"BALANCE" ON THE SUPREME COURT

(Talking Points)

In raising concerns about the nomination of Judge Robert Bork to be Associate Justice of the United States Supreme Court, Senator Biden and others have suggested that, whatever his other qualifications, it might be appropriate for a Senator to oppose Judge Bork's nomination on the grounds that it would affect the "balance" on the Supreme Court. "A major issue upon which this nomination could turn is whether the nominee would alter significantly the balance on the court", states Senator Biden paraphrasing a theme earlier developed by Prof. Laurence H. Tribe of the Harvard Law School.

-- The United States Constitution nowhere specifies any particular "balance" that is permanently to obtain on the Supreme Court. Opposing a particular nominee because he would alter the "balance" on the Court is merely a veiled way of saying that one disagrees with the philosophical direction in which a nominee would move the Court. Whatever the propriety of a Senator opposing a nominee because of philosophical differences, this should not be confused with objection on the ground of "imbalancing" the Court.

-- There have been few, if any, Presidents who have had any other objective in their Supreme Court nominations than to affect the "balance" on the Court. Just as individual members of the electorate attempt to influence the "balance" in the Congress and in the Presidency through their votes, so too do Presidents attempt to influence the "balance" on the Supreme Court through their appointments. Senator Biden may disapprove of this attempt in the case of Judge Bork's nomination, but he should not pretend that President Reagan is doing anything other than what his predecessors have routinely done in making appointments.

-- There are countless occasions in the history of the Nation in which Presidents have consciously attempted to influence the "balance" on the Supreme Court in significant ways: President Jackson's efforts to curtail the nationalist impulses of the Marshall Court; President Lincoln's efforts to influence national monetary legal policies; President Franklin Roosevelt's efforts to eliminate judicial impediments to the New Deal; and President Kennedy's effort to solidify the effective working majority in behalf of Warren Court policies.

-- A variant of the "balance" argument is Senator Simon's argument that the Supreme Court should not be a "pendulum" swinging wildly from "one extreme to another". Because the Supreme Court is a collegial body consisting of nine individuals, it is unlikely that there will be major changes in policy except in those areas in which there are fairly recent 5-4 votes. In such instances, it is not at all clear why the policy results of a transitory 5-4 majority ought to be allowed to prevail indefinitely.

-- If the argument were accepted that existing "balances" on the Court should be respected, it is difficult to see how such High Court decisions as Plessy v. Ferguson ("separate but equal") could ever be reversed by such subsequent decision as Brown v. Board of Education. More likely, the underlying theory of "balance" proponents is that the judicial philosophy espoused by the Court can evolve in only a single (more "liberal") direction.

-- The overriding jurisprudential trend of the Supreme Court over the past thirty years has been a "liberal" one. Over this period, more and more public policy decisions have been made by courts, not legislative bodies; almost invariable, the substance of such judicial decision-making has been compatible with political liberalism. This is the "balance" that advocates of the "balance" theory would like to preserve. There is certainly nothing wrong with such individual stating their opposition to a review or reversal of these decisions; it is hypocritical, however, to suggest that such opposition is principled rather than being based upon satisfaction with existing Supreme Court case-law.

-- One cannot help but wonder how committed Senator Biden or Senator Simon would be to the "balance" theory if either were to be elected President in 1988 and be faced with appointing a successor to Justice Rehnquist or Justice Scalia. Would they feel constrained in upsetting the existing Supreme Court "balance"?

-- Where were the advocates of the "balance" theory in the 1960's when Justice Goldberg and Fortas and Marshall were being placed on the Supreme Court resulting in a body that consisted of (at best) two judicial conservatives? Presumably, the "balance" theory has nothing to say when a judicial philosophy is so predominant on the Court that an additional appointment, rather than shifting the "balance", will merely solidify the dominance of an existing "balance".

-- The "balance" theory is delinquent also in its pure result-orientation, assuming that judges are always predictable in their opinions on the basis of their personal, philosophical perspectives. If Judges-- both "liberal" and "conservative" ones-- were to confine themselves to interpreting the law as given to them by statute or Constitution, rather than injecting their own personal predilections, there would be no need to worry about "balance" on the Court.

STATEMENT OF SENATOR _____

GENERAL OPENING STATEMENT

Mr. Chairman,

I would like to comment on the President's nomination of Judge Robert Bork to be an Associate Justice of the Supreme Court of the United States.

In my opinion, Judge Bork's nomination to the Supreme Court is an excellent choice for our country. In his speeches, law review articles, and written opinions on the District of Columbia Circuit Court of Appeals, Judge Bork has proven to be wise, thoughtful, and compassionate -- qualities that we should expect every Supreme Court Justice to possess.

For example, I note that in a case called Friends for All Children v. Lockheed Aircraft, Judge Bork joined two of his colleagues in requiring, as interim relief, the creation of a $450,000 fund to pay for the medical treatment of Vietnamese orphans who were injured when their plane crashed in Vietnam in 1975 during "Operation Babylift." Although this remedy was somewhat novel, Judge Bork did not let convention impede him from protecting the interests of those children under the law as he understood it. I believe the American people would be well-served by a Supreme Court Justice who conducts himself in such a manner.

We in Congress also should take note that Judge Bork has demonstrated a profound commitment to the Constitution and to the role the Constitution assigns to judges. Stated simply, Judge Bork's view is that judges should not disturb the judgments of elected officials unless the Constitution clearly requires that result. Thus, to Judge Bork, "judicial restraint" -- increasingly an elusive term that many alter to fit their own purpose -- means simply that "courts ought not invade the domain the Constitution marks out for democratic rather than judicial governance."

Judge Bork's illustrious career on the District of Columbia Circuit shows that he faithfully applies this rule to all controversies that come before him. Where the Constitution is silent with respect to any particular issue, Judge Bork is not afraid to let the American people govern themselves through their elected representatives -- whether those representatives are "liberal" or "conservative" or of some other political ilk.

On the other hand, where the Constitution does have something to say about a matter, Judge Bork is not afraid to act like a judge, and to apply the Constitution faithfully and fearlessly. I have every reason to believe that Judge Bork -- like Justice Powell before him -- has the courage to protect our constitutional rights and freedoms no matter what the circumstances.

In this year of the bicentennial of the Constitution, I believe the American people deserve a Supreme Court nominee who respects that document for what it plainly is -- the supreme law of the land, binding on judges as on all branches of government. Everything I know and hear about Judge Bork tells me that he is exactly such a man. I applaud his nomination to the Supreme Court, and I urge the Congress to confirm him.

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Mr. Chairman,

I want to comment on the nomination of Robert H. Bork to the position of Associate Justice of the United States Supreme Court. Judge Bork is considered one of the finest members of the legal community. He is honest, dedicated and possessed with a keen mind with impressive intellectual abilities.

I know of no person more qualified to sit on that august Court. Whether as a private practitioner, Yale Law School professor, Solicitor General for the United States, and now Judge on the United States Court of Appeals for the District of Columbia Circuit, Judge Bork has distinguished himself as a premier constitutional scholar and an expert in the field of antitrust law. He is well-respected and admired in the legal and judicial communities for his abilities, intellectual and practical, and for his fairness and willingness to listen to all sides of an argument.

Most important, the record of Judge Bork on the bench and his extensive, voluminous writings, indicate that Judge Bork is in action and in thought the epitome of what a judge should be in our constitutional system. It must be remembered that Judge

Bork is the primary advocate of the philosophy of "judicial restraint," by which judges give effect to the democratic aspirations of the people by deferring to legislatures -- whether state or federal -- unless the Constitution says otherwise. This is especially significant in this the two hundredth anniversary of our Constitution, the document that installed a Government of "WE THE PEOPLE."

Judge Bork's brand of judicial restraint is more than a simple opposition to unfettered judicial power. His analysis begins with the text of the Constitution. He is an extraordinarily articulate advocate of "intentionalist" or "interpretivist" jurisprudence and, simply put, believes that the words of the Constitution constrain a judge's discretion and a judge's power to legislate his or her's personal conceptions of values and morality. The text of the Constitution therefore supplies "neutral principles" to judges the strict implementation of which prevents unlimited judicial control of the political process. Too often in the recent past we have seen the anomaly of judicial supremacy in a democratic society. The alternative to this unrestrained judicial power, Judge Bork rightfully believes, is to leave authority with the people and their elected representatives. He is thus true to the heritage bequeathed to us by the Founding Fathers.

Judge Bork's jurisprudence is consequently neither politically "conservative" nor "liberal." He has no hidden

"agenda." His view on individual rights is that rights explicitly enumerated in the Constitution must be protected and has consequently endorsed expansive First Amendment protection for the press in the libel area. In short, Judge Bork is an archetypal constitutionalist, one more than fitting to sit on the Supreme Court.

Mr. Chairman, I rise in support of the President's nomination of Judge Robert H. Bork as an Associate Justice of the United States Supreme Court.

Judge Bork is eminently qualified for the position. He is a man of unquestioned brilliance and integrity. His scholarly writings and his decisions since ascending to the bench demonstrate that he is committed to applying the Constitution as written, rather than imposing, under the guise of constitutional law, his own personal political or social values on the Nation.

Because Judge Bork's ability and integrity undoubtedly qualify him for appointment to the Supreme Court, those who oppose the nomination have been forced to do so for purely ideological reasons. They claim his appointment will alter the so-called "balance" on the Court. In effect, they seem to argue that the Court's jurisprudence should be frozen as of June 1987, or that the President should appoint a clone of Justice Powell, if not a person of a decidedly liberal bent.

There is, however, nothing in the Constitution that requires that there be any sort of "balance" on the Supreme Court, liberal or conservative. Indeed, it seems to me that every time any President has nominated an individual to the Court, it has been with the intent of changing the balance of the Court in the direction of the President's judicial philosophy.

I wonder where my liberal friends, who have recently discovered the virtues of "balance" on the Court, were when Presidents in the past have used the appointment power to shift the Court to the left. Where were these newly discovered proponents of balance when President Roosevelt used his appointment power to create a more favorable forum for the New Deal programs. Or where were they when President Kennedy appointed Justice Goldberg to replace Justice Frankfurter, helping kick the Warren Court into high gear? If my colleague Senator Biden or Senator Simon becomes President in 1988, and if Justice Rehnquist then retires, I doubt that a conservative jurist would be appointed to preserve the then-existing balance of the Court.

It should be emphasized, however, that Judge Bork will bring neither a conservative nor a liberal bias to the Court. As I have stated, he is completely committed to applying the Constitution as written, whether the results are perceived as liberal, moderate or conservative. Unlike many academics today, Judge Bork does not view his role as one of divining extra-constitutional values in his decisionmaking in order to advance a political or ideological agenda.

Some have expressed the fear that Judge Bork's appointment would somehow "turn back the clock" on what they consider to be political or social advances imposed on the country by an activist Supreme Court. They fear, for example,

that his appointment would lead to the reversal of Roe v. Wade, which fourteen years ago overturned the abortion laws of every state; Miranda v. Arizona, which created out of whole cloth new police custodial interrogation procedures purportedly required by the Constitution; or Mapp v. Ohio, which forbids the use in state or federal criminal courts of probative evidence from unlawful searches.

I do not know whether Judge Bork would vote to overrule any of these cases. Even if he did, however, and even if any of them were eventually overruled, this would not roll back progress, but would simply return the issues to state or federal legislatures to determine in accordance with the will of the people. The advocates of legalized abortion, Miranda, or the exclusionary rule could then make their cases before the elected representatives of the people rather than before judges appointed for life who are not directly accountable to the people.

Mr. Chairman, I wholeheartedly support the nomination of Judge Bork, and I respectfully urge that his nomination be brought to the Senate floor as soon as possible, so that the Court can operate at full strength when its new Term begins in October.

The Supreme Court's 1973 abortion Roe v. Wade, seems to be emerging as the chief issue with respect to the confirmation of Judge Bork as the next justice of the Supreme Court. The abortion lobby has loudly issued its call to arms. Senator Kennedy has made the utterly false and hysterical statement that "Robert Bork's America is a land in which women would be forced into back-alley abortions."

Let's pause, for a moment, to think about the nature of the job that Judge Bork is being considered for. Judge Bork has been nominated for the job of interpreting the Constitution and applying it to individual cases or controversies. Let us remember, with Chief Justice Marshall in McCulloch v. Maryland "that it is a constitution we are expounding."[1] What does the Constitution have to say about abortion? What is the constitutional status of Roe v. Wade?

In 1981, Judge Bork testified before our Subcommittee on the Separation of Powers that

> I am convinced, as I think most legal scholars are, that Roe v. Wade is itself, an unconstitutional decision, a serious and wholly unjustified judicial usurpation of state legislative authority.

Is Judge Bork correct when he says that "most legal scholars" agree with him?

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[1] 17 U.S. 316, 407 (1819)

For three decades, Philip Kurland, the distinguished professor of law at the University of Chicago, has been recognized as one of our leading constitutional authorities. About Roe v. Wade, Professor Kurland has said

> But for a capacity to make constitutional bricks without any constitutional straws, certainly no prior case can be equalled by that of the abortion decisions. However, much I like the results -- and I do -- I can find no justification for their promulgation as a constitutional judgment by the Supreme Court.[2]

Neither Laurence Tribe of Harvard Law School nor John Hart Ely, formerly of Harvard, now dean of the Stanford Law School, has ever been accused of being a right-winger. In his American Constitutional Law,[3] Tribe defends Roe v. Wade but calls it "a dramatic step" and "among the most troublesome in constitutional law."[4] Furthermore he says of abortion and Roe:

> ...nothing in the Supreme Court's opinion provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability.[5]

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[2]Kurland, "Public Policy, the Constitution, and the Supreme Court," 12 Northern Kentucky L.Rev. 181, 196 (1985)

[3]Foundation Press, 1978

[4]Id. at 926, 929

[5]Id. at 927

In a previous writing, Professor Tribe stated that:

> One of the most curious things about Roe is that, behind its own verbal smokescreens, the substantive judgment on which it rests is nowhere to be found.[6]

Dean Ely's has stated his personal views about abortion as follows:

> Were I a legislator I would vote for a statute very much like the one the Court ends up drafting.[7]

Nevertheless, as a constitutional scholar, Ely feels compelled to call Roe:

> ...a very bad decision...It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.[8]

Archibald Cox -- whose resume requires no review -- substantially agreed with all the scholars quoted above when he said:

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[6]Tribe, "The Supreme Court, 1972 Term -- Foreward: Toward a Model of Roles in the Due Process of Life and Law, 87 Harvard L.Rev. 1, 7 (1973)

[7]Ely, "The Wages of Crying Wolf," 82 Yale L.Rev. 920, 926 (1973)

[8]Id. at 947

> neither historian, layman, nor lawyer will be persuaded that all the details prescribed in Roe v. Wade are part of either natural law of the Constitution.[9]

Gerald Gunther is the author of one of the most widely-used constitutional-law textbooks.[10] He adds further authority to what must now be conceded is the prevailing view about the abortion right:

> For example, I have not yet found a satisfying rationale to justify Roe v. Wade, the abortion ruling, on the basis of modes of constitutional interpretation I consider legitimate.[11]

Is Judge Bork right about constitutional scholarship with respect to Roe v. Wade? This quick review has shown that Judge Bork is in the mainstream on the constitutional status of abortion. We have seen that he agrees with a large number of other distinguished scholars -- some of whom have forthrightly said that Roe is constitutionallly impossible even though they personally favor abortion itself.

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[9]Cox, The Role of The Supreme Court in American Government, 114 (1976)

[10]Constitutional Law, Cases and Materials, University Casebook Series, 10th Edition

[11]Washington Univ. L. Quarterly 817, 819 (1979)

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