United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1150

NATURAL RESOURCES DEFENSE COUNCIL, INC., PETITIONER

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and
LEE M. THOMAS, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

VINYL INSTITUTE, INTERVENOR

Petition for Review of an Order of the Environmental Protection Agency

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Argued En Banc April 29, 1987

Decided July 28, 1987

David D. Doniger, for petitioner.

Peter R. Steenland, Attorney, Department of Justice, with whom *Stephen L. Samuels, Margaret N. Strand, Michael W. Steinberg, Mark P. Fitzsimmons*, Attorneys,

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Department of Justice, *Francis Blake*, General Counsel, *William Pedersen*, Associate General Counsel, *Charles Carter*, Assistant General Counsel, and *Earl Salo*, Attorney, Environmental Protection Agency, were on the brief, for respondents.

Jerome H. Heckman, Peter L. delaCruz, Gary H. Baise, Robert Brager, Brenda Mallory, Albert J. Beveridge III and *Don G. Scroggin* were on the brief for intervenor, The Vinyl Institute.

Daniel Marcus was on the brief for *amicus curiae*, American Iron and Steel Institute, urging approval of Environmental Protection Agency action to withdraw proposed amendments to the vinyl chloride standard.

Robert V. Percival was on the brief for *amicus curiae*, Environmental Defense Fund, urging the grant of Natural Resources Defense Council's petition for review.

G. William Frick, Martha A. Beauchamp, Arthur F. Sampson III and *John Gibson Mullan* were on the brief for *amicus curiae*, The American Petroleum Institute, urging affirmance of the panel decision. *Stark Ritchie* and *Arnold Block* also entered appearances for the American Petroleum Institute.

David F. Zoll and *Neil Jay King* were on the brief for *amicus curiae*, Chemical Manufacturers Association, urging approval of Environmental Protection Agency action. *Frederic P. Andes* also entered an appearance for Chemical Manufacturers Association.

Frederick R. Anderson was on the brief for *amicus curiae*, Various Professors of Law, urging the reversal of the panel decision.

Before: WALD, *Chief Judge*, ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BORK.

BORK, *Circuit Judge*: Current scientific knowledge does not permit a finding that there is a completely safe level of human exposure to carcinogenic agents. The Administrator of the Environmental Protection Agency, however, is charged with regulating hazardous pollutants, including carcinogens, under section 112 of the Clean Air Act by setting emission standards "at the level which in his judgment provides an ample margin of safety to protect the public health." 42 U.S.C. § 7412(b)(1)(B) (1982). We address here the question of the extent of the Administrator's authority under this delegation in setting emission standards for carcinogenic pollutants.

Petitioner Natural Resources Defense Council ("NRDC") contends that the Administrator must base a decision under section 112 exclusively on health-related factors and, therefore, that the uncertainty about the effects of carcinogenic agents requires the Administrator to prohibit all emissions. The Administrator argues that in the face of this uncertainty he is authorized to set standards that require emission reduction to the lowest level attainable by best available control technology whenever that level is below that at which harm to humans has been demonstrated. We find no support for either position in the language or legislative history of the Clean Air Act. We therefore grant the petition for review and remand to the Administrator for reconsideration in light of this opinion.

I.

Section 112 of the Clean Air Act provides for regulation of hazardous air pollutants, which the statute defines as "air pollutant[s] to which no ambient air quality standard is applicable and which in the judgment of the Administrator cause[], or contribute[] to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. § 7412

(a)(1) (1982). The statute requires the Administrator to publish a list containing each hazardous pollutant for which he intends to adopt an emission standard, to publish proposed regulations and a notice of public hearing for each such pollutant, and then, within a specified period, either to promulgate an emission standard or to make a finding that the particular agent is not a hazardous air pollutant. *See id.* § 7412(b)(1)(B). The statute directs the Administrator to set an emission standard promulgated under section 112 "at the level which in his judgment provides an ample margin of safety to protect the public health." *Id.*

This case concerns vinyl chloride regulations. Vinyl chloride is a gaseous synthetic chemical used in the manufacture of plastics and is a strong carcinogen. In late 1975, the Administrator issued a notice of proposed rulemaking to establish an emission standard for vinyl chloride. 40 Fed. Reg. 59,532 (1975). In the notice, the EPA asserted that available data linked vinyl chloride to carcinogenic, as well as some noncarcinogenic, disorders and that "[r]easonable extrapolations" from this data suggested "that present ambient levels of vinyl chloride may cause or contribute to . . . [such] disorders." *Id.* at 59,533. The EPA also noted that vinyl chloride is "an apparent non-threshold pollutant," which means that it appears to create a risk to health at all non-zero levels of emission. Scientific uncertainty, due to the unavailability of dose-response data and the twenty-year latency period between initial exposure to vinyl chloride and the occurrence of disease, makes it impossible to establish any definite threshold level below which there are no adverse effects to human health. *Id.* at 59,533-34. The notice also stated the "EPA's position that for a carcinogen it should be assumed, in the absence of strong evidence to the contrary, that there is no atmospheric concentration that poses absolutely no public health risk." *Id.* at 59,534.

Because of this assumption, the EPA concluded that it was faced with two alternative interpretations of its duty under section 112. First, the EPA determined that section 112 might require a complete prohibition of emissions of non-threshold pollutants because a "zero emission limitation would be the only emission standard which would offer absolute safety from ambient exposure." 40 Fed. Reg. at 59,534. The EPA found this alternative "neither desirable nor necessary" because "[c]omplete prohibition of all emissions could require closure of an entire industry," a cost the EPA found "extremely high for elimination of a risk to health that is of unknown dimensions." *Id.*

The EPA stated the second alternative as follows:

> An alternative interpretation of section 112 is that it authorizes setting emission standards that require emission reduction to the lowest level achievable by use of the best available control technology in cases involving apparent non-threshold pollutants, where complete emission prohibition would result in widespread industry closure and EPA has determined that the cost of such closure would be grossly disproportionate to the benefits of removing the risk that would remain after imposition of the best available control technology.

Id. The EPA adopted this alternative on the belief that it would "produce the most stringent regulation of hazardous air pollutants short of requiring a complete prohibition in all cases." *Id.*

On October 21, 1976, the EPA promulgated final emission standards for vinyl chloride which were based solely on the level attainable by the best available control technology. 41 Fed. Reg. 46,560 (1976). The EPA determined that this standard would reduce unregulated emissions by 95 percent. *Id.* With respect to the effect of the standard on health, the EPA stated that it had assessed the risk to health at ambient levels of exposure by extrapolating from dose-response data at higher levels of exposure and then made the following findings:

> EPA found that the rate of initiation of liver angiosarcoma among [the 4.6 million] people living around uncontrolled plants is expected to range from less than one to ten cases of liver angiosarcoma per year of exposure to vinyl chloride . . . . Vinyl chloride is also estimated to produce an equal number of primary cancers at other sites, for a total of somewhere between less than one and twenty cases of cancer per year of exposure among residents around plants. The number of these effects is expected to be reduced at least in proportion to the reduction in the ambient annual average vinyl chloride concentration, which is expected to be 5 percent of the uncontrolled levels after the standard is implemented.

Id. The EPA did not state whether this risk to health is significant or not. Nor did the EPA explain the relationship between this risk to health and its duty to set an emission standard which will provide an "ample margin of safety."

The Environmental Defense Fund ("EDF") filed suit challenging the standard on the ground that section 112 requires the Administrator to rely exclusively on health and prohibits consideration of cost and technology. The EDF and the EPA settled the suit, however, upon the EPA's agreement to propose new and more stringent standards for vinyl chloride and to establish an ultimate goal of zero emissions.

The EPA satisfied its obligations under the settlement agreement by proposing new regulations on June 2, 1977. While the proposal sought to impose more strict regulation by requiring sources subject to a 10 parts per million ("ppm") limit to reduce emissions to 5 ppm, and by establishing an aspirational goal of zero emissions, the EPA made it clear that it considered its previous regulations valid and reemphasized its view that the inability scientifically to identify a threshold of adverse effects did not require prohibition of all emissions, but rather permitted regulation at the level of best available

technology. 42 Fed. Reg. 28,154 (1977). The EPA received comments on the proposal, but took no final action for more than seven years. On January 9, 1985, the EPA withdrew the proposal. Noting that certain aspects of the proposed regulations imposed "unreasonable" costs and that no control technology "has been demonstrated to significantly and consistently reduce emissions to a level below that required by the current standard," 50 Fed. Reg. 1182, 1184 (1985), the EPA concluded that it should abandon the 1977 proposal and propose in its place only minor revisions to the 1976 regulations.

This petition for review followed.

II.

We must address at the outset two procedural challenges to the NRDC's petition for review. First, an industry intervenor, the Vinyl Institute, argues that the petition for review is not timely filed. Second, the EPA argues that the NRDC has failed to exhaust its administrative remedies and that we must, therefore, dismiss the petition for review.

A.

The Vinyl Institute argues that this court does not have jurisdiction because the statute provides that "[a]ny petition for review . . . shall be filed within sixty days from the date notice of [the] promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review . . . shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1) (1982). According to the intervenor, the NRDC seeks review of the 1976 standards and not of the 1985 withdrawal of the proposed amendments. Because grounds for that challenge arose more than sixty days before the NRDC filed the petition for review, the intervenor claims that the

petition is untimely. Under *Montana* v. *Clark*, 749 F.2d 740 (D.C. Cir. 1984), *cert. denied*, 106 S.Ct. 246 (1985), "an agency decision not to amend long-standing rules after a notice and comment period is reviewable agency action." *Id.* at 744. Thus, if the petition for review, filed within sixty days of the withdrawal of the proposed amendments, is a genuine challenge to the withdrawal of the proposed regulations, it was timely filed. If, by contrast, the Vinyl Institute is correct in asserting that this petition is a substantive attack on the 1976 regulations, we must dismiss the suit as untimely filed. *See Professional Drivers Council* v. *Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1217-18 n.2 (D.C. Cir. 1983). We believe the former is the more accurate characterization of this lawsuit.

The contention that this case is a "back-door" challenge to the 1976 regulations is refuted by the substance of the petitioner's brief and the relief requested. The petitioner states that "[i]n withdrawing the proposed amendments the EPA violated the law by employing cost-benefit and technological feasibility tests that are prohibited by the Clean Air Act." Brief for NRDC at 3. Indeed, the brief makes explicit that the petitioner is specifically challenging the EPA's reliance on cost and technological feasibility in its withdrawal of the proposed amendments. *Id.* at 11-13. Additionally, the petitioner does not ask the court to overturn the 1976 standards, but rather asks the court to vacate the EPA's decision to withdraw the amendments. See Brief for NRDC at 36-37. We think it clear, therefore, that the NRDC has challenged the 1985 withdrawal of the proposed amendments. The petition for review is timely.

B.

The EPA argues that the petitioner has failed to exhaust available administrative remedies because it failed to participate in the proceedings below. Congress included in section 307(d) of the Clean Air Act a statutory requirement of exhaustion, which provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B) (1982). This statutory requirement of exhaustion, however, does not apply here. The statute also provides that "[t]he requirements of . . . subsection [307(d) of the Act] shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977." 42 U.S.C. § 7606(d)(11) (1982). The withdrawal of the proposed amendments is the final EPA action on a notice of proposed rulemaking that issued on June 2, 1977. *See* 42 Fed. Reg. 28,154 (1977). Thus, even if we assume that the action of withdrawing a proposed rule amounts to a "rule" for purposes of section 307(d), the proposal withdrawn here was issued before section 307(d) took effect. Accordingly, we must look to the common law doctrine of exhaustion of remedies. *See Safir* v. *Kreps*, 551 F.2d 447, 452 (D.C. Cir.), *cert. denied*, 434 U.S. 820 (1977). The result, however, is the same.

Courts have long required a party seeking review of agency action to exhaust its administrative remedies before seeking judicial review. *See, e.g., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). In this case, the administrative remedy was participation in the rulemaking proceedings during the comment period. Indeed, this court generally requires such participation as a prerequisite to a petition for direct review of the resulting regulations. *See Environmental Defense Fund* v. *EPA*, 598 F.2d 62, 91 (D.C. Cir. 1978).

The NRDC did not participate in the rulemaking proceedings in this case, but argues that we should not dismiss its petition for review because the agency in fact considered the statutory issue raised in the petition. The

NRDC is correct. This court has excused the exhaustion requirements for a particular issue when the agency has in fact considered the issue. *See Washington Ass'n for Television & Children* v. *FCC*, 712 F.2d 677, 682 n.10 (D.C. Cir. 1983); *Etelson* v. *Office of Personnel Management*, 684 F.2d 918, 923 (D.C. Cir. 1982); *ASARCO, Inc.* v. *EPA*, 578 F.2d 319, 320-21 n.1 (D.C. Cir. 1978); *Safir* v. *Kreps*, 551 F.2d at 452. Thus, courts have waived exhaustion if the agency "has had an opportunity to consider the identical issues [presented to the court] . . . but which were raised by other parties," *see Buckeye Cablevision, Inc.*, v. *United States*, 438 F.2d 948, 951 (6th Cir. 1971), or if the agency's decision, or a dissenting opinion, indicates that the agency had "the opportunity to consider" "the very argument pressed" by the petitioner on judicial review. *Office of Communication of the United Church of Christ* v. *FCC*, 465 F.2d 519, 523 (D.C. Cir. 1972).

In this case, the issue of whether the EPA may set a standard under section 112 on the basis of cost and technological feasibility was raised before the agency. First, the 1977 proposed amendments were the product of the settlement of a lawsuit challenging the previous vinyl chloride standards on the ground that the EPA impermissibly considered these factors. The EPA, therefore, had notice of this issue and could, or should have, taken it into account in reaching a final decision on the proposed amendments. Indeed, in its notice of proposed rulemaking, the EPA remarked that "[t]he [1976] vinyl chloride standard has been criticized for allegedly placing unwarranted emphasis on technological rather than health considerations." 42 Fed. Reg. 28,154 (1977). The notice then continued by discussing the "ample margin of safety" language, the potential problem under this standard of shutting down an entire industry that produces a non-threshold pollutant, and the way the proposed amendments resolved the problem by moving toward zero emissions without banning vinyl chloride. *Id.* Thus, it is

clear that the EPA actually did consider the issue raised by the NRDC in its petition for review.

Moreover, the EDF explicitly raised the issue before the EPA in its comments on the proposed amendments. In this respect, the EDF stated:

> The proposed amendments represent a true compromise between what EDF could have pressed for in court and the existing standard. Section 112 of the Clean Air Act requires that emission standards for hazardous air pollutants . . . be set "at a level which in the judgment of the Administrator provides an ample margin of safety to protect the public health from such hazardous air pollutants." It clearly requires a health-linked, not a technology-based standard. Yet, inconsistent with the statutory requirement, the original standards were based on what EPA believed industry could accomplish with best available technology. . . . EPA recognized that vinyl chloride is "an apparent non-threshold pollutant" which creates a risk to public health at all levels. Had the case gone to trial, EDF would have taken the position that § 112 required a zero emission standard, the only standard adequate to provide the required margin of safety for a non-threshold pollutant. Instead, EDF settled for a compromise which establishes a goal of zero emissions and requires industry to move one step closer to that goal.

J.A. at 72-73. The EDF's comments contain other similar references, such as the assertion, in response to cost arguments raised by the industry, that "the statute EPA operates under requires regulations based on protection of health and not cost and technology concerns." *Id.* at 83. Thus, the EPA had before it the question of whether the statute permits considerations of cost and technology in setting standards, and it had the opportunity to consider that question in deciding to withdraw the proposed amendments.

The EPA also suggests, however, that we should be "especially" loath to allow this petition for review because the "NRDC chose not to participate *at all* in *any* of the administrative proceedings on vinyl chloride." Brief for EPA at 12 (emphasis in original). This merely restates the proposition that the NRDC has failed to exhaust its administrative remedies. None of the cases relied upon by the EPA suggests that exceptions to exhaustion have any less applicability in the case of a wholly absent party than in other exhaustion contexts. *See Environmental Defense Fund* v. *EPA*, 598 F.2d 62, 91 (D.C. Cir. 1978); *Nader* v. *Nuclear Regulatory Comm'n*, 513 F.2d 1045, 1054-55 (D.C. Cir. 1975). This is not a case in which the statute conditions a party's ability to obtain judicial review upon its participation in the rulemaking proceedings. *See Gage* v. *Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973). The jurisdictional provision of the Clean Air Act imposes no such prerequisite, and, in fact, employs rather permissive language which does not specify who may bring a petition for review. *See* 42 U.S.C. § 7607(b) (1982) ("A petition for review of action of the Administrator in promulgating . . . any emission standard or requirement under section 7412 . . . may be filed . . . in the United States Court of Appeals for the District of Columbia."). The NRDC's total abstention from participation in the rulemaking proceedings does not make the exhaustion requirement more compelling or negate the valid exception to that requirement asserted by the NRDC.

III.

The NRDC's challenge to the EPA's withdrawal of the 1977 amendments is simple: because the statute adopts an exclusive focus on considerations of health, the Administrator must set a zero level of emissions when he cannot determine that there is a level below which no harm will occur.

We must determine whether the EPA's actions are arbitrary, capricious, an abuse of discretion, or otherwise not

in accordance with law. 42 U.S.C. § 7607(d)(9)(A) (1982). Review begins with the question of whether "Congress has directly spoken to the precise question at issue" and has expressed a clear intent as to its resolution. *Chevron, U. S. A., Inc.* v. *NRDC*, 467 U.S. 837, 842-43 (1984). If so, "that intention is the law and must be given effect." *Id.* at 843 n.9. "[I]f the statute is silent or ambiguous with respect to the specific issue," we must accept an agency interpretation if it is reasonable in light of the language, legislative history, and underlying policies of the statute. *Id.* at 843; *NRDC* v. *Thomas*, 805 F.2d 410, 420 (D.C. Cir. 1986). We find no support in the text or legislative history for the proposition that Congress intended to require a complete prohibition of emissions whenever the EPA cannot determine a threshold level for a hazardous pollutant. Instead, there is strong evidence that Congress considered such a requirement and rejected it.

Section 112 commands the Administrator to set an "emission standard" for a particular "hazardous air pollutant" which in his "judgment" will provide an "ample margin of safety." Congress' use of the term "ample margin of safety" is inconsistent with the NRDC's position that the Administrator has no discretion in the face of uncertainty. The statute nowhere defines "ample margin of safety." The Senate Report, however, in discussing a similar requirement in the context of setting ambient air standards under section 109 of the Act, explained the purpose of the "margin of safety" standard as one of affording "a *reasonable* degree of protection . . . against hazards which research has not yet identified." S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970) (emphasis added). This view comports with the historical use of the term in engineering as "a safety factor . . . meant to compensate for uncertainties and variabilities." *See* Hall, *The Control of Toxic Pollutants Under the Federal Water Pollution Control Act Amendments of 1972*, 63 Iowa L. Rev. 609, 629 (1978). Fur-

thermore, in a discussion of the use of identical language in the Federal Water Pollution Control Act, this court has recognized that, in discharging the responsibility to assure "an ample margin of safety," the Administrator faces "a difficult task, indeed, a veritable paradox—calling as it does for knowledge of that which is unknown—[but] . . . the term 'margin of safety' is Congress's directive that means be found to carry out the task and to reconcile the paradox." *Environmental Defense Fund* v. *EPA*, 598 F.2d 62, 81 (D.C. Cir. 1978). And while Congress used the modifier "ample" to exhort the Administrator not to allow "the public [or] the environment . . . to be exposed to anything resembling the maximum risk" and, therefore, to set a margin "greater than 'normal' or 'adequate,'" Congress still left the EPA "great latitude in meeting its responsibility." *See id.*

Congress' use of the word "safety," moreover, is significant evidence that it did not intend to require the Administrator to prohibit all emissions of non-threshold pollutants. As the Supreme Court has recently held, "safe" does not mean "risk-free." *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 642 (1980). Instead, something is "unsafe" only when it threatens humans with "a significant risk of harm." *Id.*

Thus, the terms of section 112 provide little support for the NRDC's position. The uncertainty about the effects of a particular carcinogenic pollutant invokes the Administrator's discretion under section 112. In contrast, the NRDC's position would eliminate any discretion and would render the standard "ample margin of safety" meaningless as applied to carcinogenic pollutants.[1] Whenever *any* scientific uncertainty existed about the ill effects of a non-zero level of hazardous air pollutants—and we think it unlikely that science will ever yield *absolute* certainty of safety in an area so complicated and rife with problems of measurement, modeling, long latency, and the like—the Administrator would have no discretion but would be required to prohibit all emissions. Had Congress intended that result, it could very easily have said so by writing a statute that states that no level of emissions shall be allowed as to which there is any uncertainty. But Congress chose instead to deal with the pervasive nature of scientific uncertainty and the inherent limitations of scientific knowledge by vesting in the Administrator the discretion to deal with uncertainty in each case.

The NRDC also argues that the legislative history supports its position. To the contrary, that history strongly suggests that Congress did not require the Administrator to prohibit emissions of all non-threshold pollutants; Congress considered and rejected the option of requiring the Administrator to prohibit all emissions.

The Senate bill would have required the Administrator to prohibit any emission of a hazardous pollutant, threshold or non-threshold, unless he found, after a hearing, that a preponderance of the evidence demonstrated "that such agent is not hazardous to the health of persons" or that "departure from . . . prohibition for [a] stationary source will not be hazardous to the health of persons." S. 4358, 91st Cong., 2d Sess. § 6(b), 116 Cong.

[1] With the exception of mercury, every pollutant the Administrator has listed or intends to list under § 112 is a non-threshold carcinogen. *See* 40 C.F.R. § 61.01(a) (1986) (listing asbestos, benzene, beryllium, coke oven emissions, inorganic arsenic, radionuclides, and vinyl chloride); 50 Fed. Reg. 24,317 (June 10, 1985) (chromium); 50 Fed. Reg. 32,621 (Aug. 13, 1985) (carbon tetrachloride); 50 Fed. Reg. 39,626 (Sept. 27, 1985) (chloroform); 50 Fed. Reg. 40,286 (Oct. 2, 1985) (ethylene oxide); 50 Fed. Reg. 41,466 (Oct. 10, 1985) (1,3-butadiene); 50 Fed. Reg. 41,994 (Oct. 16, 1985) (ethylene dichloride); 50 Fed. Reg. 42,000 (Oct. 16, 1985) (cadmium); 50 Fed. Reg. 52,422 (Dec. 23, 1985) (trichloroethylene); 50 Fed. Reg. 52,880 (Dec. 26, 1985) (perchioroethylene).

Rec. 32,375 (1970). The definition of hazardous agent included any pollutant "whose presence . . . in trace concentrations in the ambient air . . . causes or will cause, or contribute to, an increase in serious irreversible or incapacitating reversible damage to health." *Id.* Presumably, this provision would have required the complete prohibition of emissions of carcinogenic agents because the Administrator cannot demonstrate by "a preponderance of the evidence" that trace concentrations of these agents will not cause harm. The final version of section 112, however, omits any reference to a prohibition of emissions and directs the Administrator to set an emissions standard "at the level which in his judgment provides an ample margin of safety to protect the public health." Thus, Congress rejected a provision which would have required the Administrator to prohibit certain emissions and adopted a provision which places that decision within the Administrator's discretion.

The only arguable support for the NRDC's position is a passage in the summary of the provisions of the conference agreement attached to Senator Muskie's statement during the post-conference debate on the Clean Air Act:

> The standards must be set to provide an ample margin of safety to protect the public health. This could mean, effectively, that a plant could be required to close because of the absence of control techniques. It could include emission standards which allow for no measurable emissions.

Senate Consideration of the Report of the Conference Committee, Exhibit 1 to Statement of Sen. Muskie, Congressional Research Service of the Library of Congress, 93d Cong., 2d Sess., 1 *A Legislative History of the Clean Air Amendments of 1970* at 133 (Comm. Print 1974). This statement does not, as the NRDC supposes, mean that the Administrator must set a zero-emission level for all non-threshold pollutants. On its face, the statement means only that, in certain conditions, there may be plant

closings and sometimes zero emissions may be required. Senator Muskie did not say this would invariably be so when scientific uncertainty existed. His statement confirms that the Administrator is *permitted* to set a zero-emission level for some pollutants; it does not hold that the Administrator is invariably *required* to do so whenever there is some scientific uncertainty.

It is also significant that this is the only reference after the Conference Committee compromise to the possibility of plant closure as a result of the Administrator's actions under section 112. To accept the petitioner's contention that section 112 *requires* the Administrator to prohibit all emissions of non-threshold pollutants, we would have to conclude that, without even discussing the matter, Congress mandated massive economic and social dislocations by shutting down entire industries. That is not a reasonable way to read the legislative history. The EPA has determined that a zero-emissions standard for non-threshold pollutants would result in the elimination of such activities as "the generation of electricity from either coal-burning or nuclear energy; the manufacturing of steel; the mining, smelting, or refining of virtually any mineral (*e.g.*, copper, iron, lead, zinc, and limestone); the manufacture of synthetic organic chemicals; and the refining, storage, or dispensing of any petroleum product." National Emission Standards for Hazardous Air Pollutants; Policy and Procedures for Identifying, Assessing and Regulating Airborne Substances Posing a Risk of Cancer, 44 Fed. Reg. 58,642, 58,660 (1979). It is simply not possible that Congress intended such havoc in the American economy and not a single representative or senator mentioned the fact. *Cf. Industrial Union Dep't*, 448 U.S. at 645 ("In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary [this] unprecedented power over American industry."). Thus, we find no sup-

port for the NRDC's extreme position in the language or legislative history of the Act.

IV.

We turn now to the question whether the Administrator's chosen method for setting emission levels above zero is consistent with congressional intent. The Administrator's position is that he may set an emission level for non-threshold pollutants at the lowest level achievable by best available control technology when that level is anywhere below the level of demonstrated harm and the cost of setting a lower level is grossly disproportionate to the benefits of removing the remaining risk. The NRDC argues that this standard is arbitrary and capricious because the EPA is never permitted to consider cost and technological feasibility under section 112 but instead is limited to consideration of health-based factors. Thus, before addressing the Administrator's method of using cost and technological feasibility in this case, we must determine whether he may consider cost and technological feasibility at all. *See Chemical Mfrs. Ass'n* v. *NRDC*, 470 U.S. 116, 134 (1985) (relevant issue is whether there is a clear congressional intent "to forbid" the challenged agency action).

A.

On its face, section 112 does not indicate that Congress intended to preclude consideration of any factor. Though the phrase "to protect the public health" evinces an intent to make health the primary consideration, there is no indication of the factors the Administrator may or may not consider in determining, in his "judgment," what level of emissions will provide "an ample margin of safety." Instead, the language used, and the absence of any specific limitation, gives the clear impression that the Administrator has some discretion in determining what, if any, additional factors he will consider in setting an emission standard.

B.

The petitioner argues that the legislative history makes clear Congress' intent to foreclose reliance on non-health-based considerations in setting standards under section 112. We find, however, that the legislative history can be characterized only as ambiguous.

The NRDC directs us to the hazardous air pollutants provision of the House bill, which states that "[i]f . . . emissions [from any class of new stationary sources] are extremely hazardous to health, no new source of such emissions shall be constructed or operated, except where (and subject to such conditions as he deems necessary and appropriate) the [Administrator] makes a specific exemption with respect to such construction or operation." *See* H.R. 17255, 91st Cong., 2d Sess. § 5(a), 116 Cong. Rec. 19,226 (1970). Thus, as to extremely hazardous emissions, the House bill granted the Administrator a rather open-ended power to exempt a source from the regulation imposed, a power that the petitioner presumes, probably correctly, to have allowed for exemptions on the basis of non-health considerations.[2] By contrast, the

[2] The bill prohibited new sources if and because they emitted extremely hazardous pollutants. Allowing exemptions to such prohibitions without specifying the permissible bases for exemption seems to invite consideration of non-health factors, for it would be strange indeed to construct a scheme under which both a prohibition and an exemption from prohibition were available on the basis of the same criterion. To be sure, the Senate bill did set up a system under which the agency was to propose a prohibition of hazardous pollutants, and could refuse to promulgate that prohibition only for health-based reasons, *see infra* pp. 21-22, but this does not make any more plausible the notion that the House bill set up a prohibition and exemption on the sole basis of health. The Senate provision did not set up a system of prohibitions and exemptions, but rather a procedural system to guide the agency. *See* S. 4358, 91st Cong., 2d Sess. § 6(b), 116 Cong. Rec. 32,375 (1970). The agency was to publish a list of hazardous pollutants on the basis of "available material evidence." This

petitioner notes, the Senate bill had a tight focus on health, prohibiting emissions "hazardous to the health of persons" and allowing only health-based exceptions to that prohibition. *See* S. 4358, 91st Cong., 2d Sess. § 6(b), 116 Cong. Rec. 32,375 (1970). Because the final version that emerged from conference more closely resembled the Senate than the House bill, and because no express provision for any "specific exemption" survived, the NRDC argues that any feasibility considerations must have been deliberately eliminated. We find this reading of the legislative history strained.

While the original Senate bill is closer than the House bill to the final legislation, neither the House nor the Senate version closely resembles in the aspect relevant here the compromise that emerged from conference. H.R. 17255 dealt only with new stationary sources and, with respect to those, only half of the regulatory scheme dealt with emissions considered "extremely hazardous to health." *See* H.R. 17255, 91st Cong., 2d Sess. § 5(a), 116 Cong. Rec. 19,225-26 (1970). The bill also dealt with new sources, the emissions of which could "contribute substantially to endangerment of the public health or welfare" but which were not "extremely hazardous to health," providing for control of such emissions "to the fullest extent compatible with the available technology and economic feasibility." *Id.* In effect, therefore, the House bill amounted to a comprehensive measure dealing with new sources, but it only incidentally treated the problem of "extremely hazardous" agents.

list would amount to a proposed prohibition of emissions of the substances on the list. The agency was then to provide notice and a public hearing for each agent or combination of agents included on the list and could refuse to promulgate the prohibition only if a preponderance of the evidence at the hearing refuted the initial basis for the substance's inclusion. Under the House bill, the exemption applied to something still considered "extremely hazardous." We do not see how such an exemption could rest on exclusively health-based considerations.

Unlike the House bill, the Senate version dealt only with hazardous air pollutants and did so with respect to all stationary sources. The bill proposed a relatively narrow definition of hazardous agents, restricting this category to pollutants "whose presence, chronically or intermittently, in trace concentrations in the ambient air, either alone or in combination with other agents, causes or will cause, or contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible damage to health." S. 4358, 91st Cong., 2d Sess. § 6(b), 116 Cong. Rec. 32,375 (1970). Under the scheme set up by the bill, the Administrator was to publish a list of hazardous agents, and follow it by a "proposed prohibition of emissions of each such agent or combination of agents from any stationary source." *Id.* The bill then provided for a hearing, after which the Administrator was required to promulgate the prohibition unless a preponderance of evidence demonstrated either "that such agent is not hazardous to the health of persons" or "that departure from prohibition for [a] stationary source will not be hazardous to the health of persons." *Id.* If the Administrator found either such condition to exist, he would then implement an emission standard in lieu of a prohibition. *Id.*

Given these starting points, the inference the petitioner draws from the changes made at conference appears tenuous at best. The final version defines a "hazardous air pollutant" as

> an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

Clean Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685.[3] The statute instructs the Administrator to publish a list of such pollutants, to conduct hearings, and, unless the hearings show a particular agent not to be a "hazardous air pollutant," to promulgate emissions standards. *Id.* The Administrator must "establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant." *Id.* The petitioner has correctly observed that the law enacted has a closer structural resemblance to the Senate bill, but this offers little, if any, support to the petitioner's claim because the Senate bill and the final legislation both were measures intended to address the problem of hazardous air pollutants from all sources. That they would resemble each other more than a House bill meant to deal with the problem of all pollution from new sources seems a natural outcome for that reason alone. The resemblance thus sheds light on the intent to adopt particular aspects of the Senate version in the final bill.

The legislative history is simply ambiguous with respect to the question of whether the Administrator may permissibly consider cost and technological feasibility under section 112. In the course of the compromise, the House lost a provision which would have permitted consideration of non-health based factors and the Senate lost a provision which would have limited the Administrator to consideration of health-based factors. The resulting standard neither permits nor prohibits consideration of any factor. Thus, we cannot find a clear congressional intent in the language, structure, or legislative history

[3] Congress in the Clean Air Act Amendments of 1977 made a minor alteration in the definition of a "hazardous air pollutant," replacing "may cause, or contribute to" with "causes, or contributes to." Pub. L. No. 95-95, § 401(a), 91 Stat. 685, 791 (1977). This change does not affect the outcome of this case.

of the Act to preclude consideration of cost and technological feasibility under section 112.

C.

The petitioner argues next that a finding that section 112 does not preclude consideration of cost and technological feasibility would render the Clean Air Act structurally incoherent and would be inconsistent with the Supreme Court's interpretation of section 110 of the Act, *see Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), and this court's interpretation of section 109 of the Act, *see Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), as precluding consideration of these factors. We do not believe that our decision here is inconsistent with either the holding or the statutory interpretation in either case.

First, as discussed below, the court in each case rejected an argument that the EPA must consider cost and technological feasibility as factors equal in importance to health. We reject the same argument here. *See infra* pp. 35-42. In this case, however, we must also address the question of whether the Administrator may consider these factors if necessary to further *protect* the public health. This issue was not addressed in either *Union Electric* or *Lead Industries*.

Second, these decisions do not provide precedential support for the petitioner's position that, as a matter of statutory interpretation, cost and technological feasibility may never be considered under the Clean Air Act unless Congress expressly so provides. In each case there was some indication in the language, structure, or legislative history of the specific provision at issue that Congress intended to preclude consideration of cost and technological feasibility. As discussed above, we find no such indication with respect to section 112.[4]

[4] The NRDC also argues that the structure of § 112 itself supports its contention; Congress expressed a clear intent to

In *Union Electric*, the Court addressed the issue of whether the Administrator could reject a state implementation plan submitted for approval under section 110 of the Clean Air Act on the ground that the plan was

preclude consideration of cost and technological feasibility in setting an emission standard under § 112(b)(1) by specifically directing the EPA to consider these factors in three other subsections of § 112. These provisions, the NRDC contends, would be superfluous if the EPA could consider cost and technological feasibiilty in setting an emission standard under § 112(b)(1).

The NRDC's argument fails because the cited provisions continue to have significance if the Administrator is permitted to consider cost and technological feasibility under § 112(b)(1). Section 112(c)(1)(B)(ii) authorizes the EPA to grant an existing source a waiver from an emission standard for up to two years if "necessary for the installation of controls." 42 U.S.C. § 7412(c)(1)(B)(ii) (1982). This provision could be utilized to grant a waiver to a source that is not able to comply with a standard which was based upon cost and technological feasibility because it does not have the appropriate control technology.

Section 112(c)(2) allows the President to exempt any stationary source from emission standards "if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security." 42 U.S.C. § 7412(c)(2) (1982). This provision would be necessary if the Administrator considered cost and technological feasibility in setting an emission level for non-threshold pollutants and then set the level below that achievable by the best available control technology because the balance favored the elimination of the risk. This provision would also be necessary when the known threshold level for a hazardous pollutant is below the level that current technology can attain.

Finally, § 112(e) authorizes the EPA to set a "design, equipment, work practice, or operational standard" if in the Administrator's judgment "it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant." 42 U.S.C. § 7412(e)(1) (1982). For the purpose of this subsection, the term "feasible," however, relates only to the ability to *measure* emissions. *See id.* § 7412(e)(2). Thus, this subsection has no relevance to the Administrator's

not economically or technologically feasible. The Court noted that section 110 sets out eight criteria that a state plan must meet and further provides that if these criteria are met, and if the state adopted the plan after notice and a hearing, the Administrator "shall" approve the plan. 427 U.S. at 257. The Court then held that "[t]he mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified, . . . and none of the eight factors appears to permit consideration of technological or economic infeasibility." *Id.* (citation omitted). In a footnote to this statement, the Court found its position bolstered by a "[c]omparison of the eight criteria of § 110(a)(2)" with other provisions of the Act which expressly permit consideration of cost and technological feasibility. *Id.* at 257 n.5. The Court concluded that "[w]here Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Id.* We simply do not, as

ability to consider cost and technological feasibility in setting an emission standard.

We also reject the contention that because Congress explicitly directed the Administrator to consider cost and technology in these provisions it intended to preclude the Administrator from considering these factors under § 112(b)(1). Petitioner in effect asserts that Congress knew how to designate such factors and did so expressly where it intended their application. We do not agree. That Congress explicitly provided for certain specific considerations in these limited and detailed subsections does not seem to us a persuasive reason to conclude that failure to specify such considerations when employing a generalized standard in § 112(b)(1) forecloses reliance on those factors in fleshing out that standard. If elsewhere in § 112 Congress had exhorted the Administrator "to provide an ample margin of safety to protect the public health," or had stated some similarly broad delegation, and then had specifically noted that he could or should consider cost or technological feasibility in making his determination, only then would the failure to so specify in § 112(b)(1) arguably foreclose consideration of such factors.

the NRDC does, read these statements as announcing the broad rule that an agency may never consider cost and technological feasibility, under any delegation of authority, and for any purpose, unless Congress specifically provides that the agency is authorized to consider these factors. At most, we believe that these statements stand for the proposition that when Congress has specifically directed an agency to consider certain factors, the agency may not consider unspecified factors. Because Congress chose not to limit specifically the factors the Administrator may consider in section 112, this discussion in *Union Electric* is not in point here. The factors that the Administrator may consider under section 112 could conceivably include all of the specific factors listed in other parts of the Act if necessary "to protect the public health."

A similar analysis distinguishes this court's reasoning in *Lead Industries*. In *Lead Industries*, we held that the Administrator is not required to consider cost and technology under the mandate in section 109 of the Clean Air Act to promulgate primary air quality standards which "allow[] an adequate margin of safety . . . to protect the public health." 42 U.S.C. § 7409(b)(1) (1982).[5] The NRDC argues that the decision in *Lead Industries*, which involved the more permissive language "adequate," rather than "ample," "margin of safety," compels the

[5] The statutory scheme involved in *Lead Industries* regulates air pollutants the "emissions of which, in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare . . . [and] the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1) (1982). The Administrator must then publish "air quality criteria" for the pollutants thus listed, *id.* § 7408(a)(2), and prescribe primary and secondary ambient air standards based on these criteria. *See id.* § 7409. Finally, states must adopt state implementation plans to meet these ambient air standards and must submit their plans to the EPA for approval. *See id.* § 7410.

conclusion that section 112 precludes consideration of economic and technological feasibility. We think not.

The *Lead Industries* court did note that the statute on its face does not allow consideration of technological or economic feasibility, but the court based its decision that section 109 does not allow consideration of these factors in part on structural aspects of the ambient air pollution provisions that are not present here. First, besides "allowing an adequate margin of safety," ambient air standards set under section 109(b) must be based on "air quality criteria," which section 108 defines as comprising several elements, all related to health. *See* 42 U.S.C. § 7408(a)(2)(A), (B), & (C) (1982). The court reasoned that the exclusion of economic and technological feasibility considerations from air quality criteria also foreclosed reliance on such factors in setting the ambient air quality standards based on those criteria. 647 F.2d at 1149 n.37. The court also relied on the fact that state implementation plans, the means of enforcement of ambient air standards, could not take into account economic and technological feasibility if such consideration interfered with the timely attainment of ambient air standards, and that the Administrator could not consider such feasibility factors in deciding whether to approve the state plans. *Id.*; *see* 42 U.S.C. § 7410 (1982). This provided further grounds for the court to believe that Congress simply did not intend the economics of pollution control to be considered in the scheme of ambient air regulations. *See* 647 F.2d at 1149 n.37.

In *Lead Industries*, moreover, the relevant Senate Report stated flatly that "existing sources of pollutants either should meet the standard of the law or be closed down." 647 F.2d at 1149. This is a far clearer statement than anything in the present case that Congress considered the alternatives and chose to close down sources or even industries rather than to allow risks to health.

The substantive standard imposed under the hazardous air pollutants provisions of section 112, by contrast with sections 109 and 110, is not based on criteria that enumerate specific factors to consider and pointedly exclude feasibility. Section 112(b)(1)'s command "to provide an ample margin of safety to protect the public health" is self-contained, and the absence of enumerated criteria may well evince a congressional intent for the Administrator to supply reasonable ones. Further, section 112, in marked contrast to the regime of ambient air standards, operates through nationally enforced standards; the state plans are permissive and may not interfere with national enforcement of any hazardous pollutant standard. 42 U.S.C. § 7412(d) (1982). No detailed provisions preclusive of technological and economic considerations govern the state plans allowed under section 112; indeed, the Administrator must delegate enforcement and implementation authority to the state (subject to his continuing ability to enforce national standards) if he finds the state plan "adequate." *Id.* Thus, nothing in the scheme of state implementation plans under section 112 demonstrates disfavor for feasibility considerations, and this further distinguishes section 112 from the *Lead Industries* court's interpretation of section 109.

Thus, in *Lead Industries*, the court found clear evidence that Congress intended to limit the factors the Administrator is permitted to consider in setting a "margin of safety" under section 109. The "margin of safety" standard in section 112 is not so adorned. For that reason, *Lead Industries* does not control this case.[6]

[6] The petitioner also asserts that our decision here is inconsistent with the Supreme Court's decision in American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981), and this court's decision in Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978). We do not agree. The relevance of the Court's decision in *American Textile* to this case is not clear. The issue in *American Textile* was whether the Occupational Safety and Health Administration ("OSHA") was required

D.

On the other side of this controversy, the EPA argues that the 1977 amendments of the Clean Air Act, in light of Congress' awareness of the 1976 vinyl chloride

to employ cost-benefit analysis, which was defined as a determination of "whether the reduction in risk of material health impairment is significant in light of the costs of attaining that reduction," 452 U.S. at 506, in setting occupational health standards under a statute which directed OSHA to consider feasibility. OSHA argued that it was not required to employ cost-benefit analysis, but instead was only required "to promulgate standards that eliminate or reduce such risks to the extent such protection is technologically and economically feasible." *Id.* at 507. The Court found that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute," *id.* at 510, and has used "specific language" to express that intent. *Id.* at 510-11. The Court held, therefore, that "the word 'feasible' cannot be construed to articulate such congressional intent." *Id.* at 511-12.

The holding in *American Textile* would seem to be limited to the finding that when Congress directs an agency to consider feasibility, the agency is not required to employ cost-benefit analysis. That issue is not before us here. The Administrator has not argued that he intends to weigh the marginal gain against the marginal cost of each increment of further regulation and then to set the level of regulation at the point at which the latter exceeds the former. Instead, he intends to set the level at the lowest level that is feasible. Thus the issue in this case involves an authority that OSHA concededly had in *American Textile* and, therefore, the case does not affect our decision here.

The petitioner argues that this court's decision in *Hercules* supports its claim that the "ample margin of safety" language prohibits consideration of cost and technological feasibility. *Hercules* involved § 307(a)(4) of the Federal Water Pollution Control Act, which directs the EPA to set standards for toxic water pollutants which provide "an ample margin of safety." *See* 33 U.S.C. § 1317(a)(4) (1982). In relevant part, the decision dealt with an industry petitioner's claim that certain regulations promulgated by the EPA under § 307(a) failed adequately to take feasibility into account. The EPA re-

regulations, amounts to a ratification of the use of cost and technological feasibility considerations in setting

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sponded that § 307(a) does not require consideration of any such factor.

The court agreed with the EPA, principally on the ground that § 307(a)(2) enumerated six specific factors to take into account in setting standards for toxic water pollutants, and none involved economic or technological criteria. 598 F.2d at 111. Reinforcing this interpretation was the fact that "[s]ection 307(a)(4) directs EPA to set standards providing 'an ample margin of safety' without any mention of feasibility criteria." *Id.* This, however, does not support the NRDC's position in this case, for *Hercules* merely stands for the proposition that the unadorned appearance of "ample margin of safety" does not *require* economic and technological considerations; the case says nothing about what such language may *permit.*

Nor do we find persuasive the dicta from *Hercules* that the NRDC cites on the subject of § 112 of the Clean Air Act. The *Hercules* court noted similarities between the Federal Water Pollution Control Act Amendments and the Clean Air Amendments of 1970. 598 F.2d at 112. The court then discerned a distinction applicable to both statutes positing "health-based" regulation for toxic water and hazardous air pollutants and "technology-based" regulation for other water and air pollutants. *See id.* The court also noted that "Congress enacted section 112 . . . without provision for considerations of feasibility." *Id.*

First, an interpretation of this dicta as providing that an agency is authorized to consider cost and technology only under "technology-based" statutes would render the court's decision inconsistent with our mandate as expressed in *Chevron.* Our role at this stage is only to determine whether Congress has expressed a clear intent to preclude consideration of cost and technological feasibility under § 112. If we do not discern such an intent, we cannot simply impose our views as to whether this is a "safety-based" or "technology-based" statute and then limit the Administrator's discretion solely on the basis of that view. *See Chevron,* 467 U.S. at 842-45.

Nor do we believe that the *Hercules* court's casual observation that § 112 makes no provision for feasibility changes the analysis. There is also no indication in § 112 that Congress intended to preclude consideration of feasibility.

standards under section 112. We think this overstates the significance of the legislative history leading up to the Clean Air Act Amendments of 1977. To understand why this is the case, and to appreciate what significance, if any, the 1977 amendments have, we turn to an examination of the history of those amendments.

In 1976, both houses of Congress passed bills purporting to amend the Clean Air Act. The first section of the House bill sought to spur the EPA to take action with respect to specified unregulated pollutants, including vinyl chloride. Within one year of the enactment of the amendments, unless the Administrator found after notice and a hearing that the enumerated "substance [would] not cause or contribute to air pollution which [could] reasonably be anticipated to endanger public health," he was to include such substance on the list of pollutants subject to regulation under an ambient air standard pursuant to sections 108 through 110 or under the hazardous air pollutant provisions of section 112, or to include sources of such pollutants on the list of stationary sources governed by section 111's new source performance standards, or to implement some combination of such regulation. H.R. 10498, 94th Cong., 2d Sess. § 101(a), 122 Cong. Rec. 29,219 (1976).

In addressing this section of the bill, the Report of the Committee on Interstate and Foreign Commerce discussed the vinyl chloride problem in some detail, emphasizing the dangerous nature of the substance. H.R. Rep. No. 1175, 94th Cong., 2d Sess. 23 (1976). During the development of the bill, the Report noted, the EPA had "proposed emission standards for vinyl chlorides under section 112 of the Act for major sources in the plastics industry," but the Committee retained vinyl chlorides in the proposed legislation to underscore "the Committee's concern that the standards be promulgated without delay and that standards be promulgated for any other significant sources of vinyl chlorides which may

exist." *Id.* at 23-24. The Committee also noted, however, that it "did not intend to specify the degree of emission reduction which should be required," but that "the Administrator should apply the appropriate means and extent of regulation under the existing statutory criteria." *Id.* at 26. The House passed the bill, leaving section 101 intact.

The Senate bill contained nothing similar. The Conference Committee, however, decided to adopt the House provision regarding unregulated pollutants in relevant part. *See* H.R. Rep. No. 1742, 94th Cong., 2d Sess. 25-26 (1976). The threat of a total filibuster, however, prevented the Senate from voting on the recommendations of the conferees, and the bill died.

In 1977, both houses reintroduced legislation to amend the Clean Air Act. In the interim between the abandonment of the 1976 amendments and the introduction of the new legislation, the EPA promulgated emission standards for vinyl chloride under section 112 of the Act. *See* 41 Fed. Reg. 46,560 (1976). In so doing, the EPA clearly articulated that the regulations adopted reduced vinyl chloride emissions "to the level attainable with best available technology" and that, while "section 112 does not explicitly provide for consideration of costs," the agency believed it could take them into account for the limited purpose of "assur[ing] that the costs of control technology are not grossly disproportionate to the amount of emission reduction achieved." *Id.* at 46,560, 46,562. The 1977 House bill contained a provision "nearly identical" to section 101 of the 1976 House bill, differing primarily in its inclusion of radioactive materials and deletion of vinyl chloride from the unregulated pollutants specified. H.R. Rep. No. 294, 95th Cong., 1st Sess. 3 (1977). The Committee explained the deletion of vinyl chloride on the ground that "[d]uring the past year the Administrator [had] promulgated final regulations for the control of vinyl chloride emissions." *Id.*

The bill passed the House with the unregulated pollutants provision intact. Once again, the Senate bill had no such provision, and, at conference, the House's provision was adopted in relevant part. *See* H.R. Rep. No. 564, 95th Cong., 1st Sess. 141-42 (1977). The conference recommendations regarding unregulated pollutants passed both houses intact, and President Carter signed the Clean Air Act Amendments into law on August 7, 1977. *See* Pub. L. No. 95-95, 91 Stat. 685 (1977).

The 1977 legislation comprehensively amended the Clean Air Act, and, in fact, amended the very section that is the subject of this lawsuit. Indeed, that amendment added a further subsection employing substantially the language that the EPA had construed in the vinyl chloride regulations to allow consideration of economic and technological feasibility. The relevant amendment to section 112 empowered the Administrator under certain circumstances to forgo use of an emission standard and instead to "promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in his judgment is adequate *to protect the public health . . . with an ample margin of safety.*" 42 U.S.C. § 7412(e)(1) (1982) (emphasis added); *see also* Pub. L. No. 95-95, 91 Stat. 685, 703 (1977).[7] Thus, at the time of the 1977 amendments, Congress expressly considered the kind of regulation the EPA should apply to hazardous air pollutants, once identified, and reenacted

[7] The Administrator could employ this alternative kind of regulation when an emission standard proved infeasible because "(A) a hazardous pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or . . . any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations." 42 U.S.C. § 7412(e)(2) (1982); Pub. L. No. 95-95, § 110, 91 Stat. 685, 703 (1977).

the standard construed by the EPA in the vinyl chloride regulations.

The House knew of the 1976 regulations,[8] and the failure to clarify the "ample margin of safety" requirement when adopting that language anew in the amendment adding section 112(e) may, therefore, indicate that the EPA has correctly discerned legislative intent. *See United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979). Indeed, if the House's and the House Committee's awareness of what was taking place could confidently be attributed to the entire Congress, the history recited of reactions in 1976 and 1977 would make a considerable case for ratification. But we cannot be certain that Congress was aware of the content of the vinyl chloride regulations,[9] and, therefore, we give the failure to repudiate the EPA's substantive interpretation of section 112 in those regulations only "modest weight," *see National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 167 & n.33

[8] The NRDC argues that because the EPA had promulgated its 1977 Notice of Proposed Rulemaking to amend the vinyl chloride standard, it becomes unclear whether the EPA's cost and technological feasibility interpretation was well established at the time of the 1977 amendments. We think it was. Although embracing a zero emission goal, the notice explicitly disagreed with criticism that the 1976 regulations placed unwarranted emphasis on technological, rather than health-based goals. 42 Fed. Reg. 28,154 (1977). Of more importance, the proposed rules mandated only "more efficient use of existing control technology at existing plants and more effective controls at new plants." *Id.* The proposal encouraged new technology but refused to ban vinyl chloride because of the drastic implications such a measure would hold for the industry. *Id.* Thus, while more stringent, the proposed regulations did not by any means abandon the EPA's earlier position.

[9] The EPA also argues that asbestos regulations based on feasibility considerations had been promulgated pursuant to § 112 prior to the 1977 amendments. We give this no weight because the EPA has given us no indication that Congress had any awareness of the existence, let alone the content, of those regulations.

(D.C. Cir. 1982), and we certainly cannot construe Congress' failure to act in these circumstances as amounting to ratification of the EPA's construction.[10] Congress, in confronting the problem of unregulated pollutants, sought only to provoke some action by the EPA, and in no way aimed to specify the appropriate degree of emission control. That the House knew of the existence of the 1976 standard for vinyl chloride and decided to remove it from the unregulated pollutants list does not, therefore, tell us whether the House examined and became aware of the content of those regulations or the theory or level of the controls imposed. The history of the 1977 amendments may give a scintilla of evidence in support of the agency position here, but it is far short of legislative ratification of the EPA's construction.

VI.

Since we cannot discern clear congressional intent to preclude consideration of cost and technological feasibility in setting emission standards under section 112, we

[10] A court must only sparingly accept arguments based on acquiescence or ratification, for "the Framers of our Constitution deliberately made the passage of legislation difficult—more difficult, for instance, than in parliamentary democracies—[and] Congress simply cannot be obliged affirmatively to correct subsequent administrative interpretations inconsistent with original legislative intent; that is the responsibility of the courts." Coalition to Preserve the Integrity of Am. Trademarks v. United States, 790 F.2d 903, 917 (D.C. Cir. 1986). Congressional inaction on a particular point may "betoken[] unawareness, preoccupation, or paralysis," rather than tacit assent. *See* Zuber v. Allen, 396 U.S. 168, 185-86 n.21 (1969). Of course, in the case before us there was more than mere congressional silence; there was affirmative evidence that members of the House knew what the EPA was doing and failed to object and that the House Committee employed language that showed a desire to achieve a reduction, but not necessarily the total elimination, of emissions. This is something more than mere failure to enact corrective legislation.

necessarily find that the Administrator may consider these factors. We must next determine whether the Administrator's use of these factors in this case is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. We must uphold the Administrator's construction if it represents "a reasonable policy choice for the agency to make." *Id.* We cannot, however, affirm an agency interpretation found to be "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. Nor can we affirm if "it appears from the statute or its legislative history that the accommodation [chosen] is not the one that Congress would have sanctioned." *United States* v. *Shimer*, 367 U.S. 374, 383 (1961).

Our role on review of an action taken pursuant to section 112 is generally a limited one. Because the regulation of carcinogenic agents raises questions "on the frontiers of scientific knowledge," *Industrial Union Dep't, AFL-CIO* v. *Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974), we have recognized that the Administrator's decision in this area "will depend to a greater extent upon policy judgments" to which we must accord considerable deference. *Id.*; *Lead Indus.*, 647 F.2d at 1146-47; *Environmental Defense Fund*, 598 F.2d at 82; *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 106 (D.C. Cir. 1978). We have also acknowledged that "EPA, not the court, has the technical expertise to decide what inferences may be drawn from the characteristics of . . . substances and to formulate policy with respect to what risks are acceptable," *Environmental Defense Fund*, 598 F.2d at 83-84, and we will not second-guess a determination based on that expertise. *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1184 (D.C. Cir. 1981); *Lead Indus.*, 647 F.2d at 1146. Our only role is to determine whether " 'the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.' " *Lead Indus.*, 647 F.2d at 1145 (quoting *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). Despite this deferential standard, we find that the Administrator has ventured into a zone of impermissible action. The Administrator has not exercised his expertise to determine an acceptable risk to health. To the contrary, in the face of uncertainty about risks to health, he has simply substituted technological feasibility for health as the primary consideration under Section 112. Because this action is contrary to clearly discernible congressional intent, we grant the petition for review.

Given the foregoing analysis of the language and legislative history of section 112, it seems to us beyond dispute that Congress was primarily concerned with health in promulgating section 112. Every action by the Administrator in setting an emission standard is to be taken "to protect the public health." In setting an emission standard for vinyl chloride, however, the Administrator has made no finding with respect to the effect of the chosen level of emissions on health. Nor has the Administrator stated that a certain level of emissions is "safe" or that the chosen level will provide an "ample margin of safety." Instead, the Administrator has substituted "best available technology" for a finding of the risk to health.

In the decision withdrawing the proposed 1977 amendments, the Administrator mentioned the risks to health, *see* 50 Fed. Reg. 1182 (1985), but based his decision solely on the finding that "there is no improved or new control technology that has been demonstrated to significantly and consistently reduce emissions to a level below that required by the current standard." *Id.* at 1184. Nowhere in the decision did the Administrator state that the 1976 emission standards provide an "ample margin of safety" such that revisions to those standards are not necessary.

In the 1977 proposal to decrease the level of emissions, the Administrator did not determine the risk to health

under the then existing standard or under the proposed new standard. Nor did the Administrator explain why one standard was "safe" and the other was not. *See* 42 Fed. Reg. 28,154-157 (1977).

The absence of any finding regarding the relationship between the risk to health at a certain level of emissions and the "ample margin of safety" standard is also evident in the Administrator's decision adopting the 1976 standards. Again, the Administrator mentioned the risks to health before and after regulation, *see* 41 Fed. Reg. 46,560 (1976), but did not provide any explanation as to whether the risk was significant, or whether the chosen standard provided an "ample margin of safety."

In the three decisions regarding emission standards for vinyl chloride, the Administrator has made one finding regarding the duty to set emission standards that will provide an "ample margin of safety." The Administrator has determined that he is not required to determine on a case-by-case basis the risk to health at a particular level of emissions or to determine the relationship between that risk and "safety." Instead, the Administrator has adopted a generic rule, which when met, will always result in an "ample margin of safety." The Administrator has determined that this standard is met whenever he sets "emission standards that require emission reduction to the lowest level achievable by use of the best available control technology in cases involving apparent non-threshold pollutants where complete emission prohibition would result in widespread industry closure and EPA has determined that the cost of such closure would be grossly disproportionate to the benefits of removing the risk that would remain after imposition of the best available control technology." 40 Fed. Reg. 59,532, 59,534 (1975).

Thus, in setting emission standards for carcinogenic pollutants, the Administrator has decided to determine first the level of emissions attainable by best available

control technology. He will then determine the costs of setting the standard below that level and balance those costs against the risk to health below the level of feasibility. If the costs are greater than the reduction in risk, then he will set the standard at the level of feasibility. This exercise, in the Administrator's view, will always produce an "ample margin of safety."

If there was any doubt that the Administrator has substituted technological feasibility for health as the primary consideration in setting emission standards under section 112, that doubt was dispelled by counsel for the EPA at oral argument. In response to a question from the court regarding a carcinogenic pollutant known to cause certain harm at 100 ppm, counsel stated that the Administrator could set an emission level at 99 ppm if that was the lowest feasible level and the costs of reducing the level below 99 ppm would be grossly disproportionate to the reduction in risk to health. Given the strong inference that harm would also certainly result at 99 ppm, the Administrator appears to have concluded that the "ample margin of safety" standard does not require any finding that a level of emissions is "safe." Instead, the Administrator need only find that the costs of control are greater than the reduction in risk to health. We disagree.

We find that the congressional mandate to provide "an ample margin of safety" "to protect the public health" requires the Administrator to make an initial determination of what is "safe." This determination must be based exclusively upon the Administrator's determination of the risk to health at a particular emission level. Because the Administrator in this case did not make any finding of the risk to health, the question of how that determination is to be made is not before us. We do wish to note, however, that the Administrator's decision does not require a finding that "safe" means "risk-free," *see Industrial Union Dep't*, 448 U.S. at 642, or a finding that the

determination is free from uncertainty. Instead, we find only that the Administrator's decision must be based upon an expert judgment with regard to the level of emission that will result in an "acceptable" risk to health. *Environmental Defense Fund*, 598 F.2d at 83-84. In this regard, the Administrator must determine what inferences should be drawn from available scientific data and decide what risks are acceptable in the world in which we live. *See Industrial Union Dep't*, 448 U.S. at 642 ("There are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider those activities 'unsafe.'"); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979). This determination must be based solely upon the risk to health. The Administrator cannot under any circumstances consider cost and technological feasibility at this stage of the analysis. The latter factors have no relevance to the preliminary determination of what is safe. Of course, if the Administrator cannot find that there is an acceptable risk at any level, then the Administrator must set the level at zero.

Congress, however, recognized in section 112 that the determination of what is "safe" will always be marked by scientific uncertainty and thus exhorted the Administrator to set emission standards that will provide an "ample margin" of safety. This language permits the Administrator to take into account scientific uncertainty and to use expert discretion to determine what action should be taken in light of that uncertainty. *See Environmental Defense Fund*, 598 F.2d at 83 ("by requiring EPA to set standards providing an 'ample margin of safety,' Congress authorized and, indeed, required EPA to protect against dangers before their extent is conclusively ascertained"); *Hercules*, 598 F.2d at 104 ("Under the 'ample margin of safety' directive, EPA's standards must protect against incompletely understood

dangers to public health and the environment, in addition to well-known risks."). In determining what is an "ample margin" the Administrator may, and perhaps must, take into account the inherent limitations of risk assessment and the limited scientific knowledge of the effects of exposure to carcinogens at various levels, and may therefore decide to set the level below that previously determined to be "safe." This is especially true when a straight line extrapolation from known risks is used to estimate risks to health at levels of exposure for which no data is available. This method, which is based upon the results of exposure at fairly high levels of the hazardous pollutants, will show some risk at every level because of the rules of arithmetic rather than because of any knowledge. In fact the risk at a certain point on the extrapolated line may have no relationship to reality; there is no particular reason to think that the actual line of the incidence of harm is represented by a straight line. Thus, by its nature the finding of risk is uncertain and the Administrator must use his discretion to meet the statutory mandate. It is only at this point of the regulatory process that the Administrator may set the emission standard at the lowest level that is technologically feasible. In fact, this is, we believe, precisely the type of policy choice that Congress envisioned when it directed the Administrator to provide an "ample margin of safety." Once "safety" is assured, the Administrator should be free to diminish as much of the statistically determined risk as possible by setting the standard at the lowest feasible level. Because consideration of these factors at this stage is clearly intended "to protect the public health," it is fully consistent with the Administrator's mandate under section 112.[11]

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[11] In response to the facts presented in this case we have analyzed this issue by using a two-step process. We do not mean to indicate that the Administrator is bound to employ this two-step process in setting every emission standard under

We wish to reiterate the limited nature of our holding in this case because it is not the court's intention to bind the Administrator to any specific method of determining what is "safe" or what constitutes an "ample margin." We hold only that the Administrator cannot consider cost and technological feasibility in determining what is "safe." This determination must be based solely upon the risk to health. The issues of whether the Administrator can proceed on a case-by-case basis, what support the Administrator must provide for the determination of what is "safe," or what other factors may be considered, are issues that must be resolved after the Administrator has reached a decision upon reconsideration of the decision withdrawing the proposed 1977 amendments.

For the foregoing reasons, the petition for review is granted, the decision withdrawing the 1977 proposed rule is vacated, and this case is hereby remanded for timely reconsideration of the 1977 proposed rule consistent with this opinion.

It is so ordered.

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§ 112. If the Administrator finds that some statistical methodology removes sufficiently the scientific uncertainty present in this case, then the Administrator could conceivably find that a certain statistically determined level of emissions will provide an ample margin of safety. If the Administrator uses this methodology, he cannot consider cost and technological feasibility: these factors are no longer relevant because the Administrator has found another method to provide an "ample margin" of safety.

8) BORK HEARING

It i[s] pleasure to introduce to this committee James [M]oody and Michael S. Kanne, who have been nominated by the Pre[si]dent of the United States to serve as Federal judges for the U.S. Di[s]trict Court in the Northern District of Indiana. Confirmation of th[es]e two excellent nominees is extremely important to the Northe[rn] District of Indiana. That district has had at least one judicial v[a]cancy for several consecutive years, and an enormous backlog of 1,971 cases has accumulated.

A graduate of Indiana University Law School in 1963, James Moody has had a distinguished career in both the private and public sector. For the last 9 years James Moody has served admirably in a public capacity as a Supreme Court judge in Lake County and as U.S. Magistrate for the Northern District of Indiana.

Born in Rensselaer, Ind., and also a graduate of Indiana University Law School in 1968, Michael Kanne has had a lengthy and impressive career as a practicing attorney and for the last 10 years as a judge for the 30th Judicial Circuit of Indiana.

It is worth noting, Mr. Chairman, that this is the first time in over 30 years that the populated areas of Lake County in northwestern Indiana would be represented on the Federal court by individuals who are from that region.

Mr. Chairman, while reviewing the qualifications of these nominees the Justice Department observed that they were among the strongest candidates they have reviewed for any judicial position in the country. At a time when our judicial system is coming under increased pressure and workload, it is encouraging to know that young, vigorous, and able nominees like James Moody and Michael Kanne are on the way to the Federal bench.

I am deeply indebted to you for this opportunity to present these candidates.

The CHAIRMAN. Well, we are very pleased to have you come, Senator. Of course, your recommendation is what caused them to be nominated and I know they are grateful to you.

I will say to these nominees that the fact that you have recommended them so highly sends them off to a good start right now. We are very pleased to have you. If you want to stay, you stay. If you have to go, we will understand.

Senator LUGAR. I will retreat, with your permission.

The CHAIRMAN. Thank you.

Senator LUGAR. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Quayle I understand has also approved these gentlemen but he cannot be here.

Senator LUGAR. He will be on his way, I understand.

The CHAIRMAN. Well, he may come later.

Now I believe, Senator Hayakawa, we will take you next. I am very pleased to have you with us, Senator.

STATEMENT OF HON. S. I. (Sam) HAYAKAWA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator HAYAKAWA. Mr. Chairman, it is my privilege today to introduce to you Mr. Alan C. Nelson, the President's nominee for the position of Commissioner of the Immigration and Naturalization Service.

I am particularly concerned about the difficult pr[o]s and s[en]sitive issues that the INS is facing. For this reaso[n] pleas[e] that the President has selected as his nominee for C[o]missioner a person who is intimately familiar with the needs of this very important agency.

Mr. Nelson was appointed Deputy Commissioner of the INS last year and is currently serving in that capacity. I am certain that his experience as Deputy Commissioner will prove to be extremely valuable, particularly as it will remove the need for any on-the-job training; he has already had that.

The nominee has had extensive experience in both the private and public sectors since graduating from the University of California's School of Law in 1955. After spending several years in private law practice, he was appointed deputy district attorney for Alameda County in 1964. He continued to serve until 1969, when he was named assistant director of the California Department of Human Resources Development. In 1972 he accepted an appointment as director of the California Department of Rehabilitation. He returned to the private sector in 1976 when he became the general attorney f[o]r the Pacific Telephone & Telegraph Co. I do not doubt that his im[p]ressive experience has provided the necessary tools to step into the position of Commissioner of Immigration and Naturalization.

I had the privilege of becoming acquainted with Mr. Nelson last summer at a meeting in San Francisco. We have discussed mutually the problems of illegal aliens and farmworkers in California. We have discussed a number of matters having to do with immigration and I am very much impressed with his command of the subject.

I am, therefore, proud to have the opportunity today to introduce Mr. Alan Nelson to my colleagues. I thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Well, since such a fine, able Senator has endorsed you, Mr. Nelson, I [a]m sure you will have no trouble. You just have a seat back there to[w]w.

Thank you very much, Senator, for your appearance here in behalf of Mr. Nelson.

Senator HAYAKAWA. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Bork, I believe, is the highest ranking person we are considering here today to be circuit judge of the District of Columbia.

Mr. Bork, I guess I had better swear you in to start with.

Do you swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BORK. I do.

The CHAIRMAN. Do you have any members of your family here? Would you like to introduce them, if you do?

Mr. BORK. My son Charles is here, Senator.

The CHAIRMAN. We are glad to have you with us. Is he a lawyer, too?

Mr. BORK. I have always hoped he would be, Mr. Chairman, but he is not. The subject is still under discussion. [Laughter.]

TESTIMONY OF ROBERT H. BORK, NOMINEE, U.S. CIRCUIT JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS

The CHAIRMAN. Do you have a prepared statement?

Mr. BORK. No, I do not, Mr. Chairman.

The CHAIRMAN. I believe you were born in Pittsburgh, and your legal residence is here in the District of Columbia. You have three children, I believe, Mr. Bork.

Mr. BORK. That is correct.

The CHAIRMAN. You attended the University of Pittsburgh and graduated from the University of Chicago, I believe, with a B.A., and a J.D., also from the University of Chicago.

You were in the service from 1945 to 1946 and then from 1950 to 1952 in the Marine Corps.

Mr. BORK. That is correct.

The CHAIRMAN. Why did you leave in 1946 and then go back, or were you called back the second time?

Mr. BORK. I enlisted in the Reserves while I was in college, after I got out the first time, and they called up the Reserves in the Korean war.

The CHAIRMAN. Then you have had various experience here. I believe from 1977 to 1981 you were Chancellor Kent professor of law at Yale Law School.

Mr. BORK. Yes, Mr. Chairman. I actually became the Alexander M. Bickel Professor of Public Law.

The CHAIRMAN. The Alexander Bickel Professor of Public Law, 1979 to 1981. You are now with Kirkland & Ellis, a law firm here in the District.

Mr. BORK. That is correct.

The CHAIRMAN. Mr. Bork, you are a very widely respected legal scholar in the field of antitrust and constitutional law, I believe. Your numerous, informative writings and books are scrutinized by both students and professors of the law.

One such article which appeared in the 1971 Indiana Law Journal entitled "Neutral Principles and Some First Amendment Problems," contains statements which have caused some individuals to suggest that you may feel that the first amendment protects only speech which is explicitly political. Will you discuss this article, and in particular give your response to the charge of limiting first amendment protection to political speech?

Mr. BORK. Of course, to begin with, Senator, the first amendment protects the free exercise of religion and the freedom of the press as well as speech. Within the speech area, I was dealing with an application of Prof. Herbert Wechsler's concept of neutral principles, which is quite a famous concept in academic debate. I was engaged in an academic exercise in the application of those principles, a theoretical argument, which I think is what professors are expected to do.

It seems to me that the application of the concept of neutral principles to the first amendment reaches the result I suggested. On the other hand, while political speech is the core of the amendment, the first amendment, the Supreme Court has clearly expanded the concept well beyond that. It seems to me in my putative

function as a judge that what is relevant is what the Supreme Court has said, and not my theoretical writings in 1971.

The CHAIRMAN. Mr. Bork, in your book, "The Antitrust Paradox," you stated that the only goal that should guide interpretation of the antitrust laws is the welfare of consumers. While consumers' welfare is certainly one of the concerns that Congress had in enacting the antitrust laws, other concerns such as preserving competition and maintaining the viability of small business have played a role in formulating antitrust policy. Would you please comment on the validity of these other goals?

Mr. BORK. Well, I think, Senator, that we desire competition—which is one of the other goals you have mentioned—primarily because competition does benefit consumers. Therefore, I think when you say "protect competition" you are talking about protecting consumers.

The antitrust laws do, of course, in many of their aspects protect the viability of small business but in general we do not protect the viability of small business at the expense of consumers in the antitrust field. For example, price fixing might benefit some small businesses. On the other hand, there is a per se rule against it and that is because, when there is a conflict in the antitrust laws, in general we protect competition and consumers rather than small business.

The CHAIRMAN. Mr. Bork, your book is highly critical of a number of Supreme Court antitrust cases, and you have urged rejection of prohibitions against such traditional antitrust violations as tie-in arrangements, exclusive dealing, predatory price cutting, and price discrimination.

If you are confirmed as a judge of the Court of Appeals, would you feel you are obliged to follow Supreme Court precedent even though you may strongly disagree with its application in a particular case?

Mr. BORK. Mr. Chairman, it seems to me that a lower court judge owes a duty of absolute obedience to Supreme Court precedent. If that were not true, the legal system would fall into chaos, so that my personal views certainly cannot affect my duty to apply the law as the Supreme Court has framed it.

The CHAIRMAN. Mr. Bork, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase "judicial activism" mean to you, and how do you feel about judicial activism?

Mr. BORK. Mr. Chairman, I think what we are driving at is something that I prefer to call judicial imperialism.

The CHAIRMAN. Imperialism?

Mr. BORK. Imperialism, because I think a court should be active in protecting those rights which the Constitution spells out. Judicial imperialism is really activism that has gone too far and has lost its roots in the Constitution or in the statutes being interpreted. When a court becomes that active or that imperialistic, then I think it engages in judicial legislation, and that seems to me inconsistent with the democratic form of Government that we have.

The CHAIRMAN. Mr. Bork, how do you feel personally about your own capacity at this point in your career to carry out the very significant power and responsibility of being a circuit court judge?

Mr. BORK. Mr. Chairman, I can only speak to my experience. I have spent a number of years in private practice, which I think gave me a practical view of the law as it operates. I have spent a number of years as a professor at Yale, which I think gave me a theoretical understanding of some problems of the law; and of course for almost 4 years I served as Solicitor General, which seems to me a combination of both the practical and the theoretical.

As to my personal capacities or abilities, that is a matter in the first instance for the President to judge, then for this committee, and finally for the Senate.

The CHAIRMAN. I do not think I have any other questions.

Do you have any?

Senator GRASSLEY. None, Mr. Chairman.

The CHAIRMAN. Do you have anything else you would like to say?

Mr. BORK. No, Mr. Chairman. Thank you.

The CHAIRMAN. Senator Baucus, do you have any questions?

Senator BAUCUS. Yes, I do, Mr. Chairman, a few brief questions.

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

There are two areas, though, I would like to briefly inquire about. The first is your view of efforts on the part of Congress to remove Supreme Court jurisdiction of certain constitutional issues. As I recall, when you appeared before this committee in hearings on S. 158, the Human Life Statute, you stated that in your view that bill and in some other cases Supreme Court jurisdiction, was unconstitutional.

Even though you personally may agree with the underlying thrust in trying to overturn what in your view are incorrect Supreme Court decisions, you felt it was improper and, more importantly, unconstitutional for the Congress to attempt to remove Supreme Court jurisdiction over constitutional issues. Is that a fairly accurate statement of your view?

Mr. BORK. I think that is entirely an accurate statement of my view, Senator Baucus.

Senator BAUCUS. Do you still hold to that view? Is that still your personal view?

Mr. BORK. Yes, it is.

Senator BAUCUS. Could you also indicate to this committee why in your view it would be unconstitutional for Congress to pass a statute that would limit Supreme Court jurisdiction over a Federal constitutional question?

Mr. BORK. Well, the attempt to eliminate Supreme Court jurisdiction as opposed to lower court jurisdiction would have to rest upon the exceptions clause of article 3 of the Constitution, which allows Congress to make such exceptions and regulations of the Supreme Court's appellate jurisdiction as it desires. Literally, that language would seem to allow this result.

I think it does not allow this result because it was not intended as a means of blocking a Supreme Court that had, in Congress

view, done things it should not. The reason I think it was not intended is that clearly in the most serious kinds of cases, where the Supreme Court might do something that the Congress regarded as quite improper, the exceptions clause would provide no remedy.

For example, if the Supreme Court should undertake to rule upon the constitutionality or the unconstitutionality of a war, and the Congress was quite upset, thinking that is not the Supreme Court's business, as indeed I agree it is not, to use the exceptions clause to remove Supreme Court jurisdiction would have the result not of returning power to the Congress but of turning the question over to each of the State court systems. We could not tolerate a situation in which 50 States were deciding through their own judges the constitutionality of a war.

Senator BAUCUS. Well, as I hear you, I hear you address the question more on a policy ground. Apart from the policy ground——

Mr. BORK. No, I do not think that is a policy ground, Senator. I think that is a constitutional argument. One of the ways of construing the Constitution, as Chief Justice Marshall showed us so well in *McCulloch* v. *Maryland*, is to argue from its structure: What is the necessity of Government? Would the framers have done something that led to results like this?

I think the answer is that the framers would not have devised a check upon the judiciary which does not return power to the Congress but returns power to the State judiciary systems, from which it probably cannot be removed. When one perceives that that is the result, then I think one has to say the framers did not intend the exceptions clause as that kind of a check upon the Court. I do not know any way to apply the Constitution that I regard as legitimate other than in terms of the intent of the framers, as best as that can be determined.

Senator BAUCUS. Could you tell me your view of whether the constitutional amendment process as outlined in article V of the Constitution is sufficient to enable the country and the Congress to respond to what it regards as improper Supreme Court decisions?

Mr. BORK. I think there is a real dilemma, Senator. I think in a variety of areas the Court over a period of years has reached results that were not intended by the framers of the Constitution or by the framers of the various amendments. I think to that degree the Court has stepped into areas that do not belong to it. It is that form of judicial activism or judicial imperialism that the chairman asked me about.

I do not think there is an adequate way of checking the Court provided in the Constitution, and I think the reason for that is that the framers never anticipated judicial review could become the enormous power that it has become. There was no court at the time that had any power resembling that.

The only cure for a Court which oversteps its bounds that I know of is the appointment power, and in addition to that the power of debate, political rebuke, and, I hope one day a better understanding by the profession and by the judges of what the limits of judicial power are.

Senator BAUCUS. What about the amendment process?

Mr. BORK. The amendment process is certainly useful but it is very hard to use. It is very hard to get the Constitution amended, and if you have a Court which frequently oversteps the bounds you cannot keep amending the Constitution every time that happens. We would be in a constant state of turmoil.

Senator BAUCUS. Well, do you recommend that some other device other than what we presently have under our present Constitution be formulated and enacted?

Mr. BORK. Senator, I do not recommend that. I would like to think about that long and hard. I think it is a very grave matter to start changing the Constitution and shifting balances of power. I do not reject it out of hand, either. I do not mean to say that. I simply have not thought that through, and I would like to think long and hard before I came down one way or the other.

Senator BAUCUS. Let me read from your statement when you testified on S. 158. It is very brief, just three sentences:

The question to be answered

this is you speaking

In assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional actions by the Court. I think it is not proper. The deformation of the Constitution is not properly cured by further deformation.

I frankly find that a very cogent and very articulate statement. Do you still hold to that statement today?

Mr. BORK. I do, Senator.

Senator BAUCUS. One other area I would like to turn to is the Watergate era, with which you are very familiar. I will give you a chance to state for the record your personal thoughts on what happened when the then-Attorney General resigned.

As I recall history, the Attorney General would not fire Special Prosecutor Cox, and the Acting Attorney General who replaced him, Mr. Ruckleshaus, also resigned, because of his unwillingness to fire Mr. Cox. You, then, the Solicitor General, became the Acting Attorney General and did fire the Special Prosecutor.

I would like to give you the opportunity to state what your thoughts were at the time and why you took the action that you did in view of the reluctance of your two immediate predecessors to take the same action.

Mr. BORK. Well, Senator, I would be delighted to answer that because it seems to me that that is a story which, although I have testified about it and given press conferences about it, has never quite been gotten straight.

Senator BAUCUS. When you are answering, too, I would appreciate if you could tell me the reasons why your predecessors refused to fire Mr. Cox. My understanding is that under the law he could only be removed for cause.

Mr. BORK. Under the charter that Elliott Richardson, then Attorney General, had given to Mr. Cox, the Special Prosecutor could only be removed for cause. That is true. That charter could be revoked, of course.

There was a lawsuit about whether the charter should have been revoked on Saturday night before he was fired, and whether therefore the firing was illegal under the charter until it was revoked. I regard that as an argument about a 36-hour period. The reason the

charter was not revoked before he was fired was that there was no staff around to do the necessary work. Monday morning the charter was revoked.

I do not think that issue of which order it should have come in and whether the thing was illegal for 36 hours is important. I think the important issue is the one you go to, Senator, which is the moral issue.

Attorney General Richardson had made those promises not to fire the Special Prosecutor, to this committee and through this committee to the Senate. He therefore could not discharge Mr. Cox when that confrontation between the President and Mr. Cox occurred, and I quite agree that Attorney General Richardson took the right position.

Deputy Attorney General Ruckleshaus felt that Mr. Richardson had brought him into the Deputy Attorney General's spot, as he had not me—I was not brought in by that Attorney General—and Bill Ruckleshaus felt that he was bound by his own statements to the Senate through this committee and by Elliott Richardson's representations.

During that afternoon, which was the only time I had to think about this because this came upon me quite suddenly—I was not involved in this whole ruckus—I discussed the point at length with Bill Ruckleshaus while Elliott Richardson was at the White House, and he agreed that my moral position therefore was different. I had a moral choice to make, not encumbered by the charter. I had made no such representations, and therefore I had a moral choice to make free of those problems they had.

I would make two points about the decision to discharge: One is that there was never any possibility that that discharge of the Special Prosecutor would in any way hamper the investigation or the prosecutions of the Special Prosecutor's office. Neither the President nor anyone else at the White House ever suggested to me that I do anything to stop or hinder in any way those investigations. If I had been asked to do that, I would not have done it.

The next day after the discharge there was a meeting in my office on Sunday. I brought in Henry Peterson, who was then the head of the Criminal Division of the Department of Justice, and I brought in Mr. Cox's two deputies, Henry Ruth and Phillip Lacovara.

At that meeting I told them that I wanted them to continue as before with their investigations and with their prosecutions, that they would have complete independence, and that I would guard that independence, including their right to go to court to get the White House tapes or any other evidence they wanted. Therefore, I authorized them to do precisely what they had been doing under Mr. Cox.

When I named Mr. Leon Jaworski later as the Special Prosecutor, I made the same promises and representations to him and those promises were kept. They were independent; they remained independent; they went to court. The investigations went forward with the results we all know and are now a part of American history. At no time was there any threat to the integrity of the processes of justice.

The second point I want to make is simply this, and that is the reason for the discharge. The point I have just made is why there was no harm to justice from the discharge. The reason for the discharge was that I had, I thought, to contain a very dangerous situation, one that threatened the viability of the Department of Justice and of other parts of the executive branch.

The President and Mr. Cox had gotten themselves, without my aid, into a position of confrontation. I have explained why the Attorney General and the Deputy Attorney General could not discharge Mr. Cox, and why my position was not the same as theirs because I had not made the representations and the assurances that they had, although I did make them to the people who came after Mr. Cox.

I was third in line in the Department of Justice, and the Acting Attorney Generalship came to me automatically by operation of Department regulation. I was not appointed Acting Attorney General; I became Acting Attorney General the moment those two gentlemen resigned. There was nobody after me in the line of succession, nobody. If I resigned, there was simply nobody who stepped into that position.

At that point, the President was committed because of this symbolic confrontation to discharging Mr. Cox. He would have appointed, I assume, an Acting Attorney General and he probably would have had to go outside the Department of Justice to do so. Perhaps one of the White House lawyers would have been appointed Acting Attorney General and would have discharged Mr. Cox. There was never any question that Mr. Cox, one way or another, was going to be discharged.

At that point you would have had massive resignations from the top levels of the Department of Justice. I talked to those people, the other Assistant Attorneys General and their deputies. If that had happened, the Department of Justice would have lost its top leadership, all of it, and would I think have effectively been crippled.

For that reason I acted, made the discharge, called the Department together, the leaders together, told them why I had done it, talked to a number of them in private. None of them left; they all stayed with me, stayed with the Department.

Therefore, that was my choice, Senator. On the one hand there was no threat to the investigations from the discharge and no threat to the processes of justice. On the other hand, I preserved an ongoing and effective Department of Justice. The only thing that weighed against doing what I did was personal fear of the consequences, and I could not let that, I think, control my decision.

Senator BAUCUS. I appreciate your answer. Obviously our country was going through very difficult times during that period. I thought we both had an obligation to discuss this because you are going to be sitting as a Federal judge There are some people who would like to know what happened, what you were thinking at the time, what your motives were, what the explanations were for your actions. I think your statement today helps explain all of that and I appreciate that statement very much.

In America, sometimes I think that perhaps public officials, perhaps members of this body, should resign on the basis of principle

more often than we do. However, that is a side issue; it is not central to the point here under discussion today.

I wish you very well as you serve on the court.

Mr. BORK. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Bork, it is a pleasure to see you here this afternoon. I am sorry if I am late.

I am familiar with your views with respect to antitrust legislation, antitrust enforcement, and you and I are totally in disagreement on that subject. However, as I said at the time Justice O'Connor was up for confirmation, the fact that my views might differ from hers on any one of a number of different issues would not in any way affect my judgment as pertains to confirmation or failure to confirm a member of the judiciary.

However, having said that, I have some concerns—and I think that Senator Thurmond has already addressed himself to some of those concerns. My concerns are not that your views might differ from mine but whether or not you would interpret the law on the basis of heretofore decided Supreme Court decisions.

Your entire book is a comprehensive attack on the current antitrust laws, and by your own admission these are the laws on the books as interpreted by the highest Court in the land. It was a great disappointment to me when Mr. Baxter appeared before our committee and indicated that notwithstanding that, he did not feel any obligation to enforce those laws. I think he was wrong.

I do not think you are in that position. You are not up for confirmation as an enforcement official. The concern that I have is whether or not you will be able to wholeheartedly apply the laws as previously interpreted by the Court, or are you going to start trimming them and cutting into them here and there to suit your own ideas, not of what is the law but what is good economic sense.

I guess I know even in asking the question that you have no alternative but to say, "No, I am not going to. I am going to follow the law," and yet I think it is appropriate that we put into the record your response.

Mr. BORK. I think so, Senator. I think my response has to be along the lines of the response I gave to the chairman about the problem of judicial activism. I have long been opposed to judges who write their own views into the law rather than what they think, on the basis of principled interpretation, the law is. I would be false to those views if I interpreted the antitrust laws in a way that I did not think the law really was or in a way contrary to the interpretation given to them by the Supreme Court.

I think that is true of any field of law. I assume, Senator, that in fields I have never written about and therefore nobody can really question me about, that I will often think that the law I am called upon to apply is not a terribly good law.

However, that is not my business as a judge. My business, particularly as a lower court judge, is to be obedient to the Supreme Court's interpretation of the law. Otherwise, our legal system falls into chaos. The Supreme Court cannot take enough cases every year to straighten out all of the lower court judges if they all began to interpret the law according to their own views rather than ac-

cording to the Supreme Court's views. Therefore, to be a good judge is to be obedient to precedent as it stands.

Senator METZENBAUM. You wrote in your book, "Disregarding the value of efficiency, a majority of the Court for a long time struck down every merger that came before it. Subsequent decisions allowing some mergers have by no means repaired the damage. The result is a merger law that deserves to be called an antitrust statute about as much as the Smoot-Hawley tariff did."

Mr. BORK. I have a gift, Senator, for colorful phrase occasionally which I now regret. [Laughter.]

Senator METZENBAUM. On page 406 of your book—I really wish I could say to you I have read every page—I did not but my staff did—on the antitrust paradox you argue that one way to beef up antitrust enforcement in the price-fixing area—one of the few areas, I might say, where you have indicated that you think antitrust enforcement is appropriate—you have indicated that one of the ways to beef up antitrust enforcement in the price-fixing area is by beefing up antitrust field office staffs.

In light of this, what is your reaction to recent Justice Department decisions to close some of its antitrust field offices and to transfer many of the antitrust field office attorneys—I think about 20 out of 100 or 110—to the U.S. attorneys' offices?

Mr. BORK. I am not familiar with this, Senator. Will they perform the antitrust function out of the U.S. attorney's office?

Senator METZENBAUM. Unclear.

Mr. BORK. Well, I am not familiar with it. It may be a budget measure, in which case I have no idea about it, but if an antitrust capacity were put in each U.S. attorney's office you would obviously have many more antitrust field offices than you do now.

My concern is that I think the field offices typically enforce the law within a rather small radius of the office, which means I think a lot of price-fixing is going on in communities that are never visited by a Department of Justice lawyer. Perhaps if you put the function into the U.S. attorneys' offices you would have a much greater coverage of the country. I have no idea of what that proposal is or what it accomplishes.

Senator METZENBAUM. I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Grassley.

Senator GRASSLEY. I have no questions.

The CHAIRMAN. Senator Baucus?

Senator BAUCUS. May I ask one or two very brief questions?

Mr. Bork, following up on the first question of Senator Metzenbaum, concerning judicial activism, as you know the charge of judicial activism tends to be leveled by those who feel that a court or a judge has been too liberal. The charge generally has not been leveled by liberals against conservative judges who are too active in their conservatism on the court.

When you talk about judicial imperialism, are you referring to liberal activism or conservative activism or both?

Mr. BORK. In our time, Senator—by that I mean in the era of roughly 1955 or 1960 onward—courts have been active or imperialistic in what is loosely referred to as a liberal direction, an egalitarian direction. Prior to 1936 or 1937, the Court was imperialistic or active in a conservative direction. I think both of those are equally improper.

Senator BAUCUS. As a judge, you would not indulge in either?

Mr. BORK. To the best of my understanding of a particular case, I would not.

Senator BAUCUS. What would you do as a judge when a case appears before you and it is clear that Congress did not contemplate the situation before you? You know, they have legislated all around it and the issue squarely before you has to do with a matter that clearly Congress did not contemplate. Would you intervene and try to decide what Congress would have decided, or how would you handle that situation?

Mr. BORK. Senator, that is often the case.

Senator BAUCUS. Maybe that is why I am asking the question. That is right.

Mr. BORK. I see nothing wrong with a judge attempting to deal with that. Holmes said that courts properly make law interstitially, in between the areas where Congress has made law. I think the best you can do is look at the overall policy thrust of the statute or the program that you are dealing with and attempt to resolve the unknown area in line with that policy thrust.

There may be occasions in which Congress has made no decision, even about the basic policy. Sometimes one sees a statute in which it is quite vague what choice Congress made. I do not know what I would do in a case like that.

Senator BAUCUS. However, the more a judge tries to decide the interstitial cases, the more isn't he indulging in activism? Why shouldn't a judge decide, "Well, Congress has not addressed this situation. There the party claiming relief or bringing the action in the first place is not entitled to relief or to a judgment, again because Congress has not provided for that situation?"

Mr. BORK. Well, I think, Senator it depends upon these matters of degree. There are times when Congress has written a law which is clearly intended to cover this kind of situation but they never contemplated quite this one, so you have no direct order. I do not think it is activism, and if it were activism I think statutes would be unenforceable because if you had to go only by what Congress had specifically and explicitly contemplated, most cases would never fall within the statute. Now there are other cases in which the matter is so far outside the statute that you simply ought to say it is not covered by the statute.

Senator BAUCUS. One more question: How strongly do you adhere to the principle of stare decisis?

Mr. BORK. Well, I think as a court of appeals judge one has to adhere to it very strongly, and that is to follow the lead of the Supreme Court. It is less clear, for example, about precedent within a single court and whether that court should follow it or not.

For example, if a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court. If that were not true, the commerce clause would still be as limited as it was in 1936.

Senator BAUCUS. I understand that, and I agree in large part with what you said, that is, as a lower Federal court judge the principle of stare decisis applies much more strongly to Supreme Court decisions than it would within a single court.

While you are here, though, and I have a chance to pick your brain a little, do you have any general guiding principles as to when a Supreme Court judge should adhere to the principle in looking at, revisiting Supreme Court issues?

Mr. BORK. Well, yes. I think it is a parallel to what Thayer said about the function of a judge when he is reviewing a legislative act for constitutionality. He said he really ought to be absolutely clear that it is unconstitutional before he strikes down the legislative act, if not absolutely clear, awfully clear.

I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious.

Senator BAUCUS. I appreciate that, Mr. Bork.

Mr. Chairman, I want to thank you for the time that you have taken.

Actually, Mr. Bork, I suppose these are questions that I will address you in your next hearing before this committee.

The CHAIRMAN. Mr. Bork, I want to thank you for your appearance and your testimony here. You have a very fine reputation as being an able lawyer and a dedicated public servant, so I would anticipate that the committee will approve you. Of course, no one can ever guarantee it but I wish you good luck.

Mr. BORK. Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Quayle, you have two judges here from Indiana, Judge Kanne and Judge Moody. In a few minutes they will testify but I do not want to hold you up, and we will take you now if you care to say anything about these gentlemen.

STATEMENT OF HON. DAN QUAYLE, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator QUAYLE. Thank you very much, Mr. Chairman. I certainly appreciate all the cooperation that you have given me.

As has been outlined by Senator Lugar, the character and professional competence of Michael Kanne and James Moody are unassailable. Further, their judicial careers exhibit compatibility with the ideals and the philosophy espoused by the present administration. They understand and adhere to the view that the primary responsibility for policymaking lies with the executive and legislative branches of Government, and that the judiciary should confine itself to just resolution of specific cases and issues.

Mr. Chairman, I just briefly want to point out the need for additional judges in the northern district. As of December 31, 1981, there were 1,904 civil cases pending in this district and 67 criminal cases. Since 1975 the number of cases for the Fort Wayne division alone has more than doubled. While the Hammond division covers only two counties, it accounts for the bulk of the backlog in the district. The bench, the bar, and the leaders in these communities are

in agreement with the urgent need for these two fine nominees before you today.

I just want you to know, Mr. Chairman, that I noted your cooperation, you individually and your committee and your staff. You do a fine job and we certainly appreciate the quick attention that you have given us on these matters and other matters and other matters to come before you. You will not be let down.

I ask unanimous consent that the entire text of my remarks appear in the record.

The CHAIRMAN. Senator Quayle, the high endorsement in which you are held by the Members of the Senate makes your approval of these gentlemen here very advantageous to them. We are very pleased to have you with us.

Senator QUAYLE. Thank you very much.

[The prepared statement of Senator Quayle follows:]

THE HUMAN LIFE BILL

HEARINGS

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 158

A BILL TO PROVIDE THAT HUMAN LIFE SHALL BE DEEMED TO EXIST FROM CONCEPTION

APRIL 23, 24; MAY 20, 21; JUNE 1, 10, 12, AND 18

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THE HUMAN LIFE BILL

MONDAY, JUNE 1, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2228, Dirksen Senate Office Building, Hon. John P. East (chairman of the subcommittee) presiding.

Present: Senators Baucus and Heflin.

Staff present: Jim McClellan, chief counsel; Craig Stern and Jim Sullivan, counsels.

OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. I would like to call the Subcommittee on Separation of Powers to order.

This morning, we are continuing our discussion of S. 158. We have had a series of discussions already. We had earlier sessions that dealt with the scientific and medical implications of this legislation. We had a session just prior to the recess dealing with the constitutional and statutory implications of it, and this morning we are continuing that dialog.

We have two distinguished panels this morning.

I would like to welcome my distinguished colleague, Senator Baucus, the ranking minority member of this subcommittee.

If you would like to make a statement, please go ahead.

STATEMENT OF SENATOR MAX BAUCUS

Senator BAUCUS. Thank you, Mr. Chairman.

I have no formal statement to make, except that I look forward to the additional days of hearings we have scheduled on S. 158. I think the past several days have been most instructive. We have received a great deal of useful testimony on the bill.

I am also very pleased to see that we have two very distinguished panels of individuals who will testify this morning.

It is an interesting footnote to today's hearing, according to my understanding, that this will be the first time that former Solicitor General Archibald Cox and former Solicitor General Robert Bork have been together since that infamous date a few years ago.

With that, I think we should begin the hearing. I look forward very much to the testimony.

Senator EAST. Thank you, Senator.

We would like to proceed in this way, if we might: Would the first panel please take the : place? That is the panel consisting of

Prof. Robert Bork, Prof. Robert Nagel, Prof. Archibald Cox, and Prof. Basile Uddo.

Before we commence, I would like briefly to identify these very distinguished gentlemen.

Mr. Bork is currently the Alexander M. Bickel Professor of Public Law at Yale University Law School. He served as Solicitor General of the United States for 1973 until 1977 and as Acting Attorney General of the United States in 1973 and 1974. He is also an adjunct scholar at the American Enterprise Institute.

Professor Nagel is currently a visiting professor of law at Cornell University. He received his B.A. from Swarthmore College and his law degree from Yale University. He served as deputy attorney general of the State of Pennsylvania from 1972 until 1975 and as associate professor of law at the University of Colorado since 1975 and is a member of Phi Beta Kappa.

Prof. Archibald Cox is the Carl M. Loeb University Professor of Harvard Law School. He is a former Solicitor General of the United States and a former director of the Watergate Special Prosecutor Force. Professor Cox is the author of "The Role of the Supreme Court in American Government."

Prof. Basile Uddo is associate professor of law at Loyola University in New Orleans. He holds a B.A. from Loyola and received his doctor of jurisprudence degree from Tulane Law School and the LL.M. from Harvard University.

Gentlemen, we welcome you all this morning.

The way we would like to proceed, please, is to have each of you summarize his comments extemporaneously the best you can. Your written statements will be a part of the record, so we would like to encourage you to summarize them the best you can, again, consistent with making your point.

We would like for each of you to take your turn at bat, and then we would like to be able to come back and begin the discussion.

I would remind all parties concerned that we are under a time limit—until 1 o'clock, at which time we expect to adjourn. We have two panels. We would appreciate it if, in terms of statements as well as questions and answers, people would be as concise as they can, in order that we might get in as much useful discussion as possible.

I would also like to remind the spectators that, under the rules of the Senate, applause is inappropriate. We are delighted to have you here, but we would simply appreciate your restraining your enthusiasm for the testimony, whichever way you happen to lean on the matter. We are all very aware that there are rather strong differences of opinion on this issue. You do not have to be around very long to learn that.

Professor Bork, it is a pleasure to have you. If you would, please summarize your statement for us.

STATEMENT OF PROF. ROBERT BORK, YALE LAW SCHOOL, NEW HAVEN, CONN.

Mr. BORK. Thank you, Senator.

S. 158 would provide that human life would be deemed to exist from conception. The intended result is to bring 14th amendment protections of human life to bear upon unborn fetuses. The object,

as I understand it, is to return to the States the power to regulate abortions that was denied by the Supreme Court in Roe against Wade

The bill further attempts to remove jurisdiction over abortion cases from the lower Federal courts, if not from the Supreme Court, thus insuring that litigation concerning abortion laws would reach the Supreme Court through the State courts.

It seems to me, in brief, that the bill is constitutional insofar as it deprives the lower Federal courts of jurisdiction but unconstitutional insofar as it attempts to prescribe a rule of decision for the courts under the 14th amendment.

Before coming to the question of constitutionality, I should say that if this bill were enacted and accepted as constitutional it is not at all clear what the results would ultimately be.

States might choose to allow many types of abortions simply by not banning them. Under the premises of S. 158, that would be equivalent to not having a law against some kinds of homicides.

There is at least one Supreme Court decision that suggests that that might be denial of equal protection of the law, but it is highly uncertain whether or not such an attack would succeed today if the State chose not to prohibit some kinds of abortions.

It has been said that the passage of S. 158 would not interfere with private abortions, which seems to me correct since, in such cases, there is no State action.

But it has also been said that the passage of the law would preclude Federal or State funding of abortions. That seems to me not entirely clear. The State courts and ultimately the Supreme Court would have before them under this statute a case involving the clash of two constitutional rights—that of the woman and that of the fetus.

Given the clash of two constitutional rights, it is impossible to say how the Supreme Court would adjust them, and it is entirely possible that the adjustment would produce a constitutional law of abortions very much like the law of *Roe* v. *Wade*.

I mention these matters merely to suggest that S. 158 may not be a cure-all. We do not know what it would become in the hands of the courts even if they accepted it, at least nominally, as constitutional.

I turn now to my doubts that S. 158 is constitutional. Here, I am forced to defend the Supreme Court's ultimate authority to say what the Constitution means against recent decisions of the Supreme Court.

The supporters of S. 158 argue for its constitutionality from a line of cases that seem to cede to Congress a major role in defining the substantive content of the Constitution. There is no doubt that these decisions exist—you have heard about them, and I will mention them only briefly.

In the *Lassiter* case, of course, the Court held that States were constitutionally empowered to use a nondiscriminatory literacy test for voting. Yet, in *Katzenbach* v. *Morgan*, the Court held the Court could eliminate literacy in English as a condition for voting by exercising the power granted in section 5 of the 14th amendment.

In *Oregon* v. *Mitchell*, the Court upheld Congress elimination of all literacy tests.

There are other decisions that declare a congressional power to define substantive rights guaranteed by the 13th, the 14th, and 15th amendments, by employing the power to enforce that those amendments have given to Congress.

I would conclude, therefore, that S. 158, which is an attempt by Congress, I think, to define a substantive right given by the Constitution, would be constitutional but for my conviction that each of these decisions represents a very bad and, indeed, pernicious constitutional law.

The power lodged in Congress to enforce constitutional guarantees is the power to provide criminal penalties, redress in civil damage suit, and the like, for violations of those constitutional guarantees, as they are defined by the courts.

The power to enforce is not a power to define the substantive content of the guarantees, themselves. I know of no indication that Congress was given any such power in the legislative history of these amendments and no precedent of the Supreme Court that would uphold any such power until the era of the modern activist Supreme Court.

In these respects, I agree entirely with the dissent of Justice Harlan, joined by Justice Stewart, in *Katzenbach* v. *Morgan* which stated:

> When recognized State violations of Federal constitutional standards have occurred, Congress is of course empowered by section 5 of the 14th amendment to take appropriate remedial measures to redress and prevent the wrongs. But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the S5 power into play at all.

The majority position that Congress can define the substantive content of the 14th amendment works two constitutional revolutions at once. It replaces the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution, and it also replaces State legislatures with Congress for all matters now committed to State legislation.

A National Legislature empowered to define the meaning, for example, of involuntary servitude, privileges, and immunities, due process, equal protection, and the right to vote can void any State legislation on any subject and replace it with a Federal statute.

It is because, I think, S. 158 rests upon the principle of *Katzenbach* v. *Morgan* that I think it is unconstitutional. This places me in a somewhat uncomfortable position.

I am convinced, as I think most legal scholars are, that *Roe* v *Wade* is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority. I also think that *Roe* v. *Wade* is by no means the only example of such unconstitutional behavior by the Supreme Court.

The fact is that S. 158 proposes a change in our constitutional arrangements no more drastic than that which the judiciary has accomplished over the past 25 years.

I think the question to be answered in assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional action by the Court. I think it is not proper

The deformation of the Constitution is not properly cured by further deformation. Only if we are prepared to say that the Court has become intolerable in a fundamental, democratic society, and

that there is no prospect for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role

I do not think we are at that stage, but if others think we are, then we should be debating not the technicalities of S. 158 and cases such as *Katzenbach v. Morgan* but the question of whether we should retain, abandon, or modify the constitutional function of the courts as we have known it since *Marbury v. Madison*. That is a legitimate subject for inquiry, but we ought not to arrive at the answer in the narrow context of S. 158 without fully realizing what it is we are really discussing

Thank you

Senator EAST. Thank you, Professor Bork

[The prepared statement of Professor Bork follows:]

PREPARED STATEMENT OF PROFESSOR ROBERT H. BORK

My name is Robert H. Bork. I am the Alexander M. Bickel Professor of Public Law at Yale University. I am pleased to testify on the constitutionality of S. 158 at the Subcommittee's invitation.

S. 158 would provide that human life shall be deemed to exist from conception. The intended result of the law is to bring fourteenth amendment protections of human life to bear upon unborn fetuses. The object, as I understand it, is to return to the states the power to regulate abortions that was denied by the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973). The bill further attempts to remove jurisdiction over abortion cases from the lower federal courts but not the Supreme Court, thus ensuring that litigation concerning abortion laws would reach the Supreme Court through the state courts.

At the outset I want to say that discussions of constitutionality are often embarrassed by the failure to note the differences, which are sometimes significant, between a prediction of what the Supreme Court will do in fact, what it would do if it followed its own precedents, and what it would do if it followed the Constitution. I will evaluate the bill primarily from the third viewpoint, discussing its validity if the Constitution itself were followed.

From that perspective, it seems to me that the bill is constitutional insofar as it deprives the lower federal courts of jurisdiction but unconsitutional insofar as it attempts to prescribe a rule of decision for the courts under the fourteenth amendment.

Before coming to that, it should be said that if S. 158 were enacted and held constitutional it is not at all clear what the results would be. States might choose to allow many types of abortions simply by not banning them. Under the premises of S. 158 that would be the equivalent of not having a law against some kinds of homicides. There is at least one, perhaps aberrational, Supreme Court decision that suggests the possibility of

an equal protection attack on such an arrangement (Skinner v. Oklahoma, 316 U.S. 535 (1942), thus requiring the states to outlaw abortions or abandon laws punishing homicide. It is highly uncertain whether or not such an attack would succed today in this context.

It has been said that passage of S. 158 would not interfere with private abortion , which seems correct since there is in such cases no state action. But it has also been said that passage of the law would preclude federal or state funding of abortions. That seems less clear. The state courts, and ultimately the Supreme Court, would have before them a case involving the clash of two constitutional rights -- that of the woman and that of the fetus. The fact that the constitutional right of the woman to an abortion is the result of judicial legislation, is, in this context, irrelevant. Given the clash of two constitutional rights, it is impossible to say how the Supreme Court would adjust them. It is entirely possible that the adjustment would produce a constitutional law of abortions very much like the law of Roe v. Wade, 410 U.S. 113 (1973).

I mention these matters merely to suggest that S. 158 may not be a cure-all. We do not know what it would become in the hands of the courts, even if they accepted it, at least nominally, as constitutional.

I turn next to my own doubts that S. 158 is constitutional. Here I am forced to defend the Supreme Court's ultimate authority to say what the Constitution means against recent decisions of the Court. The supporters of S. 158 argue for its constitutionality from a line of Supreme Court decisions that cede to Congress a major role in defining the substantive content of the Constitution. There is no doubt those decisions exist. Since you have heard about them before, I will mention them only briefly.

In Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), a unanimous Supreme Court held that states were constitutionally empowered to use a non-discriminatory litracy test for voting. Yet in Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court held that Congress could eliminate literacy in English

as a condition for voting by exercising the power granted in Section 5 of the Fourteenth Amendment. In Oregon v. Mitchell, 400 U.S. 112 (1970), a unanimous Court upheld Congress' elimination of all literacy tests. There are other decisions that declare a congressional power to define substantive rights guaranteed by the thirteenth, fourteenth and fifteenth amendments by employing the granted power to "enforce" the provisions of those amendments. These precedents all uphold the constitutionality of S. 158. I would conclude that S. 158 is constitutional but for my conviction that each of these decisions represents very bad, indeed pernicious, constitutional law.

The power lodged in Congress to "enforce" constitutional guarantees is the power to provide criminal penalties, redress in civil damage suits, and the like, for violations of those constitutional guarantees as they are defined by the courts. It is not a power to define the substantive content of the guarantees themselves. I know of no indication that Congress was given any such power in the legislative history of these amendments, and no precedent of the Supreme Court that would uphold any such power -- until the era of the modern, activist, liberal Supreme Court. In testimony here, you have heard cited the 1879 case of Ex parte Virginia, 100 U.S. 339 (1879), but that decision does not contemplate any such congressional power to define substance. It held that Congress could make it a federal crime to disqualify persons from jury service on account of race because the fourteenth amendment, as interpreted by the Supreme Court, prohibited such action.

In these respects, I agree entirely with the dissent of Justice Harlan, joined by Justice Stevart, in Katzenbach v. Morgan, which stated:

> When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by S5 to take appropriate remedial measures to redress and prevent the wrongs. (citation omitted) But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the S5 power into play at all. (384 U.S. at 666)

The majority position in Katzenbach v. Morgan works

two constitutional revolutions at once. It replaces the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution. The majority position also replaces state legislatures with Congress for all matters now committed to state legislation. A national legislature empowered to define the meaning of involuntary servitude, privileges and immunities, due process, equal protection, and the right to vote, which includes all qualification of electors, can void any state legislation on any subject and replace it with a federal statute.

It is because I think S. 158 rests upon the principle of Katzenbach v. Morgan that I think it unconstitutional.

This places me in a somewhat uncomfortable position. I am convinced, as I think almost all constitutional scholars are, that Roe v. Wade is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority. I also think that Roe v. Wade is by no means the only example of such unconstitutional behavior by the Supreme Court.

The point is that S. 158 proposes a change in our constitutional arrangements no more drastic than that which the judiciary has accomplished over twenty-five years. Without any warrant in the Constitution, the courts have required so many basic and unsettling changes in American life and government that a political response was inevitable. Though I do not think it desirable that the political response should succeed in the form this bill takes, the fact of expressed political outrage at such judicial usurpation is in many ways a healthy development in our constitutional democracy.

The judiciary have a right, indeed a duty, to require basic and unsettling changes, and to do so, despite any political clamor, when the Constitution, fairly interpreted, demands it. The trouble is that nobody believes the Constitution allows, much less demands, the decision in Roe v. Wade or in dozens of other cases of recent years. Not even those most in sympathy with the results believe that, as demonstrated by a growing body

of literature attempting to justify the courts' performance on grounds of moral philosophy rather than of legal interpretation. Such justifications will not wash. The judiciary's legitimate power to set aside the decisions and actions of elected representatives and politically responsible officials comes from the Constitution alone and is limited to a fair interpretation of the Constitution.

The question to be answered in assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional action by the Court. I think it is not proper. The deformation of the Constitution is not properly cured by further deformations. Only if we are prepared to say that the Court has become intolerable in a fundamentally democratic society and that there is no prospect whatever for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role. I do not think we are at that stage. But if others think we are, then we should be debating not the technicalities of S. 158 and cases such as Katzenbach v. Morgan, but the question of whether we should retain, abandon, or modify the constitutional function of the courts as we have known it since Marbury v. Madison, 1 Cranch 137 (1803). That is a legitimate subject for inquiry, but we ought not arrive at the answer in the narrow context of S. 158 without fully realizing what we are really discussing.

Indeed, the only affirmation possible comes from the subjective perception by some that this is the way it should be. Unfortunately, that perception has been too influential in recent lower federal court incursions into the abortion issue. But should we expect any more from a judicial enterprise that got its start with a wink from the bench?

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life. Many nurses find this hard to rationalize.

. . . .

. . . [It is [difficult] to solicit nursing personnel to minister abortion patients. Many nurses have expressed their qualms, especially when they encounter a large, dead fetus. They must be able to separate their own feelings about abortion from the responsibilities for good nursing.

Yaloff, Wade, & Burlingame, *Nursing Care in an Abortion Unit*, 14 Clinical Obstetrics & Gynecology 67, 68 (1971).

Senator EAST. Gentlemen, I wish to thank you all for your valuable testimony. As I have indicated, your written statements will be made a part of our permanent record.

As I have indicated, time always in this sort of thing becomes very precious. I would anticipate we need to wind up this phase of the discussion around 11:30 so that we can devote an hour and a half to our second panel.

Senator Baucus and I will rotate our time. I shall take about 10 minutes, which will take us to 5 after the hour, and then we will let Senator Baucus have his swing at this. So, gentleman, you are now fair game, if you will, for our questions.

A point I would like clear up—and I suppose I am directing this comment particularly at Professors Bork and Cox—is this. I sense in both of you—certainly very strongly in Professor Bork, and I will just state my postion and let you respond to it, if you will, please—a general unhappiness with *Roe* v. *Wade,* not maybe so much with the policy result, but that it is not good constitutional law. Certainly with Professor Bork there is no desire to defend the way in which the Court has proceeded to involve itself in this issue.

I sense also with you, Professor Cox, certainly not a great deal of glee in having to defend their intervention in this particular matter and that it does become an example, it would seem, of inappropriate exercise of judicial power.

I am reminded, of course, that in the dissent in *Roe* v. *Wade,* William Rehnquist and Byron White, two members of the Court, both described this as an improvident and extravagant use of the power of judicial review, both of those distinguished gentlemen suggesting that something was very much amiss in what was going on.

Many Americans—and I will include myself in that category, it is probably no great secret—share that concern.

What we are trying to do is to find some sort of reasonable, prudent, modest way out of it.

We have various kinds of alternatives in dealing with this sort of thing. You can make sure that future Court appointees think prop-

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erly, but then that is always fraught with difficulty lest you try to skew it too much to your own political predilections.

You can withdraw Court jurisdiction. Obviously, Professor Cox has deep reservations about that as a remedy. We have, of course, the route of constitutional amendment, which the two of you do not rule out as a possibility here. Though I would argue, on a hierarchy of remedies, that is a pretty severe kind of thing, where you reach a point that you acknowledge the Court has done a very radical and, if you will, unprincipled thing by intervening in this way. We are trying to find some sort of reasonable, prudent way out of it.

Constitutional amendments up the ante very high. First of all, there is the difficulty of achieving it, which is not necessarily a bad thing; but, second, it would, interestingly, invert *Roe* v. *Wade* and give you a national policy wholly different in scope.

It seems to me that the human life bill has a couple of advantages. One, it is a relatively modest remedy. All we are really doing, I would argue as a defender of the bill, is inviting the Court to reconsider what it had done. It had indicated in the majority opinion that it could not define "life," and the implication is very strong—overwhelming—that if they had known when life begins they would have come to a different result. We look upon that—at least I do and many others—as, if you will, a tacit invitation that perhaps we might begin to exercise our prerogative. It certainly would be an appropriate, or certainly not an inappropriate, legislative function to look into this matter, to determine, if in fact we can determine, when life begins.

If we say we can, we are not overruling the Court. They will have another shot at it. We have not taken away their appellate jurisdiction. We are simply suggesting, well, let us try it. This is a gentle prodding of the Court to reconsider.

They can reconsider on due process grounds. Who knows? They might even, in reconsideration, get into equal protection questions.

It seems to me all four gentlemen are suggesting that we start with not a very good decision. And we start with a legitimate desire on the part of many—even the opponents here—to do something about it.

A statute that invites the Court to reconsider I would consider, Professor Cox, a very modest remedy, as opposed to the alternatives. All we are doing here is trying to enlist them in a little dialog on this very profound public issue and get them to look at it again.

They could ultimately hold the bill unconstitutional. Perhaps they would. We do not eliminate that option. Then the alternative would be, for those who feel strongly about it, to go for a constitutional amendment—a right to life amendment. But that is stronger medicine than this.

I am very sensitive—indeed, totally resistant—to the notion that what we are doing here is "radical and unprincipled." I would say it is very prudent, very modest, and merely a testing of the constitutional waters to see if the Court might not reconsider what we all seem to be agreed upon was a very poor decision in terms of the whole concept of the power of judicial review, going back to *Marbury* v. *Madison*, going back to The Federalist, No. 78.

Now, I have said my piece. Perhaps, Professor Cox, since I spoke a little bit more critically of your analysis, you might respond to that. Where do you think that I go awry on this thing?

Mr. Cox. I think—without intending to be impolite at all, Senator, and with respect—that you go awry at just about every step of your statement.

First, a constitutional amendment may be difficult to achieve, but it is a modest way of correcting a Supreme Court error; and it is one that has a good many instances of precedent in our history.

The 11th amendment resulted that way, and the income tax amendment resulted that way—certainly, those two; whether there are others, I do not recall at the moment.

An amendment could easily be phrased in a way which would provide that nothing in the 14th amendment should be deemed to deprive the States of power to enact and administer laws prohibiting abortion, if that is the purpose of S. 158. Such an amendment would not attack any basic constitutional principle.

Second, here the langauge is hardly phrased in terms of, "Please reconsider." It is phrased in terms of, "Life shall be deemed"—not even of factfinding—"to begin at the moment of conception." And the term "person" is defined for the Court, instead of leaving the definition of constitutional terms to the Court, which I think is where it belongs if the Constitution is to have any meaning.

Now, when I called it unprincipled, I am sure you understood, Senator—and I want to make it clear to everybody else—I am not using the word in the sense that charges anybody with lacking moral principle. I call it unprincipled because I do not think that you or anyone else would be willing to generalize the principle on which the bill necessarily rests; that is, that Congress can define the terms in the Constitution.

Think about what that means. That would mean that the Congress, by simply majority, could declare that separate education shall be deemed equal education; or that probable cause to arrest a person or search their houses, papers, or effects, "shall be deemed to be the opinion of a police officer that the search or seizure will advance the administration of justice;" or that aid to secretarian schools shall not be deemed an establishment of religion.

Once one gets into this business—it seems to me, with all respect—it is the most radical thing in the world, and any generalization of your approach would undermine our whole constitutional system.

Senator EAST. I guess the quarrel I have with you, Professor Cox, with all due respect to you, is this: The words "radical and unprincipled" I do not consider appropriate to this kind of dialog, because I would not use those words to describe your position, nor have I used them to describe *Roe* v. *Wade* really, and if they fit anywhere, they probably fit there. "Radical and unprincipled" suggest something totally unwarranted and wholly indefensible.

Now, on any major constitutional policy question, fair-minded reasonable minds can differ. I am a little in agreement with Professor Uddo that sometimes the opposition engages in some rhetorical overkill with this, with ridicule on top of it, which I find unbecoming to people skilled in the academic community.

What we are trying to do is not to label one another or to ridicule one another but to engage in a genuine, academic, intellectual—I would hope—dialog on what it is we are doing.

I do not think your position is extremist, and I do not think my position is extremist. I think what we are doing is working within the framework of the U.S. Constitution and trying to figure out where we might go. To inflame it with excess rhetoric I am not quite sure contributes to the dialog.

I do not wish to overstate my case, but I want to get on the record with it—that extreme labels and the use of ridicule in this very important debate, I find, obscure and make more difficult good discussion. It reduces it then to name-calling and to ridicule, which I have never found in my own teaching experience a good tool of instruction.

Mr. Cox. Let me emphasize again, Senator, as I tried to say a moment ago, I did not mean to use those words in any way that implied any personal——

Senator East. Well, they were there, and I heard them.

Mr. Cox. No, no—I used them, but I am sure you also heard me say that they did not imply any personal lack of respect for you or any question about your behaving as a man of principle.

Senator East. Of course, in response, you can say that, when you describe the opposition position as being of that character—I see you are now wishing to withdraw that and to deny it, and I respect that and accept it, but——

Mr. Cox. No, sir, I did not withdraw it.

Senator East. I do not quite know where you are with it, then. You are saying it does not apply to me personally. I presume that it applies to others——

Mr. Cox. I said that by "unprincipled" I meant a proposal resting on a principle which I thought not even the sponsors would be willing to generalize. "Lacking in principle" might have been better words, but I thought they were equivalent.

By "radical," I mean that it seems to me that the proposal goes outside the established framework of the Constitution—that it would undermine the established constitutional framework. Thus, that seems to me the most apt word I can think of for describing something that does not stay within the framework of our institutions.

Mr. Uddo. Mr. Chairman, might I just try to respond to something Professor Cox said?

First of all, I think the examples he gives of the "slippery slope" that this might put us on are a bit overdone. I think most of the examples, if not all of the examples, he uses are instances where the factfinding would be irrational and the Court would not have to defer to the factfinding. Clearly, "separate but equal" could not be equal, and that would be an irrational factfinding.

On defining terms in the Constitution, in 1971 in the Cincinnati Law Review, Professor Cox proposed, under section 5—proposed, I presume rhetorically—the Speedy Trial Act of 1971 where the sixth amendment guarantee of a speedy trial could be defined by Congress as to what would constitute a speedy trial, and suggested even that it may differ with the Court's view of what a speedy trial would be. I suspect that if this proposal is radical, so was that one.

Senator EAST. Professor Bork, I will let you respond, and then I will turn it over to Senator Baucus.

Mr. BORK. I think you are quite right about my attitude toward *Roe* v. *Wade*, which I think is in the running for perhaps the worst example of constitutional reasoning I have ever read. I would not say it is the worst, but it is certainly in the running.

In one sense, I certainly do not think this proposal is radical and unprincipled because I think Congress has done it before, and I think the Court has accepted it before.

I think it is a mistake; I think it should not have been done then, and I think it should not be done now. But I do think it is healthy to have a political response to a Court that is trenching upon the proper preserve of democratic government and is doing it repeated ly, and it has done it in this case egregiously.

So I think this kind of debate and this kind of proposal is entirely proper, even though I hope the form this response takes does not become law.

You have referred to the statute, S. 158, as an invitation to reconsider. If it were a sense-of-the-Congress resolution which expressed Congress strong feeling the *Roe* v. *Wade* is wrong, I would think that was entirely proper.

You said the Court could declare S. 158 unconstitutional. My fear is that they might declare it constitutional and thus ratify what they have done in the past, which is to give Congress control over the meaning of the terms of the Constitution, which I think is quite bad.

The problem, of course, is more widespread with the Court than simply the abortion decision, and I think I would shift the emphasis that Professor Cox has given to this problem somewhat. He has spoken of the Court as a bulwark of our liberties, which indeed it is, but the Court can also be a threat to democratic government, as it has been in this case, and then we have a real problem about what to do with the Court. It is very hard to cope with that problem.

Senator EAST. Thank you.

Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Nagel and Mr. Uddo, in your statements where you invite Congress to engage in a dialog with the Court, neither one of you ever mention the amendment process. Isn't that the process that our constitutional framers provided for overruling or overriding constitutional decisions of the Court?

Mr. NAGEL. Mr. Baucus, in my statement I did say that the proper exercise of Congress enforcement power under section 5 of the 14th amendment is not amending the Constitution. It is enforcing the Constitution. I think that is a sufficient answer to your question.

Of course, Congress can go by way of the amendment process if it wishes, but it is not required to do that as long as it is operating properly within its power under section 5, which is a part of the Constitution.

Mr. Bork just said—and I agree with him—that given the current Supreme Court caselaw on Congress authority under section 5,

Congress can proceed here without any fear of amending the Constitution.

Senator BAUCUS. With all respect, I do not think you answered the question. The question is: Why is not the amendment process generally a more appropriate route for the Congress and the States to follow in trying to override the constitutional decisions of the Court?

Mr. UDDO. Could I take a shot at that?

Senator BAUCUS. Surely.

Mr. UDDO. I think the answer to that is the unique way the *Roe* v. *Wade* was decided. Justice Blackmun's opinion categorically admitted that judiciary was incapable of making the factual determination of when life begins.

I would point out two things: He said that the judiciary was incapable of making that determination. He did not say everyone was, and he did not say Congress was incapable of it. In addition, he said, "at this time in the development of man's knowledge."

It seems to me that Justice Blackmun was saying that we do not know all we might ought to know about this. Unfortunately they went on and decided the case anyway. But I think that left open a very critical factual determination which invites the exact kind of exercise of section 5 power that S. 158 represents.

Had the case said that life does not begin until such-and-such a point, it may have been a different problem, but it seems to me it left wide open a factual question which Congress is uniquely equipped to answer.

Senator BAUCUS. Let my tread on some sensitive ground—the dialog between Professor Cox and the chairman about the use of the word "unprincipled."

I would like to determine the principles that you would apply in helping us determine when the Congress should attempt to amend the Constitution, by means other than the amendment process or the judicial nomination process.

Mr. UDDO. I would endorse most of what Professor Cox has written on that subject; that is, in those areas where Congress, as a coenforcer of the 14th amendment, can amass legislative facts and make determinations on those facts, to help make decisions about 14th amendment rights, I think that it is perfectly appropriate.

Senator BAUCUS. As I understand you then, the general principle embodied in *Marbury* v. *Madison* applies to most constitutional protections except the protections of the 14th amendment?

Mr. UDDO. No. I think *Marbury* v. *Madison* applies to all protections.

Senator BAUCUS. Does section 5 give Congress more power to override the Court in the 14th amendment area than the Congress has with respect to other constitutional rights?

Mr. UDDO. I would be careful about using the word "override." I am not so sure that that is what this bill does. What I would say is that, clearly, section 5, being part of the 14th amendment, explicitly recognizes a different role for Congress in enforcing that amendment—the debates of the 14th amendment and the contemporary commentary make it clear that Congress was to be coenforcer.

In fact, some of the commentary suggests that it was more to expand Congress power than the Court's because there was a general distrust of the Court at the time.

So my answer would be that those situations which are uniquely fitted for the kind of things that Congress can do such as fact-finding carves out a role for congressional determinations.

Senator BAUCUS. It seems to me that if you agree that *Marbury* v. *Madison* is an overriding principle that should also apply to the 14th amendment rights then the basic question is: What does the term "enforce" mean? When does enforcement become an act of overruling the Court, and when is enforcing the act enforcing of rights that have been prescribed by the Court?

Mr. UDDO. I think, in 158, the distinction I would make is that the first part defining "life" is very clearly within the enforcement provision. I think the determination on "personhood"——

Senator BAUCUS. Excuse me. At that point, why is that enforcement?

Mr. UDDO. It is defining rights. It is defining and expanding the area of rights for the unborn.

On the question of defining "personhood," I think that is a clear instance where Congress determination would come into conflict with what the Court said in *Roe* v. *Wade*, and there I think I would very freely admit that *Marbury* v. *Madison* will prevail.

If 158 is passed and it gets before the Supreme Court—which certainly it will—and the Court decides that Congress information about personhood is incorrect, it seems quite clear to me that *Marbury* v. *Madison* will prevail.

Senator BAUCUS. I find one point intriguing. Your view seems to be that constitutional rights should be defined more by Congress, the legislative branch, than is currently the case.

If, for example, this bill becomes a law, and if, as Professor Bork worries, the Supreme Court might uphold it, would you be in here arguing just as strenuously for a bill which would undo—say, the opposite of this bill—that is, under the 14th amendment, this Congress now finds that at some future date—1984 or 1985—that the rights of the unborn do not go this far?

Mr. UDDO. Would I be arguing in favor of that bill?

Senator BAUCUS. Yes. Would you argue that that would be a constitutionally permissible exercise of power?

Mr. UDDO. Of course. I would have to.

Senator BAUCUS. Does that not bother you a little bit? You have a very strong personal concern for the rights of the unborn. That comes through in your statement.

Mr. UDDO. Yes.

Senator BAUCUS. Do you want a process where, by a 51-percent majority, Congress could so easily undo protected constitutional rights?

Mr. UDDO. We could have done that with the public accommodations provision of the Civil Rights Act and most of the civil rights legislation. I do not think that that is a good thing—that it can be undone by a majority vote—but it is a fact of life. That is the way legislation is.

Senator BAUCUS. But you do favor a more transitory constitutional right, then?

Mr. UDDO. No, I did not say that.

Senator BAUCUS. Or one that is more illusory, because you feel Congress should take a more aggressive role in defining constitutional rights?

Mr. UDDO. I did not say I favor it. I am here to speak about S. 158, not what I think is the ultimate solution to the abortion question or the best way to solve it.

Senator BAUCUS. What I am trying to drive at is what your principle is.

Mr. UDDO. My principle is that the cases that I have read that interpret section 5 would strongly suggest that S. 158 is constitutional.

Senator BAUCUS. Would the panel generally agree that if this bill becomes law States would be prohibited from funding abortions?

Mr. BORK. I think so.

Mr. NAGEL. I agree.

Mr. COX. I think probably so.

Senator BAUCUS. And they would also probably be prohibited from providing funds to medical clinics which distribute IUD's?

Mr. BORK. Yes.

Mr. COX. I would think probably so—yes.

Senator BAUCUS. So the effect of this bill, if it becomes law, is quite different than what the law was prior to *Roe* v. *Wade*—is that right?—insofar as prior to *Roe* v. *Wade* there was no constitutional prohibition against States conducting in such conduct.

Mr. BORK. Prior to *Roe* v. *Wade*, there was no constitutional law about abortion in any direction.

Senator BAUCUS. So the answer is yes?

Mr. BORK. *Roe* v. *Wade* created one direction, and this bill would take it in the other direction, but it would not return it to the pre-*Roe* v. *Wade* situation.

Senator BAUCUS. I am just trying to establish that, if this bill becomes law, it does not place the state of the law as it was prior to *Roe* v. *Wade*—that it goes further insofar as it prohibits State action.

Mr. COX. Indeed. I do not want to put words in his mouth, but as I read Professor Nagel's testimony, he said that the bill does not affect *Roe* v. *Wade*, the only thing it does is prevent States from funding or otherwise giving aid to those who wish to have abortions.

Mr. NAGEL. That is right.

Mr. COX. That is what you said?

Mr. NAGEL. Yes.

Mr. COX. So his position is that it is quite the reverse of simply going back to before *Roe* v. *Wade*—that it does not carry us back to before *Roe* v. *Wade* but does prevent the States from funding abortions.

Again, I really do not want to put words in your mouth, but I thought it was a dramatic——

Mr. NAGEL. I should add that, although I do not think the bill by its own force, reverses *Roe* v. *Wade*—and that is why I think a lot of the reaction describing the bill as a radical departure is extreme, and over-reacting in my judgment, but I do think it might bear on

the Court's reassessment of that decision in light of the different legal issue before it.

So I am not saying that the Court might not come to a different judgment about some similar issues as were decided in *Roe* v. *Wade* if this bill were passed. I am just saying the bill on its own would not reverse *Roe* v. *Wade*.

Senator BAUCUS. Another point I would make here, too, is this: Insofar as this bill would prohibit States from funding abortions and the distribution of IUD's, in a sense it is not returning the determination to the States but is establishing a national policy which prevents States from engaging in certain conduct. The effect of this bill is not to throw the question of abortion back to the States but rather it sets a national policy that would prevent States from funding abortions. That is correct, is it not?

Mr. NAGEL. In my view, that is an unfortunate aspect of the bill.

Senator BAUCUS. It is an unfortunate aspect? Why is that?

Mr. NAGEL. Because I think it ought to be a matter of States in their own judgment to decide on.

Senator BAUCUS. Thank you, Mr. Chairman. I have no more questions.

Senator EAST. Thank you, Senator Baucus.

Senator Heflin, we certainly welcome you here.

We are having two panels here this morning. We were trying to finish this one up roughly around 11:30 or thereabouts, if we could, and then move on to a second one that would take us roughly to 1 o'clock.

We certainly welcome you and would be happy to hear any statement or questions you might have.

STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. I am sorry I have not been able to attend other meetings of these hearings. I have been tied up on some other matters. I am interested very much in this.

I would like to perhaps, from what I understand has been addressed, ask this panel to address the issue of the 10th amendment in relationship to this bill.

As I see this, it is a Federal approach toward solving a social ill, if you classify it as a social ill. In regard to this matter, if we are dealing in a Federal approach, will it set a precedent on the Federal preemption of all matters dealing with life which basically have been reserved to the States? I would like to have some discussion of that aspect of it.

Mr. Cox. If I may, Senator, I would think that the answer was that this interpretation of section 5 of the 14th amendment reads section 5 as modifying 10th amendment in some respects.

I remember Senator Ervin was strongly convinced of that, too, and I debated the point, arguing that it did. He argued that it did not and that legislation should not be adopted of that kind.

I would think that, despite some limiting language in the bill, it is very probably that if it were valid its definition of "life" and of "person" would become controlling for the purposes of the equal protection clause and that thenceforth the States would be required to treat the unborn persons the same way they treated born persons for most purposes under the equal protection clause.

And, second, I certainly see no reason why Congress, even if it did not have that effect to begin with, should not follow up with additional legislation regulating the way State law shall deal with these questions of who is a person or what is life.

But I do want to make it plain that I have been somewhat categorical about some things this morning. I do not want to seem categorical on that one because I feel a good deal of uncertainty.

Mr. UDDO. Senator Heflin, I would just say that it is a question that we had not discussed before. I do not see that it is a precedent for federalizing questions dealing with life because I think the bill very clearly attempts to overcome some of the problems that *Roe* v. *Wade* created by taking that away from the States.

It seems to me that this is a fairly modest proposal for returning that to the States. It could be a much more expansive bill and one that involved a great deal more Federal regulation, but I do not think that that is what this bill intends to do.

I doubt seriously that anyone could say today that that would never happen, but, of course, I think that the good judgment of the Congress would see that that is not what this bill is moving toward.

Mr. BORK. Senator Heflin, if I may—I think the version of section 5 of the 14th amendment that is being propounded here in support of this bill not only federalizes the question of life but, indeed, federalizes State police powers.

Under the equal protection clause and the due process clause together, those are turned over to Congress, and there is no State legislation on any topic that I can think of that cannot be federalized if Congress so chooses.

Mr. NAGEL. I would agree with Professor Bork if he were talking about not this bill but other legislation that might follow this bill if Congress were to pass it. But if you are speaking only of this bill, I do not think this bill has those sorts of dramatic effects. I would echo what Professor Uddo said—it would not have those effects as long as Congress exercised some sensitive judgment to the needs of federalism in our system.

Senator HEFLIN. If this bill is passed and declared constitutional, it is then, in effect, a foot in the door as to all aspects of human life probably for police power. It has that potential invoved. I am just interested in that aspect of it. Most of it has been directed strictly at the 14th amendment.

Mr. UDDO. Senator Heflin, as I understood what Professor Bork said, it was that not this bill but the section 5 precedent that is already in existence.

Mr. BORK. No, I meant that, but I also meant that the version of section 5 that many supports of this bill advance——

Mr. UDDO. The second rationale of *Morgan*?

Mr. BORK [continuing]. Would indeed federalize every subject.

Mr. UDDO. But depending on a case that has already been decided?

Mr. BORK. If this bill were declared constitutional on those grounds.

Mr. UDDO. OK.

Senator HEFLIN. Thank you.

Senator EAST. Senator Baucus?

Senator BAUCUS. Mr. Bork, I would like to establish the degree to which constitutional scholars are united or not united on the unconstitutionality of this bill. As you know, 12 constitutional law scholars have signed a letter and 6 former U.S. Attorneys General have signed a letter declaring this bill to be unconstitutional.

In view of Mr. Uddo's statement that perhaps there is not agreement on this question, I am just curious as to whether you think that this is a close question. Would the majority of experts be of the view that this is unconstitutional?

Mr. BORK. I do not know what the universe of experts is, Senator Baucus.

Senator BAUCUS. Say law professors and former Attorneys General—that is a good category—since we cannot ask the Court.

Mr. BORK. I really do not know. I think there is quite a division of opinion, and the discussion is confused or embarrassed by the fact that we fail to note the differences, which are sometimes significant, between a prediction of what the Supreme Court will do in fact, what the Supreme Court has held in the past, and what the Supreme Court would do if it were following the Constitution. Those are not always the same thing.

Senator BAUCUS. Taking all those views together is there any way to generalize?

Mr. BORK. I think the spread of views here today is probably indicative of the spread of views in the law teaching profession generally. I do not think there is unanimity.

Senator BAUCUS. Thank you very much. I know there is not unanimity. I am just curious as to whether——

Mr. BORK. Well, I do not think there is anything resembling an overwhelming sentiment.

Senator BAUCUS. Would it be 50–50?

Mr. BORK. That I do not know, sir.

Mr. UDDO. Senator Baucus, why not just say that those 12 people who signed that letter feel that way? Why assume that they can speak for the whole universe of constitutional scholars?

Senator BAUCUS. Obviously, that is why I asked the question.

Mr. UDDO. How will we ever determine whether it is 50–50 or 75–25? Those 12 scholars feel that way. I suggest that of the hundreds who teach constitutional law in this country there is quite a bit of division.

Senator BAUCUS. I hope we are not at the point where constitutional law professors are so different that there is a division of opinion on whether there are 24 hours in a day.

Mr. UDDO. We will not disagree on that.

Senator BAUCUS. All right, thank you.

Senator EAST. Gentlemen, I wish to thank all of you for coming. I regret that the hour continues to press in upon us, but we do appreciate all of your excellent contributions.

Without objection, your prepared statements will be included in the record.

We will now proceed to our next panel since the hour is a little bit after 11:30. I would appreciate it if Dr. Carl Degler, Dr. James Mohr, Prof. William Marshner, and Prof. Victor Rosenblum would please come forward.