protectors of individuals and minorities from oppressive government; and a commitment to the special place of courts in elaborating and enforcing principles implicit in the Constitution's structure, even when those principles may not be explicitly stated within the four corners of the document.

CONCERNS ABOUT MEMBERSHIP IN DISCRIMINATORY PRIVATE CLUBS AND RESTRICTIVE CIVIL RIGHTS DECISIONS

Mr. President, although the weight of the record on Judge Kennedy indicates that he is a fair-minded and even-handed jurist, there are several issues which have been of concern to me and a number of civil rights organizations.

First is the matter of Judge Kennedy's membership in private clubs which have practiced discrimination in admissions. Judge Kennedy tendered his resignation from two of those clubs when his nomination to the Supreme Court became imminent. A third he resigned from several years ago when, as he described to me in a private meeting, he realized that it was inapropraite for a Federal judge to walk from the courthouse to have lunch in a facility that excluded women and minorities. Judge Kennedy expressed to me his recognition of the impropriety of his continuing membership in that club. Unfortunately, he did not take the same action with respect to his membership in two other private clubs which similarly excluded women or minorities, by policy or practice.

The problem in my view is compounded by the fact that Judge Kennedy sat on the Federal judicial conference committee which worked on the canon of judicial ethics dealing with the problem of membership by members of the judiciary in discriminatory private clubs. The 1984 commentary to that canon states:

> It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women, and others, that the judge's impartiality is impaired.

In our discussion of this matter, Judge Kennedy candidly acknowledged his need to be more sensitive on this type of issue in the future.

Mr. President, I hope that the problems that continued membership in discriminatory private clubs pose for individuals like Judge Kennedy who aspire to positions of public confidence will help bring additional pressure upon these organizations to abandon such discrimination. The subtle and not-so-subtle adverse impact that these discriminatory membership policies have upon women and minorities, particularly in their professional relationships with colleagues and business associates, needs to be ended. Judge Kennedy's resignations, although belated, underscores the unacceptability of continuation of this type of discriminatory policy.

There has also been justifiable concern expressed by a number of civil rights organizations, including several leading Hispanic groups in California, about a pattern of decisions rejecting the claims of civil rights litigants, often on procedural or technical grounds. Particularly disturbing is Judge Kennedy's decision in the TOPIC versus Circle Realty case, denying standing to individuals in a

housing discrimination case. That decision, rejected by the Supreme Court in a 7-to-2 opinion authored by Justice Powell, suggests a failure to recognize the importance of rectifying racial discrimination by aggressive enforcement techniques. Similarly, his concurrence in affirming a summary judgment in a key voting rights case, Aranda versus Van Sickle, suggests a failure to afford the plaintiffs the full opportunity to establish their claims of discrimination. The summary disposition of many of the factual issues—found in favor of the plaintiffs by the trial court—in the case involving wage discrimination, AFSCME versus State of Washington, is also of concern. In other discrimination cases, Judge Kennedy has authored opinions barring litigants from pursuing their cases because of procedural problems, for example, EEOC versus Alioto Fish Co.

Nevertheless, balanced against these cases are several civil rights decisions by Judge Kennedy protecting the interests of minority litigants. In particular, Flores versus Pierce, a case involving discrimination by local elected officials against Hispanic restaurant owners, can be cited as an example of Judge Kennedy affirmatively upholding a civil rights complaint.

Mr. President, I am disturbed that Judge Kennedy's application of narrow procedural rules has served in so many cases to bar civil rights litigants from establishing their claims. Yet, as Professor Tribe testified, in none of these decisions is there any "evidence of antipathy to fundamental constitutional principles."

It is my belief that Judge Kennedy needs to become more sensitive to the more sophisticated aspects of discrimination in our society and to become more receptive to the need to implement vigorous enforcement techniques designed to root out and bring an end to the invidious discrimination which continues to plague our Nation. Broad antidiscrimination policies will have little impact if procedural obstacles bar implementation of those policies.

I do, nevertheless, see in Judge Kennedy the capacity to grow and become more acutely aware of these problems and the role that the courts must play in protecting civil rights.

Finally, Mr. President, it should be noted that Judge Kennedy received a unanimous well qualified rating by the American Bar Association—its highest rating.

CONCLUSION

Mr. President, a Senator's task in voting upon a nomination to the Supreme Court is not to determine whether that nominee might be one selected by the particular Senator or whether the nominee is sufficiently "liberal" or "conservative." Nor, indeed, should the vote rest upon an assessment of how the nominee will vote upon any single given issue.

The task is to determine, first, whether the nominee possesses the basic qualities of intellect, objectivity, and temperament required for the High Court, and, then, to ascertain whether the nominee understands and is committed to fundamental constitutional values and principles and appreciates the important role of the judiciary in defending constitutional rights and liberties.

I believe that Judge Kennedy meets each of these tests.

When President Reagan first announced his selection of Anthony Kennedy, I noted that the last Californian to sit on the Supreme Court was Chief Justice Earl Warren, who wrote the unanimous decision in Brown versus Board of Education. The Brown decision brought an end to racial segregation in this Nation and helped set a course for civil rights and individual liberty leading to a better and more just society for all Americans. I said that I hoped that Judge Kennedy's commitment to individual rights and equal justice measures up to the standards set by his predecessor from our great State.

I think Judge Kennedy has the intellect, the compassion, and the courage needed to help move our Nation forward as we confront the great issues ahead. I hope that he will fulfill that role and that history will mark his confirmation as part of a continuing march toward a better and more just society.

Mr. DOLE. Mr. President, it has now been more than 7 months since Justice Lewis F. Powell, Jr., announced his retirement from the Supreme Court. In that period of time, we in the Senate have gone through some amazing maneuvers in attempting to carry out our constitutional obligation of "advice and consent." Some experts say that, for better or for worse, we may have altered forever the way we choose the members of our Highest Court.

It is tempting, at this time, to talk about a nomination that is no longer before us; to question the fairness of a process that rejected an extraordinary scholar and jurist. I, for one, will resist that temptation, because raising those questions again will only detract from the extraordinary accomplishments of the man whose nomination is before us.

When Judge Anthony Kennedy was nominated to fill the vacancy on the Supreme Court, he faced a frightening array of obstacles. Some people openly speculated that no nominee could pass muster under the standards that had been applied to the two previous nominees. Others speculated that even a safe nomination could become hopelessly entangled in election-year politics.

Judge Kennedy, who by that time had compiled an impressive record as a lawyer, a teacher, and a judge, quickly put those doubts to rest. His appearance before the Judiciary Committee was masterful, silencing his early critics with keen thinking, and a clear sense of balance. The Judiciary Committee rewarded him with its unanimous "favorable recommendation," a result that had seemed almost unattainable at the outset of the process.

In my opinion, we cannot confirm Judge Kennedy too quickly. Since it opened its term in October, the Supreme Court has divided evenly on two important cases. More such confusing results may already be in the works. This country certainly deserves better than that.

More particularly, however, Judge Kennedy deserves to sit on that Court. He has proven his qualifications under the most difficult circumstances, and should receive the support and gratitude of every Member of this body.

I urge his unanimous confirmation.

Mr. KERRY. Mr. President, I support the nomination of Judge Anthony M. Kennedy to the Supreme Court of the United States. I do so not because I agree with Judge Kennedy on every issue, but because I believe that he is a thoughtful, moderate jurist who is within the mainstream of American judicial thought. I believe that Judge Kennedy will bring a reasoned, careful, case-by-case approach to the Supreme Court, much like that of his predecessor on the Court, Justice Lewis Powell.

I opposed the nomination of Judge Robert Bork to the Supreme Court because I felt that his writings as a law professor and a judge showed him to be outside the mainstream of American thought on issues of civil rights and civil liberties. His views did not reflect the consensus of the American people on these issues. For these reasons, Judge Bork's nomination was rejected by the Senate by a large margin.

Judge Kennedy, however, is much different in his approach from Judge Bork. One example is the right to privacy. Although not enumerated specifically in the Constitution, the Supreme Court has found an implicit right to privacy in the Constitution. Judge Bork rejected that concept and that precedent. Judge Kennedy respects it. He does recognize a right to privacy as implicit in the Constitution, and he so stated during his confirmation hearings in December. This is a major and important difference between Judge Kennedy and Judge Bork.

I do have some concerns about Judge Kennedy, particularly some of his past decisions in the area of civil rights and civil liberties.

For example, I have questions about his decision in Beller versus Middendorf, where Judge Kennedy authored an opinion upholding the constitution-

ality of Navy regulations providing for the discharge of those who engage in homosexual activities. While I agree with Judge Kennedy that there must be a "reasonable effort to accommodate the needs of the government with the interests of the individual," I am not convinced that this case strikes such a balance.

Also, in U.S. versus Leon, Judge Kennedy dissented from the majority's holding which affirmed the suppression of evidence in a drug case and refused to recognize a so-called "good faith" exception to the exclusionary rule. In U.S. versus Cavanaugh, Judge Kennedy upheld the legality of electronic surveillance by the FBI of an engineer who was suspected of espionage. And in AFSCME versus State of Washington, Judge Kennedy authored an opinion reversing a district court judge who found discrimination by Washington State against its female employees on the basis of "comparable worth."

I might have decided these cases differently than Judge Kennedy. But I believe that, on balance, his decisions were reasonable ones, based on his perception of the merits of each case, and not on some overeaching ideological theory or doctrine. Judge Kennedy's approach is one that I believe is appropriate for a Supreme Court Justice.

Judge Kennedy has been on the Federal bench for 12 years, and has authored over 400 opinions. He enjoys the respect of his colleagues. The American Bar Association has given Judge Kennedy its highest rating. His nomination has been reported out favorably, and unanimously, by the Senate Judiciary Committee. While I am concerned by the fact that respected groups such as Americans for Democratic Action and the National Organization of Women have decided to oppose his nomination, I believe that his nomination is as good as we are likely to get from this administration, and is better than most.

In a 1980 speech on presidential powers, Judge Kennedy said, "My position has always been that as to some fundamental constitutional questions, it is best not to insist on definitive answers. The constitutional system works best if there remain twilight zoners of uncertainty and tension between the component parts of the Government. The surest protection of constitutional rule lies not in definitive announcements of power boundaries, but in a mutual respect and deference among all the component parts."

That is a reasonable and thoughful view of our system of government, one which I can support. Unlike Judge Bork, Anthony Kennedy is not a judicial activist. He does not have a radical agenda. From all that his record permit us to determine, he is a judicial moderate, well within the mainstream of the judiciary. For these reasons, I will vote to confirm Judge Kennedy as an Associate Justice of the Supreme Court.

I ask unanimous consent that an article from the December 1, 1987, New York Times be printed in the RECORD.

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

[From the New York Times, Dec. 1, 1987]

SPEECHES OFFERING INSIGHT INTO JUDGE KENNEDY

(By Stuart Taylor, Jr.)

WASHINGTON, Nov. 30.—Speeches written over the years by Judge Anthony M. Kennedy show that he has expressed cautious skepticism about whether the Constitution protects sexual privacy and other rights not actually spelled out in the text.

Judge Kennedy, President Reagan's Supreme Court nominee, has also questioned some decisions of the Supreme Court headed by Chief Justice Earl Warren expanding procedural protections for criminal defendants and aspects of the Court's handling of the 1974 Nixon tapes case.

But in none of the 20 speech texts obtained by The New York Times has Judge Kennedy stated flatly that the Court's privacy decisions have been wrong, or argued for overruling any of the decisions. His overall tone in the addresses to groups such as fellow judges, graduating law students and Rotary clubs has been one of moderation, subtlety and respect for tradition and precedent.

MOST PREVIOUSLY UNPUBLISHED

The speech texts, which span the period from 1975 to last month and served as guidelines for the judge's remarks, were provided by the Reagan Administration to the Senate Judiciary Committee late today. Most of them have not previously been published. They will provide grist for questioning when hearings on his nomination begin Dec. 14.

Judge Kennedy's speech texts provide the most detailed insights so far into his overall judicial philosophy, and shed new light on his views about issues ranging from judicial enforcement of "unenumerated" constitutional rights to the rights of crime victims and criminal defendants, Presidential powers, federalism, the Bernhard Goetz case and other issues.

In a 1986 speech discussing "unenumerated rights," including the right to sexual privacy, Judge Kennedy said undue judicial activism in this area undermined representative government and the court's claim to be a neutral arbiter.

The speech texts are generally consistent with the image of the 51-year-old Sacramento jurist as a thoughtful, moderate man who is considered likely to win overwhelming Senate confirmation next year.

Judge Kennedy, like President Reagan and Attorney General Edwin Meese 3d, has repeatedly called in his speeches for "judicial restraint" and fidelity to the Constitution's language and history, and has warned against "the raw exercise of political power by courts."

In a 1984 speech, he said: "My own judicial philosophy has been described by others as conservative, and therefore unlikely to accept doctrines which substantially expand the role of the courts. None of us like a simple label to explain our thought, but the description is probably apt as a general rule."

But none of his speech texts mount the kind of broad attack on the modern Supreme Court, or sound the kind of clarion call for a return to the "original intent" of the framers of the Constitution, that marked the writings and speeches of Judge Robert H. Bork, and that contributed to the 58 to 42 Senate rejection of his nomination.

And some of Judge Kennedy's statements contrast with those of Judge Bork, both on particular issues and on broader philosophical approaches to constitutional law.

Judge Bork had worked out an overarching constitutional philosophy that led him to condemn much of modern constitutional law with an air of certitude that some critics called arrogance.

Judge Kennedy's speeches, on the other hand, repeatedly sound the theme that neither he nor, perhaps, anyone else can plumb all the Constitution's ambiguities or provide definitive answers to the hardest questions it poses—such questions as how far the Supreme Court should go in restraining majority rule, and how powers over foreign affairs should be allocated between the President and Congress.

"TWILIGHT ZONES OF UNCERTAINTY"

"My position has always been that as to some fundamental constitutional questions, it is best not to insist on definitive answers," he said in the text of a 1980 speech on Presidential powers.

"The constitutional system works best if there remain twilight zones of uncertainty and tension between the component parts of the government. The surest protection of constitutional rule lies not in definitive announcements of power boundaries but in a mutual respect and deferrence among all the component parts."

In an August 1987 speech to a Federal judicial conference in Hawaii, he observed that "it's necessary to develop a theory of constitutional interpretation" that respects the intentions of the framers of the Constitution and confines judges, but that "it's far easier to point out the defects in someone else's theory than to defend the merits of your own."

Judge Kennedy is said by acquaintances to be widely read in American constitutional history, and there is much evidence of this in his speech texts. They are studded with references to little-known but telling historical details and with apt quotations from the writings of political and judicial figures including James Madison, Alexander Hamilton, George Mason, Oliver Wendell Holmes and others, as well as from literary figures ranging from John Keats to Sigmund Freud to Jeremy Bentham.

According to one former law clerk, Judge Kennedy has typically prepared his speech texts himself, rather than having them drafted by law clerks. He has used them as rough outlines rather than reading them aloud verbatim. And he has declined to publish them in law reviews because he had not polished them to his satisfaction.

STANFORD SPEECH CITED

Judge Kennedy's most detailed discussion of the Supreme Court's decisions enforcing a right to sexual and family privacy came in a 1988 paper prepared in connection with lectures at Stanford University Law School.

Judge Kennedy's Stanford lecture suggests the Court should not "announce in a categorical way that there can be no unenumerated rights" in the Constitution that judges can enforce, and in this and other

contexts he has made seemingly approving references to some of the Court's decisions protecting family privacy.

But in contrast to some liberal jurists, Judge Kennedy stressed "the difficulties encountered in defining fundamental protections that do not have a readily discernible basis in the constitutional text," including sexual privacy, the right to travel and certain voting rights the Court has recognized.

Among those difficulties, he said, are the problem of judicial interference with the responsibilities of elected officials to "determine the attributes of a just society" and the imperative that "the constitutional text and its immediate implications, traceable by some historical link to the ideas of the framers, must govern the judges."

NO SPECIFIC VIEW ON ABORTION

Judge Kennedy's speech texts contain no specific discussion of the Court's decisions protecting rights to abortion and contraception.

One of his recurring themes is, as he put it in his 1986 Stanford lecture: "One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system."

In other speeches, Judge Kennedy has made these points:

He said in his 1980 speech on presidential powers that "the noble but general phrases of the Constitution do not by themselves provide the answers to the questions whether the Chief Executive has exceeded the bounds of his constitutional authority." He added that the course of history and the necessities of modern life have dictated that "great powers flow to the President in foreign affairs," subject to "the authority of Congress to issue corrective instructions in appropriate cases."

In the same speech, Judge Kennedy said "there is room for argument about the wisdom" of the extraordinary procedure by which the Supreme Court expedited a case pending in a lower court in order to require President Nixon to surrender the Watergate tapes to a special prosecutor in 1974. He suggested it might have been better to wait and let Congress solve "its own problem with the Executive" over Watergate, which was the subject of impeachment proceedings. But he did not say the Court should have upheld Mr. Nixon's refusal to surrender the tapes.

In a March 1987 speech in New Zealand, Judge Kennedy denounced the callousness of the criminal justice system towards the victims of crimes and suggested that while expanding defendants rights in the 1960's the Supreme Court had slighted the problems of victims.

In the same speech, noting the "disturbing" public sympathy for Bernard Goetz, who shot four youths in the subway in fear they might assault him, the nominee said "the public acclaim with which Goetz' actions were received in some quarters indicates that the present criminal justice system breeds disrespect for the rule of law."

In a 1981 law school commencement speech, Judge Kennedy said "some of the refinements we have invented for criminal cases are carried almost to the point of an obsession." He did not specfy which refinements he meant.

EXCERPTS FROM 2 KENNEDY SPEECHES

The imperatives of judicial restrain spring from the Constitution itself, not from a particular judicial theory. The Constitution was written with care and deliberation, not by accident. . . . The constitutional text and its immediate implications, traceable by some historical link to the ideas of the Framers, must govern the judges. . . . If these principles do not provide fixed boundaries for judicial interpretation in constitutional cases, at least two systemic failures become manifest in the operation of checks and balances.

First, the political branches of the government will misperceive their own constitutional role, or neglect to exercise it. If the judiciary by its own initiative or by silent complicity with the political branches announces unenumerated rights without adequate authority, the political branches may deem themselves excused from addressing constitutional imperatives in the course of the legislative process. This would be a grave misallocation of power. . . . The courts must never be an accomplice to a regime that erodes the initiative or the power of the political elements in the constitutional system.

The second injury to the constitutional order is done to the judiciary itself.

* * * * *

It is a great irony of contemporary history that those who argue most passionately for creative judicial intervention in effect advocate abolition of an independent, nonelected judiciary. The unrestrained exercise of judicial authority ought to be recognized for what it is: the raw exercise of political power. If in fact that is the basis of our decisions, then there is no principled justification for our insulation from the political process.

Finally, I am unconcerned that there is a zone of ambiguity, even one of tension, between the courts and the political branches over the appropriate bounds of government power. Uncertainty is itself a restraint on the political branch, causing it to act with deliberation and with conscious reference to constitutional principles. I recognize, too, that saying the constitutional text must be our principal reference is in a sense simply to restate the question what that text means. But uncertainty over precise standards of interpretation does not justify failing in the attempt to construct them, and still less does it justify flagrant departures.

"Unenumerated Rights and The Dictates of Judicial Restraint," Stanford University, July 1986.

An essential purpose of the criminal justice system is to provide a catharsis by which a community expresses its collective outrage at the transgression of the criminal. It does not do to deny that same catharsis to the member of the community most affected by the crime. A victim's dissatisfaction with the criminal justice system, therefore, represents a failure of the system to achieve one of the goals it sets for itself.

The victim's dissatisfaction with the system is more than a symptom of failure; it is a threat to the system itself. We must rely on victims to report crimes and to testify against criminals. This participation is essential if we are committed to the presumption of innocence. Citizen participation is a necessary counterweight to a pervasive police presence. Yet the fact is that victims often fail to report crimes because they do not expect the authorities to be responsive.

Another, disturbing outgrowth of a system's lack of concern or protection for victims is the temptation of the victim to take the law into his own hands. Perhaps you are familiar with the celebrated case of Bernard Goetz, the subway vigilante in New York City. He had responded with gunfire when four would-be attackers accosted him and requested five dollars. . . . Lost in the nationwide publicity over the event was the fact that Goetz had been mugged three years earlier in another subway incident, and his only communication from the law enforcement authorities was an offer to mediate his dispute with the mugger. Was this the treatment that in Goetz' eyes justified distrust of the criminal justice system to protect his interests? Equally disturbing is that Goetz emerged from the subway incident as a hero in the eyes of a large portion of the citizenry, the victim who finally fought back. If the rule of law means that citizens must forgo the use of private violence in return for the state's promise of protection, then the public acclaim with which Goetz' actions were received in some quarters indicates that the present criminal justice system breeds disrespect for the rule of law.

The focus on the public aspect of criminal justice system was also manifested in the criminal law and criminal procedure revolution of the 1960's. The significant criminal law decisions of the Warren Court focused on the relation of the accused to the state, and the police as an instrument of the state. Little or no thought was given to the position of the victims.

Mr. DIXON. Mr. President, I rise to support the nomination of Anthony Kennedy to be a Justice on the Supreme Court of the United States.

I do not object to the nomination of judicial conservatives to the Supreme Court. I tend to believe that the President is entitled to nominate those that share his philosophy, and I have voted for judicial conservatives in the past. When I voted against the nomination of Judge Robert Bork, I opposed him not because he was a judicial conservative, but because I had serious questions about his views on fundamental constitutional issues: The interaction between the powers of Government and individual liberties and the role he sees for the Court in protecting individual rights guaranteed by our Constitution. I concluded that his view of the Constitution leads to a much more cramped and narrow view in many important areas including civil rights and the right to privacy. These views had no place on the Highest Court of the land responsible for the interpretation of the Constitution.

In contrast, I feel very comfortable with Judge Kennedy's fundamental views on the Constitution and the role it plays in our society. During his confirmation hearing, he stated:

> I do not have an overarching theory, or a unitary theory of interpretation. I am searching * * * for the correct balance in Constitutional interpretation.

When commenting directly on the Constitution and the role of the Supreme Court in applying its provisions, he said:

The Court can use history in order to make the meaning of the Constitution more clear. As the Court has the advantage of a perspective of 200 years, the Constitution becomes clearer to it, not more murky * * *. This does not mean the Constitution changes. It just means that we have a better perspective of it * * *. To say that new generations yield new insights and new perspectives, that doesn't mean that our Constitution changes. It just means that our understanding of it changes.

I commend Judge Kennedy for his clearly developed understanding of constitutional interpretation that is consistent with the history and tradition of the Supreme Court and this Nation.

His intellectual and judicial credentials are also impressive. He graduated with distinction from Stanford University in 1958. In 1961, he graduated cum laude from Harvard Law School. Kennedy then practiced law in California until 1975, when President Ford appointed him to the U.S. Court of Appeals for the Ninth Circuit, a position he has held since that time. Over the last 12 years on the court he has participated in more than 1,400 decisions and authored over 400 published opinions.

The American Bar Association's Standing Committee on the Federal Judiciary unanimously gave Judge Kennedy their highest rating of "well qualified." Based on its investigation, the committee stated that his—

Integrity is beyond reproach, that he enjoys justifiably a reputation for sound intellect and diligence in his judicial work and that he is uniformly praised for his judicial temperament.

The committee went on to conclude that Judge Kennedy—

Is among the best available for appointment to the Supreme Court of the United States from the standpoint of professional competence, integrity and judicial temperament.

These are very strong words of praise.

On January 27, 1988, after careful scrutiny of his credentials, the Senate Judiciary Committee voted unanimously to report Judge Kennedy's nomination with a favorable recommendation. This recommendation is a particularly strong testimony of Judge Kennedy's qualifications, given the broad range of political philosophy represented by the committee members.

Mr. President, I firmly believe that Judge Kennedy's record and views warrant his confirmation by the Senate. I believe he will be a very favorable addition to the Supreme Court.

Mr. MURKOWSKI. Mr. President, today this body shall vote on whether to confirm Judge Anthony M. Kennedy as a U.S. Supreme Court Justice in order to fill the seat vacated by Justice Lewis F. Powell, Jr. I ask that my colleagues join me in supporting Judge Kennedy's confirmation.

At 51 years of age, Judge Kennedy has a broad background rich in judicial experience, legal practice, constitutional law, and academic scholarship.

He has attended some of our country's finest schools, earning degrees at Stanford University and Harvard Law School. For 12 years he has been a Federal appeals court judge for the Ninth U.S. Circuit Court of Appeals, having written some 450 legal opinions. Before that time he practiced law for some 14 years in northern California. He has also been a professor of constitutional law since 1965 at McGeorge School of Law in Sacramento, CA.

The American Bar Association has unanimously endorsed Judge Kennedy, giving him its highest rating.

During his tenure as a Federal appeals court judge he has dealt with a myriad of complex legal issues involving fundamental clashes between legitimate Government interests and inherent personal freedoms. Experts who have analyzed these cases have found his decisions balanced, well-reasoned, temperate, and fair. They also have found him difficult to lable or predict. This makes him a fitting choice for what many believe may be a key "swing vote."

Judge Kennedy does not adhere to, or profess to hold any overriding constitutional philosophy. In his own words he is still searching for a "correct balance" of interpretation over the principles of order and liberty. Because he is not so predisposed, those who will come before him can be assured that he will let the facts shape his decisions.

He prefers narrow judicial rulings and seeks to address only the issues necessary to resolve a case. He is also inclined to defer to the political process, if possible. This practice of restraint is consistent with his distain for judges who use cases to make policy or let personal views influence court ruling. It also helps preserve such cherished American principles of separation of powers and checks and balances.

Although Judge Kennedy's views on the first and 14th amendments, and privacy guarantees, do not fall into predictable patterns they are nevertheless in keeping with acceptable traditional notions of proper constitutional interpretation.

He sees the Court's role as paramount in safeguarding personal individual freedoms. He believes privacy is an integral part of liberty protected under the due process clause. He is particulary sensitive to discrimination problems, recognizing that subtle barriers in the form of indifference and insensitivity can often inhibit equality of advancement.

Political speech is viewed by judge Kennedy as central to the democratic process, and that protected speech can take on many forms of expression.

While Judge Kennedy holds no fixed views per se, he places a high premium on the importance of judges adhering to precedent for with it comes stability, an understanding of what is expected, and a respect for law.

Mr. President, I am confident that our country will be well-served by Judge Kennedy as a U.S. Supreme Court Justice. His record, background, and character make ready to take on the challenges of maintaining the delicate balance between order and liberty.

Mr. DODD. Mr. President, I rise to express my support for the nomination of Judge Anthony M. Kennedy to be an Associate Justice of the U.S. Supreme Court.

Like all of my colleagues, I approach the question of the confirmation of Judge Kennedy with enormous seriousness and solemnity. As Senators, 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.

As I stated some months ago during the debate on the nomination of Judge Bork, 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.

Therefore, the vote on Judge Kennedy's nomination clearly is one of the most important and far-reaching votes that any Member of this body will ever make.

The crucial question for me in considering a Supreme Court nomination always has been whether the nominee is capable of and committed to upholding the Constitution of the United States, and protecting the individual rights and liberties guaranteed therein.

I voted against the confirmation of Judge Bork. I did so not because Judge Bork is a conservative jurist, but because I concluded that his views are totally out of step with many of our fundamental constitutional values and that his confirmation was not in the best interest of the United States.

Judge Kennedy also is conservative. I do not agree with everything Judge Kennedy has said or written, and I fully expect to disagree with some of the opinions he likely would write and votes he likely would cast as a Supreme Court Justice.

However, while he is conservative and possesses views with which I disagree, I believe that Judge Kennedy's considerable intellectual strengths are coupled with a deep and abiding com-

mitment to fundamental constitutional values and principles.

Although I disagree with Judge Kennedy's judicial philosophy in certain areas, such as civil rights protection for women and minorities, I find that his approach to liberty and fundamental rights generally is within the tradition of Supreme Court jurisprudence.

Judge Kennedy has no single, immutable, or overarching theory for interpreting the Constitution but instead, is devoted to a principled search for the correct balance in constitutional interpretation. Throughout his career on the Federal bench, Judge Kennedy has demonstrated that he is openminded and intellectually flexible.

The picture of Judge Kennedy that emerges as a result of the Judiciary Committee's investigation and hearings is that of a judge who issues well reasoned opinions premised on scrupulously careful analysis of Supreme Court precedents and close attention to factual variations and competing interests. Moreover, his testimony before the committee established that he respects a continuous evolution of constitutional doctrine.

On balance, the evidence I have reviewed indicates that Judge Kennedy would serve with distinction and would work to preserve and protect our fundamental constitutional values, if confirmed as a Justice of the Supreme Court. There is no indication that his approach to the Constitution, or to the Court's role in enforcing it, would unravel the settled fabric of constitutional law.

Thus, despite my differences with some of his views, I urge the Senate to confirm the nomination of Judge Kennedy to be an Associate Justice of the Supreme Court.

Mr. WALLOP. Mr. President, I rise today to express my strong support for the confirmation of Anthony Kennedy to be an Associate Justice of the Supreme Court. This vote today marks the end of a long, often contentious and vindictive struggle to fill this vacancy. We rejected one eminently, superbly qualified man. Another stepped aside.

Now, some 7 months after Justice Powell announced his retirement, we are ready to confirm Judge Kennedy. It is worth noting that by the time the new Justice takes his place on the High Court, nearly half of the cases set for argument this term will have been heard.

Clearly, the time for confirmation of a new Justice has not only come, it is long overdue. I am, however, pleased that the Judiciary Committee and the Senate have heeded President Reagan's call in his State of the Union Message to act quickly on the backlog of judicial nominations by bringing Judge Kennedy's nomination to the floor in a timely manner.

The venom and rancor that characterized the Bork nomination have been mercifully absent from the Kennedy nomination process. Miraculously, the Senate seems to have regained its equilibrium and its common sense since October and is again willing to evaluate a judicial nominee on the basis of a consistent standard of competence for the job, rather than whether he passes the political litmus test of a certain set of interest groups.

I continue to be distressed by the double standard so blatantly adhered to by the Senate in its consideration of that nomination. I am thankful that the Senate has seen fit to exercise its advise and consent role in the Kennedy nomination in a more reasoned manner. I hope that will continue to be the case with future nominations that come before this body.

Judge Kennedy brings to the High Court an impeccable set of credentials, and his relative youth, at age 51, will ensure that he will serve the Court and the Nation for many years to come. He has practiced as a private attorney, has taught at the McGeorge School of Law at the University of the Pacific since 1965 and has served on the Ninth Circuit Court of Appeals for 12 years. He has built a reputation with his colleagues from all walks of life as fair, scholarly, and of unquestioned integrity. He has participated in over 1,400 cases during his tenure on the bench and has authored some 400 opinions.

During the Senate Judiciary hearings, Anthony Kennedy forcefully demonstrated his respect for judicial restraint and his conviction that the law should be interpreted, rather than legislated, by the courts. He clearly has the temperament and the wisdom to serve the Supreme Court with tremendous distinction. I am honored to support this impressive nominee and I urge all of my colleagues to vote in favor of his confirmation.

Mr. SASSER. Mr. President, I rise today to support the nomination of Judge Anthony M. Kennedy for a seat on the Supreme Court.

It is critical that this seat be filled. It is true that the Court can, and has, functioned for fairly long periods of time with less than a full complement of Justices. However, it is always an undesirable situation. A decision by a less than full Court often leaves a gray cloud of uncertainty in important areas of the law.

Plaintiffs and defendants alike are left with doubts as to what the outcome of a case would have been if it had been argued before a full Court. Potential litigants with similar cases are tempted to bring additional cases in the hope that a new Justice will bring a different chemistry to the Court and that they will achieve a different result.

This is particularly true when, as now, the Court is sharply divided on many issues. We have seen numerous cases in the past few years resolved by a one-vote margin. And cases this term which raise important constitutional issues have been decided—if that is the right word—on a tie vote.

So, I am pleased that the President has finally sent us a nominee who can achieve broad support in the Senate.

In keeping with my practice on judicial nominations, I have waited until after the hearings have been completed before announcing my decision. I have carefully reviewed the hearing record and Judge Kennedy's record on the Ninth Circuit Court of Appeals.

I find that his opinions are well-reasoned and firmly grounded in established constitutional doctrine. They show an appreciation for the intent of the Founding Fathers as well as a awareness of 200 years of the American constitutional experience. That does not mean that I agree with every opinion that Judge Kennedy has handed down. However, I do believe that he has shown a commitment to the fundamental rights and liberties that Americans believe are guaranteed by the Constitution—the right to privacy, civil rights, and equal justice under the law.

Judge Kennedy comes to the Senate for confirmation after a long and distinguished record on the bench. He is a graduate of Stanford University and Harvard Law School. He also studies at the London School of Economics. In 1976, he was appointed to the Ninth Circuit Court of Appeals.

During his time on that court, he has authored numerous opinions. The reasoning in some of them was later adopted by the Supreme Court. This shows two things, I believe. First, it indicates that he is firmly in the mainstream of constitutional interpretation and constitutional doctrine. Second, it offers the hope that he will be a Justice that can mold a consensus on the Court.

This latter point is more important than appears at first glance. It is often a critical role on the Court—especially a Court as divided as the present Court has been in recent years. As I said earlier, a sharply divided Court speaks with a divided voice. It leaves Americans unsure of exactly where their constitutional liberties begin and end.

The Supreme Court is a crucial element in our democratic fabric. It is living proof that the bar of justice is open to all. That every citizen may have his or her day in court and the opportunity for the protection of his or her individual rights. For many of our citizens, who may well have exhausted all other means of redress, it is indeed the Court of last resort.

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So, with that, Mr. President, I congratulate Judge Kennedy on his confirmation and I wish him well in the important though difficult work on which he is about to embark.

Mr. KERRY. Mr. President, I support the nomination of Judge Anthony M. Kennedy to the Supreme Court of the United States. I do so not because I agree with Judge Kennedy on every issue, but because I believe that he is a thoughtful, moderate jurist who is within the mainstream of American judicial thought. I believe that Judge Kennedy will bring a reasoned, careful, case-by-case approach to the Supreme Court, much like that of his predecessor on the Court, Justice Lewis Powell.

I opposed the nomination of Judge Robert Bork to the Supreme Court because I felt that his writings as a law professor and a judge showed him to be outside the mainstream of American thought on issues of civil rights and civil liberties. His views did not reflect the consensus of the American people on these issues. For these reasons, Judge Bork's nomination was rejected by the Senate by a large margin.

Judge Kennedy, however, is much different in his approach from Judge Bork. One example is the right to privacy. Although not enumerated specifically in the Constitution, the Supreme Court has found an implicit right to privacy in the Constitution. Judge Bork rejected that concept and that precedent. Judge Kennedy respects it. He does recognize a right to privacy as implicit in the Constitution, and he so stated during his confirmation hearings in December. This is a major and important difference between Judge Kennedy and Judge Bork.

I do have some concerns about Judge Kennedy, most particularly about some of his past decisions in the area of civil rights and civil liberties.

For example, I have questions about his decision in Beller versus Middendorf, where Judge Kennedy authored an opinion upholding the constitutionality of Navy regulations providing for the discharge of those who engage in homosexual activities. While I agree with Judge Kennedy that there must be "a reasonable effort to accommodate the needs of the government with the interests of the individual," I am not convinced that this case strikes such a balance.

Also, in U.S. versus Leon, Judge Kennedy dissented from the majority's holding which affirmed the suppression of evidence in a drug case and refused to recognize a so-called good faith exception to the exclusionary rule. In U.S. versus Cavanaugh, Judge Kennedy upheld the legality of electronic surveillance by the FBI of an engineer who was suspected of espionage. And in AFSCME versus State of Washington, Judge Kennedy authored an opinion reversing a district court judge who found discrimination by Washington State against its female employees on the basis of "comparable worth."

I might have decided these cases differently than Judge Kennedy. But I believe that, on balance, his decisions were reasonable ones, based on his perception of the merits of each case, and not on some overarching ideological theory or doctrine. Judge Kennedy's approach is one that I believe is appropriate for a Supreme Court Justice.

Judge Kennedy has been on the Federal bench for 12 years, and has authored over 400 opinions. He enjoys the respect of his colleagues. The American Bar Association has given Judge Kennedy its highest rating. His nomination has been reported out favorably, and unanimously, by the Senate Judiciary Committee. While I am concerned by the fact that respected groups such as Americans for Democratic Action and the National Organization of Women have decided to oppose his nomination, I believe that his nomination is as good as we are likely to get from this administration, and is better than most.

In a 1980 speech on Presidential powers, Judge Kennedy said, "My position has always been that as to some fundamental Constitutional questions, it is best not to insist on definitive answers. The Constitutional system works best if there remain twilight zones of uncertainty and tension between the component parts of the government. The surest protection of constitutional rule lies not in definitive announcements of power boundaries, but in a mutual respect and deference among all the component parts."

That is a reasonable and thoughtful view of our system of government, one which I can support. Unlike Judge Bork, Anthony Kennedy is not a judicial activist. He does not have a radical agenda. He is a judicial moderate, well within the mainstream of the judiciary. For these reasons, I will vote to confirm Judge Kennedy as an Associate Justice of the Supreme Court.

Mr. ADAMS. On January 27, the Judiciary Committee voted to recommend the confirmation of Judge Anthony Kennedy to fill the vacancy on the Supreme Court. While Judge Kennedy would not have been the individual I would have chosen to replace Justice Lewis Powell, I believe he has the requisite integrity, intelligence and fair mindedness to be a Justice of the Supreme Court.

During the Judiciary Committee hearings, Judge Kennedy was forthright and articulate in expressing his views and describing his judicial philosophy. I do not agree with him on every issue. For example, I believe that his decision in the Washington State comparable worth case, AFSCME versus State of Washington, was wrong. Despite these differences, however, Judge Kennedy has displayed sensitivity to the rights of individuals in our society and the role of the courts in protecting our cherished liberties. For these reasons, I will vote to confirm Judge Kennedy to the Supreme Court.

The advice and consent responsibility of the U.S. Senate requires each Senator to make a searching inquiry into each nominee's qualifications and come to an independent judgment on his or her fitness for the Federal judiciary. I made this inquiry with Judge Bork, who I felt was not qualified to become a Supreme Court Justice, and now with Judge Kennedy. I will continue to exercise my judgment in scrutinizing future Reagan nominations.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Mr. President, I believe we have 3 minutes left. I yield that time to Senator WILSON from the home State of the nominee.

Mr. WILSON. Mr. President, it is little wonder that victims of crimes often fail to report crimes, as Judge Kennedy has noted, because the criminal justice system's failure to care about victims has become widely perceived, if not in fact, at least in belief. Too often that belief has inspired public doubt that true justice will be done.

The concern that Judge Kennedy has expressed so eloquently is appropriate not only for those of us entrusted with making the law but clearly for judges who apply it, and certainly appropriate for those whose duty it is to test the law against the Constitution.

I said a moment ago that he would provide leadership. He has done so already. In the Chadha decision, Mr. President, he corrected congressional overreaching and said that the legislative veto that we had enacted intruded upon the province of the other two branches.

In the United States versus Leon, Judge Kennedy's dissent in the ninth circuit in fact became the basis for the majority opinion by the Supreme Court overturning the ninth circuit and establishing as a principle that good-faith errors on the part of law enforcement when they do not invalidate the evidence will not cause it to be excluded. Time and again, he has demonstrated a concern for victims as well as those who in good faith seek to protect society against criminals, set forth in an eloquent style and upheld by an even more important philosophy.

It is not enough, Mr. President, that the Supreme Court have those who will simply serve. It must have people, certainly every now and again, of the caliber of Anthony Kennedy. People

who can, in fact, provide the kind of leadership that is essential to the rule of law in America.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. LEAHY. Mr. President, we are going to vote soon.

I would note that the chairman of the Senate Judiciary Committee is not here because of an illness. I know how personally disappointing that must be to him. We would not be here at this time without the leadership of Senator BIDEN, who has carefully brought these hearings to fruition, moved them through expeditiously, in a way so that all sides could be heard. I think the fact that this nomination is here in such good shape is a tribute to Senator BIDEN.

The PRESIDING OFFICER. The Senator's time has expired. All time has expired.

The hour of 10:30 having arrived, the question is will the Senate advise and consent to the nomination of Anthony M. Kennedy, of California, to be an Associate Justice of the Supreme Court.

The yeas and nays have been ordered. 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.

I also announce that the Senator from Delaware [Mr. BIDEN] is absent because of illness.

I further announce that, if present and voting, the Senator from Delaware [Mr. BIDEN] and the Senator from Tennessee [Mr. GORE] would each vote "yea."

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 97, nays 0, as follows:

[Rollcall Vote No. 16 Ex.]

YEAS—97

Adams	Evans	Lugar
Armstrong	Exon	Matsunaga
Baucus	Ford	McCain
Bentsen	Fowler	McClure
Bingaman	Garn	McConnell
Bond	Glenn	Melcher
Boren	Graham	Metzenbaum
Boschwitz	Gramm	Mikulski
Bradley	Grassley	Mitchell
Breaux	Harkin	Moynihan
Bumpers	Hatch	Murkowski
Burdick	Hatfield	Nickles
Byrd	Hecht	Nunn
Chafee	Heflin	Packwood
Chiles	Heinz	Pell
Cochran	Helms	Pressler
Cohen	Hollings	Proxmire
Conrad	Humphrey	Pryor
Cranston	Inouye	Quayle
D'Amato	Johnston	Reid
Danforth	Karnes	Riegle
Daschle	Kassebaum	Rockefeller
DeConcini	Kasten	Roth
Dixon	Kennedy	Rudman
Dodd	Kerry	Sanford
Dole	Lautenberg	Sarbanes
Domenici	Leahy	Sasser
Durenberger	Levin	Shelby
Simpson	Symms	Weicker
Specter	Thurmond	Wilson
Stafford	Trible	Wirth
Stennis	Wallop	
Stevens	Warner	

NOT VOTING—3

Biden	Gore	Simon

So the nomination was confirmed.

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.

Mr. BYRD. Mr. President, I move to reconsider the vote by which the nomination was confirmed.

Mr. METZENBAUM. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will now be a period for the transaction of morning business for not to exceed 30 minutes. The majority leader.

RECESS UNTIL 11:45 A.M.

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate stand in recess for 45 minutes.

There being no objection, the Senate, at 11 a.m., recessed until 11:45 a.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer [Mr. SHELBY].

EXTENSION OF MORNING BUSINESS

Mr. BYRD. Mr. President, what is the pending business before the Senate, if any, at the moment?

The PRESIDING OFFICER. Morning business has expired.

Mr. BYRD. Mr. President, I ask unanimous consent that morning business be extended for an additional 30 minutes and that Senators may speak therein up to 5 minutes each.

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

SOVIET ARMAMENTS TO ORTEGA—UNITED STATES ARMS TO CONTRAS DOES NOT BRING PEACE

Mr. MELCHER. Mr. President, my continued and consistent opposition to U.S. money for the Contras is based on my strong feeling that throwing money at 15,000 or 20,000 armed troops will not bring peace. I have continuously evaluated President Reagan's Nicaraguan policy, and I have always concluded this policy simply is wrong. As long as we continue to send the Contras money, they will find ways to gobble it up.

Sending more money to solve the mess in Nicaragua ignores the basic problem: as long as Nicaragua receives outside shipments of armaments, the Nicaraguans, with their war, will keep plodding on.

Is there anything wrong with President Reagan telling Gorbachev that the Soviets must stop supplying war materials to the Nicaraguan Government? That government is sick, and the continuous supply of Soviet armaments is the root of their sickness. To match that with U.S. supplies for the Contras does not treat the illness but only spread it.

My prescription is to have President Reagan notify Gorbachev that arms shipments to Nicaragua are unacceptable. That is the best U.S. contribution to the Arias peace plan. If the peace proposal is to succeed, it will be worked out gradually, without outside interference.

We have enough problems at home with a shaky economy that reflects the serious budget and trade deficits. The attention to Ortega and the Contras continually distracts attention from our major economic problems.

Nicaragua has been a continuous drain, both in dollars and time for the President and Congress. Meanwhile, America sinks deeper into its own economic swamp.

To make our position clear, the President should promptly notify the Soviets to halt Nicaraguan arms shipments and then permit the focus of our efforts to be turned to our own problems.

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, the two requests I am about to make have been cleared with the distinguished Republican leader.

TRADITIONAL READING OF WASHINGTON'S FAREWELL ADDRESS

Mr. BYRD. Mr. President, I ask unanimous consent that notwithstanding the resolution of the Senate of January 24, 1901, on Monday, February 15, 1988, immediately following the prayer and the disposition of the Journal, the traditional reading of Washington's Farewell Address take place, and that the chair be authorized to appoint a Senator to perform its reading.

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